



LEGISLATIVE COUNCIL

PORTFOLIO COMMITTEE NO. 5

## Road Transport Amendment (Mobile Phone Detection) Bill 2019

Report 52

November 2019

5



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Portfolio Committee No. 5 - Legal Affairs

# **Road Transport Amendment (Mobile Phone Detection) Bill 2019**

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## Terms of reference

That:

- (a) the provisions of the Road Transport Amendment (Mobile Phone Detection) Bill 2019 be referred to the Portfolio Committee No. 5 – Legal Affairs for inquiry and report,
- (b) the bill be referred to the committee upon receipt of the message on the bill from the Legislative Assembly,
- (c) that the committee report by Tuesday 12 November 2019, and
- (d) on the report being tabled, a motion may be moved immediately for the first reading and printing of the bill and that the bill proceed through all remaining stages according to standing and sessional orders.

The terms of reference were referred to the committee by the Legislative Council on 15 October 2019.

## Committee details

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### Committee members

<b>The Hon Robert Borsak MLC</b>	Shooters, Fishers and Farmers	<i>Chair</i>
<b>Mr David Shoebridge MLC</b>	The Greens	<i>Deputy Chair</i>
<b>The Hon Sam Farraway MLC</b>	The Nationals	
<b>The Hon Rose Jackson MLC</b>	Australian Labor Party	
<b>The Hon Natasha Maclaren-Jones MLC</b>	Liberal Party	
<b>The Hon Shaoquett Moselmane MLC</b>	Australian Labor Party	
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## Chair's foreword

On 15 October 2019, the Legislative Council referred the provisions of the Road Transport Amendment (Mobile Phone Detection) Bill 2019 to Portfolio Committee No. 5 – Legal Affairs for inquiry and report.

The bill aims to amend road transport legislation in relation to mobile phone use by drivers to support the Government's mobile phone detection camera program. The bill seeks to establish a presumption that an object held by or resting on a driver in a photograph taken by an approved camera is a mobile phone for the purposes of a mobile phone use offence, unless the driver satisfies a court that the object was not a mobile phone.

During this short inquiry, the committee received evidence from a number of key stakeholders in government, industry and road safety. It became clear through the evidence that mobile phone use by drivers is a widespread problem that presents a serious risk to drivers, passengers, other road users and pedestrians. Cultural change is required to make drivers aware of the real risks involved in using a mobile phone whilst driving.

This inquiry was established to explore issues that stakeholders had with the bill and the Government's mobile phone detection camera program and to inform the committee about how cameras were piloted and how they are going to be used in future.

Stakeholders involved in this inquiry raised concerns about the bill and whether there was a need to reverse the onus of proof, as well as the effect this might have on members of the public and the court system. They also raised concerns about privacy and signage around the camera program.

On behalf of the committee, I wish to express my gratitude to my committee colleagues and all who participated in the inquiry at short notice.



Hon Robert Borsak MLC  
**Committee Chair**

## Recommendation

### Recommendation

29

That the Legislative Council proceed to consider the Road Transport Amendment (Mobile Phone Detection) Bill 2019, including any amendments in relation to the reverse onus of proof, the use of artificial intelligence and privacy.

## Conduct of inquiry

On 15 October 2019, the House referred to this committee terms of reference for an inquiry into the provisions of the Road Transport Amendment (Mobile Phone Detection) Bill 2019. The House referred the 'provisions' of the bill, as the bill itself at that time was still in the Legislative Assembly. The bill was received by the Legislative Council later that day.

The committee received seven submissions.

The committee held one public hearing at Parliament House in Sydney on 30 October 2019.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts and tabled documents.

## Procedural issues

As this was a short inquiry submissions were invited from key stakeholders.

There was no provision for questions on notice or supplementary questions.



# Chapter 1 Overview

## Reference

- 1.1** The Road Transport Amendment (Mobile Phone Detection) Bill 2019 was introduced into the Legislative Assembly on 24 September 2019 by the Hon Andrew Constance MP, Minister for Transport and Roads. The Minister also gave his second reading speech on the bill in the Legislative Assembly on 24 September 2019 before debate was adjourned. Debate resumed in the Legislative Assembly and the bill passed all its remaining stages on 15 October 2019.
- 1.2** Also on 15 October 2019, the Legislative Council, on the recommendation of the Selection of Bills Committee, resolved that 'the provisions of the Road Transport Amendment (Mobile Phone Detection) Bill 2019 be referred to Portfolio Committee No. 5 – Legal Affairs for inquiry and report ... by Tuesday 12 November 2019'.<sup>1</sup> The bill was received by the Legislative Council later that day.

## Purpose of the bill

- 1.3** The Road Transport Amendment (Mobile Phone Detection) Bill 2019 seeks to amend the *Road Transport Act 2013* to create a rebuttable presumption that any object that is held by (or resting on) a driver of a motor vehicle in a photograph taken by an approved camera, is a mobile phone for the purposes of a mobile phone use offence. The driver would be able to rebut this presumption by satisfying a court, on the balance of probabilities, that the object was not in fact a mobile phone.
- 1.4** The bill also seeks to amend the *Road Rules 2014* so that a driver is not guilty of a mobile phone driving offence if the driver is only holding the phone to comply with a requirement to hand it to a police officer or other authorised officer.
- 1.5** In his second reading speech, the Minister for Transport and Roads, the Hon Andrew Constance MP, discussed the impact of mobile phone use on road safety. He stated that there were at least 158 casualties as a result of crashes involving a mobile phone in New South Wales between 2012 and 2018 and that the involvement of mobile phone use in motor accidents was likely under-reported.<sup>2</sup> The Minister noted the impact mobile phone use has on driver concentration, arguing that driving while using a mobile phone has the same effect on concentration as drink driving,<sup>3</sup> and stating that 'mobile phone use while driving is associated with at least a four-fold increase in the risk of having a casualty crash'.<sup>4</sup>

<sup>1</sup> *Minutes*, NSW Legislative Council, 15 September 2019, pp 499-500.

<sup>2</sup> The Hon Andrew Constance MP, Second reading speech: Road Transport Amendment (Mobile Phone Detection) Bill 2019, 24 September 2019.

<sup>3</sup> The Hon Andrew Constance MP, Second reading speech: Road Transport Amendment (Mobile Phone Detection) Bill 2019, 24 September 2019.

<sup>4</sup> The Hon Andrew Constance MP, Second reading speech: Road Transport Amendment (Mobile Phone Detection) Bill 2019, 24 September 2019.

- 1.6 The Minister described how cameras to detect driver mobile phone use had recently been piloted in New South Wales, stating 'the purpose of the bill is to amend road transport legislation to further support camera-based enforcement of offences involving mobile phone use while driving'.<sup>5</sup> He noted that a significant number of drivers involved in the pilot program were detected to be using a mobile phone illegally and that this indicated a 'clear and pressing need to address this road safety risk'.<sup>6</sup>
- 1.7 The Minister stated that:
- The high-resolution images captured by the camera clearly depict drivers holding objects that have the form of a mobile phone and are being held in a manner consistent with using the functions of a mobile phone, such as talking, texting or touching a screen.<sup>7</sup>
- 1.8 In relation to how this program would work in practice, the Minister stated that 'a final adjudication of images is undertaken by an appropriately trained officer before action is taken against a driver. An infringement notice will not be issued if there is doubt that the object is a mobile phone'.<sup>8</sup> He clarified that drivers will still be able to use a mobile phone while driving 'if it is safely secured and is currently permitted by the rules'.<sup>9</sup>
- 1.9 In relation to the second part of the bill, the Minister stated 'we are also making it explicit in the road rules that it is not an offence for a driver to comply with a requirement made by a police officer or authorised officer to hand the mobile phone to the officer'.<sup>10</sup>

## Overview of the bill's provisions

- 1.10 The objects of the bill, as set out in the explanatory note, are as follows:
- to amend the *Road Transport Act 2013* to establish a presumption that an object held by, or resting on, the driver of a vehicle in a photograph taken by an approved traffic enforcement device that is approved for mobile phone use offences is a mobile phone for the purposes of a mobile phone use offence, unless the driver satisfies a court that the object was not a mobile phone,
  - to amend the *Road Rules 2014* to provide that, for a mobile phone use offence, the driver of a vehicle is not committing an offence if the driver is complying with a requirement made by a police officer or other authorised officer to hand the phone to the officer.

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<sup>5</sup> The Hon Andrew Constance MP, Second reading speech: Road Transport Amendment (Mobile Phone Detection) Bill 2019, 24 September 2019.

<sup>6</sup> The Hon Andrew Constance MP, Second reading speech: Road Transport Amendment (Mobile Phone Detection) Bill 2019, 24 September 2019.

<sup>7</sup> The Hon Andrew Constance MP, Second reading speech: Road Transport Amendment (Mobile Phone Detection) Bill 2019, 24 September 2019.

<sup>8</sup> The Hon Andrew Constance MP, Second reading speech: Road Transport Amendment (Mobile Phone Detection) Bill 2019, 24 September 2019.

<sup>9</sup> The Hon Andrew Constance MP, Second reading speech: Road Transport Amendment (Mobile Phone Detection) Bill 2019, 24 September 2019.

<sup>10</sup> The Hon Andrew Constance MP, Second reading speech: Road Transport Amendment (Mobile Phone Detection) Bill 2019, 24 September 2019.

**1.11** The key provisions of the bill are found in Schedule 1. Part 1.1 of the schedule inserts a new section – section 139B – into the *Road Transport Act 2013*. This proposed section provides:

**139B Photographic evidence of mobile phone use (device approved for mobile phone use offences)**

1. This section applies to a photograph taken by an approved traffic enforcement device that is approved for mobile phone use offences.
2. If a photograph to which this section applies shows an object held by the driver of a motor vehicle, the object is presumed to be a mobile phone held by the driver for the purposes of a mobile phone use offence.
3. In proceedings for a mobile phone use offence in which a photograph to which this section applies is admitted into evidence, the presumption in subsection (2) may be rebutted by the defendant establishing, on the balance of probabilities, that the object was not a mobile phone.
4. In this section—  
*held* includes held by, or resting on, any part of the driver's body, but does not include held in a pocket of the driver's clothing or in a pouch worn by the driver.<sup>11</sup>

**1.12** Part 1.2 of the schedule amends the *Road Rules 2014* by adding to the existing list of exemptions of mobile phone offences under section 300. It states that the rule against mobile phone use by drivers does not apply if the driver is 'complying with a requirement made by a police officer or other authorised officer to hand the phone to the officer'.<sup>12</sup> It also clarifies that this provision does not grant the officer any authority to require a driver to hand them their phone. The last section of this part introduces the same sections to Road Rule 300-1 so that the additional exemption and clarification applies to drivers who are holders of learner and provisional P1 or P2 licences.

## The report of the Legislation Review Committee

**1.13** The report of the Legislation Review Committee, tabled in the Legislative Council on 15 October 2019, considered the bill's reversal of the onus of proof, noting that this impacted on the presumption of innocence. The committee noted the community safety objectives of the bill but referred the matter to Parliament to consider whether the reversed onus is reasonable in the circumstances.<sup>13</sup>

<sup>11</sup> Road Transport Amendment (Mobile Phone Detection) Bill 2019.

<sup>12</sup> Road Transport Amendment (Mobile Phone Detection) Bill 2019.

<sup>13</sup> Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest No. 6/57* (2019), p 5.



## Chapter 2 Background to the bill

This chapter provides an overview of the current rules around the use of mobile phones whilst driving and the government's use of driver phone use detection cameras, including the pilot program and intended future use.

### The risk associated with using a mobile phone while driving

- 2.1** Using a mobile phone while driving is a widespread and significant issue for road safety. The Government aims to reduce road fatalities and serious injuries by 30 per cent by 2021,<sup>14</sup> but this year, the NSW road toll stands at 309 deaths from 1 January 2019 to 30 October 2019, 17 more deaths than at the same point in 2018.<sup>15</sup> As driver mobile phone use becomes more normalised and complex, it represents a greater risk to road safety that needs to be addressed.
- 2.2** Using a mobile phone while driving is associated with an estimated four-fold increase in the risk of a crash.<sup>16</sup> Statistics indicate that in NSW 'between 2012 and 2018, there were at least 158 casualty crashes involving a driver or a rider using a hand held mobile phone',<sup>17</sup> resulting in 12 deaths and 212 injuries.<sup>18</sup> The exact number of mobile phone use-related accidents, however, is anticipated to be much higher as 'the contribution of mobile phone use in crashes is under-reported due to difficulties obtaining conclusive evidence at crash scenes'.<sup>19</sup>
- 2.3** The submission of the Transport and Road Safety (TARS) Research Centre at the University of New South Wales also indicated that mobile phone use whilst driving is likely under-reported.<sup>20</sup> The submission cited research that found that, while the majority of road users understand that mobile phone use whilst driving is risky, a significant proportion of drivers nevertheless do so.<sup>21</sup> The Transport for NSW submission discussed similar research from a national survey which found that 64 per cent of drivers use a mobile phone whilst driving or riding, and from the NRMA, which found that almost one-fifth of drivers texts whilst driving.<sup>22</sup>
- 2.4** According to the Queensland Centre for Accident Research and Road Safety (CARRS-Q), research indicates that using a mobile phone whilst driving can lead to riskier decision making, slower reactions, speed variations, less controlled braking and inappropriate actions at traffic

<sup>14</sup> Submission 7, Transport for NSW, p 3.

<sup>15</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 46.

<sup>16</sup> Tabled document, World Health Organisation, *Mobile Phone Use: A Growing Problem of Driver Distraction*, 2011, p 24.

<sup>17</sup> Submission 7, Transport for NSW, pp 1-2.

<sup>18</sup> Submission 7, Transport for NSW, p 2.

<sup>19</sup> Submission 7, Transport for NSW, p 2.

<sup>20</sup> Submission 5, Transport and Road Safety (TARS) Research Centre, University of New South Wales, p 1.

<sup>21</sup> Submission 5, Transport and Road Safety (TARS) Research Centre, University of New South Wales, p 1.

<sup>22</sup> Submission 7, Transport for NSW, p 2.

lights, as well as reduced awareness of a driver's surroundings.<sup>23</sup> Mr Russell White, Chief Executive Officer of the Australian Road Safety Foundation, told the committee that even hands-free devices impact a driver's situational awareness capability 'from the very moment that a mobile phone [rings]'.<sup>24</sup> He stated:

I personally sat next to people and saw them clip hazards that they did not even think they were anywhere near or fail to recognise situations or go from being able to assess situations and make corrective judgments to virtually being the polar opposite.<sup>25</sup>

**2.5** Mobile phone use is considered such a problem for drivers because of the way it distracts drivers. While it is generally agreed that anything which requires a driver to take their eyes off the road increases the likelihood of a motor accident,<sup>26</sup> mobile phones are believed to distract drivers in three distinct ways – physically, visually and cognitively. Mobile phones distract drivers physically by requiring a driver to move a hand off the steering wheel and visually by diverting a driver's eyes from the road.<sup>27</sup> They distract a driver cognitively as they shift attention, concentration and judgment away from the road.<sup>28</sup>

**2.6** In evidence, Mr Russell White agreed that distraction can be broken down into these three types and that all three types of distraction are taking place when a person is interacts with a phone.<sup>29</sup> He noted that all types of distraction limit a driver's ability to assess their surroundings, that mobile phone use 'can reduce a person's visual capabilities or visual scanning zone by up to two-thirds',<sup>30</sup> and that mobile phone use 'takes a person from what we call being broadly and externally focussed to being narrow and internally focussed'.<sup>31</sup> He noted that texting is particularly dangerous as 'it combines all of the general distraction aspects of mobile phone conversations with multiple timeframes'.<sup>32</sup>

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<sup>23</sup> Submission 6, Safety and Policy Analysis International, Attachment 1, p 1.

<sup>24</sup> Evidence, Mr Russell White, Chief Executive Officer, Australian Road Safety Foundation, 30 October 2019, p 2.

<sup>25</sup> Evidence, Mr Russell White, Chief Executive Officer, Australian Road Safety Foundation, 30 October 2019, p 2.

<sup>26</sup> Submission 5, Transport and Road Safety (TARS) Research Centre, University of New South Wales, p 1.

<sup>27</sup> Submission 6, Safety and Policy Analysis International, Attachment 1, p 2.

<sup>28</sup> Submission 6, Safety and Policy Analysis International, Attachment 1, p 2.

<sup>29</sup> Evidence, Mr Russell White, Chief Executive Officer, Australian Road Safety Foundation, 30 October 2019, p 9.

<sup>30</sup> Evidence, Mr Russell White, Chief Executive Officer, Australian Road Safety Foundation, 30 October 2019, p 2.

<sup>31</sup> Evidence, Mr Russell White, Chief Executive Officer, Australian Road Safety Foundation, 30 October 2019, p 2.

<sup>32</sup> Evidence, Mr Russell White, Chief Executive Officer, Australian Road Safety Foundation, 30 October 2019, p 3.

- 2.7 Mr White noted that any activity that requires direct connection with a phone, such as engaging with social media, severely limits a driver's capacity to assess and respond to their environment.<sup>33</sup> He argued, however, that although holding or touching a phone presents more of a risk, 'the level of distraction is the same whether it is handheld or hands-free'.<sup>34</sup>

## The rules relating to mobile phone use while driving

- 2.8 Mobile phone use by drivers of motor vehicles is governed by Road Rule 300 of the *Road Rules 2014*. Under Road Rule 300, a driver may not use a mobile phone while the vehicle they are in is moving (or stationary but not parked). Road Rule 300 contains a number of exceptions such that mobile phone use is allowed if the phone is being used to make or receive an audio phone call or is being used in an audio playing function and the phone is either secured in a mount device affixed to the vehicle or the phone is not being held and is not required to be touched.<sup>35</sup> A version of Road Rule 300 has been adopted by all Australian jurisdictions.<sup>36</sup>
- 2.9 Road Rule 300-1 governs mobile phone use by holders of learner and provisional P1 or P2 licences. Under Road Rule 300-1, a driver who holds a learner or provisional licence may not use a mobile phone under any circumstance whilst the vehicle is moving (or stationary but not parked). The exceptions for mobile phone use during an audio call or while a phone is mounted to a vehicle under Road Rule 300 do not apply to learner or provisional licence holders under Road Rule 300-1. In evidence, Assistant Commissioner Michael Corboy of the NSW Police indicated that, in practice, this means that learner and provisional licence plate drivers must place their phone in the car boot or glovebox.<sup>37</sup>
- 2.10 Mobile phone use by drivers is currently detected by a police officer directly witnessing the offence. In its submission to the inquiry, Transport for NSW stated that police may only penalise drivers for illegal mobile phone use in contravention of Road Rules 300 and 300-1 where they witness the driver committing the offence, direct the driver to pull over and inspect the object being used to determine if it is a mobile phone.<sup>38</sup> Police officers also use motorcycles with helmet cameras to identify driver mobile phone use as the cameras in highway patrol cars cannot capture drivers on their phones.<sup>39</sup>

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<sup>33</sup> Evidence, Mr Russell White, Chief Executive Officer, Australian Road Safety Foundation, 30 October 2019, p 3.

<sup>34</sup> Evidence, Mr Russell White, Chief Executive Officer, Australian Road Safety Foundation, 30 October 2019, p 5.

<sup>35</sup> Road Rules 2014.

<sup>36</sup> Submission 7, Transport for NSW, p 3.

<sup>37</sup> Evidence, Assistant Commissioner Michael Corboy, Traffic and Highway Patrol Command, NSW Police, 30 October 2019, p 46.

<sup>38</sup> Submission 7, Transport for NSW, p 1.

<sup>39</sup> Evidence, Assistant Commissioner Michael Corboy, Traffic and Highway Patrol Command, NSW Police, 30 October 2019, p 45.

- 2.11** If caught using a mobile phone whilst driving, a driver can be fined \$344 (or \$457 if detected in a school zone).<sup>40</sup> NSW Police issued around 37,500 penalty notices for mobile phone use offences in 2018.<sup>41</sup>
- 2.12** According to Safety and Policy Analysis International, previous attempts at addressing driver phone use have focussed on developing restricted phone applications, in-vehicle aids and device block-outs.<sup>42</sup> Traditional enforcement has not been effective as it requires manned police resources via on-road patrols.<sup>43</sup>
- 2.13** In its submission, Transport for NSW noted that the current approach to driver mobile phone use was developed in 1999, when mobile phones were primarily used for phone calls.<sup>44</sup> Assistant Commissioner Corboy argued that the road rules need to respond to the changing nature and culture of mobile phone technology, in particular the increased use of video chat.<sup>45</sup>
- 2.14** The Minister for Transport and Roads flagged in his second reading speech a potential review of the road rules 'to ensure they are keeping pace with new technology and digital functionality'.<sup>46</sup> In evidence to the committee, Mr Carlon, Executive Director of the Centre for Road Safety, Transport for NSW stated that the national road rules, on which the NSW rules are based, are currently being reviewed.<sup>47</sup>

### **The mobile phone detection camera (MPDC) program**

- 2.15** The use of cameras to detect driver mobile phone use was authorised in 2018 with amendments to the *Road Transport Act 2013* passed by the Parliament in the *Road Transport Legislation Amendment (Road Safety) Act 2018*. The 2018 amendments allowed cameras to be used to detect illegal mobile phone use whilst driving and provided for the use of the photos taken by such cameras to be used as evidence of illegal phone use.<sup>48</sup>

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<sup>40</sup> Submission 7, Transport for NSW, p 3.

<sup>41</sup> Submission 7, Transport for NSW, p 1.

<sup>42</sup> Submission 6, Safety and Policy Analysis International, pp 2-3.

<sup>43</sup> Submission 6, Safety and Policy Analysis International, pp 2-3.

<sup>44</sup> Submission 7, Transport for NSW, p 3.

<sup>45</sup> Evidence, Assistant Commissioner Michael Corboy, Traffic and Highway Patrol Command, NSW Police, 30 October 2019, p 46.

<sup>46</sup> The Hon Andrew Constance MP, Second reading speech: Road Transport Amendment (Mobile Phone Detection) Bill 2019, 24 September 2019.

<sup>47</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 44.

<sup>48</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 40.

- 2.16** A pilot of the MPDC program took place from January to June 2019.<sup>49</sup> The camera system was trialled over 3 months in two fixed locations in metropolitan Sydney and various other relocatable locations.<sup>50</sup> The relocatable cameras were moved approximately every 4 days on major arterial roads.<sup>51</sup>
- 2.17** During the trial, over 8.5 million vehicles were photographed and more than 100,000 drivers were detected using their phones illegally, representing a non-compliance rate of 1.2 per cent.<sup>52</sup> Mr Carlon, Executive Director of the Centre for Road Safety, Transport for NSW, stated in evidence that the two fixed location cameras identified over 95,000 instances of illegal driver phone use over the 90 day pilot,<sup>53</sup> which represents 1.8 per cent of all vehicles on the road.<sup>54</sup> Mr Carlon argued that such a high rate of detection indicates that the problem of mobile phone use whilst driving is widespread and 'happening right across the whole of the network'.<sup>55</sup>
- 2.18** The MPDC program uses a number of different cameras at different angles to capture images of different driver mobile phone use. The cameras capture drivers holding a mobile phone to their ear and holding a mobile phone on their lap, as well as the vehicle's registration.<sup>56</sup> Mr Carlon described the mobile phone detection camera system as follows:
- There are two cameras, one at an angle which captures people on handheld up to their ear and another which captures people texting down low, which you would have seen the images of. So there are two angles which captures that image.<sup>57</sup>
- 2.19** Under the MPDC system, each vehicle which passes a camera is photographed and then 'artificial intelligence will assess the images and determine whether somebody is holding or using a mobile phone'.<sup>58</sup> Mr Roger Weeks, Director of Compliance, Transport for NSW, described the artificial intelligence system as a pattern recognition algorithm.<sup>59</sup> The algorithm completes a series of different pattern recognition steps, for example, first identifying if there are two hands on the steering wheel, to identify images that may contain a driver using a mobile phone illegally.<sup>60</sup>

<sup>49</sup> *Hansard*, NSW Legislative Assembly, 24 September 2019, p 25 (per Minister Constance).

<sup>50</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 40.

<sup>51</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 43.

<sup>52</sup> Submission 7, Transport for NSW, p 3.

<sup>53</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 43.

<sup>54</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 47.

<sup>55</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 43.

<sup>56</sup> Submission 7, Transport for NSW, p 4.

<sup>57</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 47.

<sup>58</sup> Evidence, Commissioner Samantha Gavel, NSW Privacy Commissioner, 30 October 2019, p 26.

<sup>59</sup> Evidence, Mr Roger Weeks, Director of Compliance, Transport for NSW, 30 October 2019, p 54.

<sup>60</sup> Evidence, Mr Roger Weeks, Director of Compliance, Transport for NSW, 30 October 2019, p 54.

- 2.20** The Transport for NSW submission noted that a number of privacy protections are in place and images undergo a number of reviews. First, images that are deemed by the software to depict a likely offence are reviewed by camera provider personnel.<sup>61</sup> These images are cropped to display only the driver and will not include information about vehicle registration or the date, time and location of the image.<sup>62</sup> Camera provider personnel are required to have specialist training and follow RMS-approved business rules.<sup>63</sup> Transport for NSW indicated in its submission to the inquiry that 'in cases where there is limited clear evidence of illegal mobile phone use, no offence is confirmed. This information is irretrievably deleted typically within 48 hours of collection'.<sup>64</sup>
- 2.21** Images that contain a confirmed depiction of a likely offence are then verified by Roads and Maritime Services.<sup>65</sup> Revenue NSW officers then conduct a further review of the image before issuing a penalty notice. The registered operator of the vehicle will be able to access a copy of the image and request a review by Revenue NSW.<sup>66</sup>
- 2.22** Ms Larisa Michalko, Director, Criminal Law Specialist at the Department of Communities and Justice, described the steps that will take place from the photo being taken to a penalty notice being issued:
- ... first the AI detection, then the review by the mobile detection camera provider personnel, then it goes to RMS, then there is a review by Revenue NSW, then the penalty notice is issued, then there is the review process through Revenue NSW as well.<sup>67</sup>
- 2.23** In evidence, Mr Roger Weeks, Director of Compliance, Transport for NSW, asserted that images captured by the cameras would be subject to a 'very strict audit regime'.<sup>68</sup> The submission of Transport for NSW indicated that images that are identified by the software as likely not to depict an offence are 'automatically and irretrievably deleted without human review, usually within an hour of capture'.<sup>69</sup> Additionally, every 90 days an authorised officer or technician would audit the images held on the physical camera before deleting them.<sup>70</sup>
- 2.24** In its submission to the inquiry, Transport for NSW stated that the pilot was 'technologically successful' but that it did highlight a gap in the legislative framework regarding prosecution that would be addressed by the bill.<sup>71</sup> The full camera detection program is expected to be rolled out

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<sup>61</sup> Submission 7, Transport for NSW, p 4.

<sup>62</sup> Evidence, Mr Roger Weeks, Director of Compliance, Transport for NSW, 30 October 2019, p 54.

<sup>63</sup> Submission 7, Transport for NSW, p 4.

<sup>64</sup> Submission 7, Transport for NSW, p 4.

<sup>65</sup> Submission 7, Transport for NSW, p 4.

<sup>66</sup> Submission 7, Transport for NSW, pp 4-5.

<sup>67</sup> Evidence, Ms Larisa Michalko, Director, Criminal Law Specialist, Department of Communities and Justice, 30 October 2019, p 49.

<sup>68</sup> Evidence, Mr Roger Weeks, Director of Compliance, Transport for NSW, 30 October 2019, p 54.

<sup>69</sup> Submission 7, Transport for NSW, p 4.

<sup>70</sup> Evidence, Mr Roger Weeks, Director of Compliance, Transport for NSW, 30 October 2019, p 54.

<sup>71</sup> Submission 7, Transport for NSW, p 5.

from late 2019 and will include fixed and relocatable trailer-mounted cameras.<sup>72</sup> The cameras are expected to be installed in December 2019.<sup>73</sup> Mr Simon O'Hara, Chief Executive Officer of Road Freight NSW, noted that there is a community expectation that the program will commence by Christmas 2019.<sup>74</sup>

**2.25** Transport for NSW indicated that it hopes to photograph 135 million<sup>75</sup> vehicles annually within 4 to 5 years of the start of the program. In evidence, Mr Carlon stated:

The proposal is that we will screen, within a four or five year period, the equivalent of our top stationary speed camera locations, so screen the equivalent number of vehicles, about 123 million checks, and that is across the general population.<sup>76</sup>

**2.26** In response to questioning about resourcing provided to support the MPDC program, Mr Carlon noted that the program's cost is estimated to be \$88 million 'over the forward estimates',<sup>77</sup> covering 'the impacts associated with the operation and the purchasing of the equipment, the contracts that we enter into, the processing of the whole of the system and the system impacts'.<sup>78</sup>

**2.27** The full roll-out of the MPDC program will be accompanied by a 'significant public education campaign'<sup>79</sup> and a 'three-month warning letter period at the commencement of the program during which drivers will not be penalised'.<sup>80</sup>

**2.28** It is believed the MPDC program could prevent over 100 fatal and serious injury crashes over five years, according to independent modelling.<sup>81</sup> Mr Carlon noted that 'there is potentially a 30 per cent or 40 per cent, conservatively estimated, deterrent effect'.<sup>82</sup> During the hearing on 30 October 2019, Mr Carlon provided to the committee modelling by Monash University that indicated that a 30 per cent reduction in driver mobile phone use would represent a reduction

<sup>72</sup> Transport for NSW Centre for Road Safety, *Mobile phone technology: Mobile phone detection cameras targeting illegal phone use across NSW*, 22 September 2019.

<https://roadsafety.transport.nsw.gov.au/stayingsafe/mobilephones/technology.html>.

<sup>73</sup> *Hansard*, NSW Legislative Assembly, 24 September 2019, p 27 (per Minister Constance).

<sup>74</sup> Evidence, Mr Simon O'Hara, Chief Executive Officer, Road Freight NSW, 30 October 2019, p 18.

<sup>75</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 43. In evidence, Mr Carlon originally cited a figure of 123 million. Transport for NSW subsequently notified the committee that the correct figure is 135 million.

<sup>76</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 43.

<sup>77</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 51.

<sup>78</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 51.

<sup>79</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 43.

<sup>80</sup> Submission 7, Transport for NSW, p 11.

<sup>81</sup> Submission 7, Transport for NSW, p 3.

<sup>82</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 46.

of approximately 86 casualties and \$16,268,357 in New South Wales annually.<sup>83</sup> A 40 per cent deterrence rate is estimated to reduce casualties by approximately 115 and costs by \$33,558,475 per year, according to the same modelling.<sup>84</sup> These figures are shown in Figure 1 below, which reproduces the Monash University modelling.

**Figure 1 Monash University estimates - benefits of the mobile phone camera detection program over 5 years**

		30% deterrence		40% deterrence	
		No overt signage	With overt signage	No overt signage	With overt signage
Cas crashes prevented	Fatal	5.86	1.17	7.82	1.56
	Serious injury	88.88	17.78	118.64	23.73
	Moderate injury	148.02	29.60	197.59	39.52
	Minor/other injury	92.41	18.48	123.35	24.67
	<b>Casualty crashes</b>	<b>335.15</b>	<b>67.03</b>	<b>447.41</b>	<b>89.48</b>
Casualties prevented	Fatalities	6.33	1.27	8.45	1.69
	Serious injuries	99.77	19.95	133.19	26.64
	Moderate injuries	190.12	38.02	253.80	50.76
	Minor/other injuries	133.57	26.71	178.30	35.66
	<b>Casualties</b>	<b>429.79</b>	<b>85.96</b>	<b>573.74</b>	<b>114.75</b>
Crash \$ saved	Fatal	\$51,000,515	\$10,200,103	\$68,085,378	\$13,617,076
	Serious injury	\$52,582,906	\$10,516,581	\$70,195,822	\$14,039,164
	Moderate injury	\$14,272,848	\$2,854,570	\$19,053,547	\$3,810,709
	Minor/other injury	\$7,833,898	\$1,566,780	\$10,457,626	\$2,091,525
	<b>Total</b>	<b>\$125,690,167</b>	<b>\$25,138,033</b>	<b>\$167,792,373</b>	<b>\$33,558,475</b>

## Key stakeholder views

- 2.29** The committee addresses the key issues raised about the bill in detail in the following chapter. While all stakeholders agreed that mobile phone use by drivers is a significant road safety issue, the key parties to the inquiry differed in their response to the bill.
- 2.30** Witnesses who appeared on behalf of the NSW Government, including representatives from Transport for NSW and legal experts from the Department of Communities and Justice and Hunt and Hunt Lawyers, spoke in support of the bill and the MPDC program. Representatives from Road Freight NSW and the Australian Road Transport Industrial Organisation were also

<sup>83</sup> Tabled document, Monash University, *Modelling the potential trauma reductions of automated mobile phone enforcement in NSW*, p 2.

<sup>84</sup> Tabled document, Monash University, *Modelling the potential trauma reductions of automated mobile phone enforcement in NSW*, p 2.

supportive of the bill, noting that their priority was road safety and deterring drivers from using mobile phones.<sup>85</sup>

- 2.31** NSW Privacy Commissioner Samantha Gavel also said she supported the bill, subject to strong privacy controls. She stated: 'the technology makes it easier for Transport for NSW and Roads and Maritime Services to identify drivers who are illegally using mobile phones in the act of driving and will further deter drivers from continuing to use mobile phones'.<sup>86</sup>
- 2.32** The committee notes that given the tight timeframe of the inquiry, the committee resolved that witnesses not be able to take questions on notice during the hearing on 30 October 2019. However, the committee was assisted by additional correspondence from Commissioner Gavel dated 5 November 2019.
- 2.33** In terms of the specific privacy issues raised by the bill, the Privacy Commissioner's evidence was of minimal assistance to the committee. Despite being asked directly, the Commissioner was unable to inform the committee which privacy principles would be impacted by the bill. In terms of the specific provisions in the legislation, and what if any privacy concerns were raised with its implementation by Revenue NSW, the Commissioner was unable to assist the committee. She advised the committee that her experience was 'more about the pilot program and there was not a need to consult with Revenue because Revenue was not involved in the pilot program ...'<sup>87</sup>
- 2.34** On the other hand, the NSW Council for Civil Liberties and the Law Society of New South Wales, expressed concerns about the bill, arguing that its scope is too wide,<sup>88</sup> and that it would place an unnecessary and unfair evidentiary burden on members of the public.<sup>89</sup> These concerns are discussed in the following chapter.

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<sup>85</sup> Evidence, Mr Simon O'Hara, Road Freight NSW; Mr Hugh McMaster, Secretary/Treasurer, Australian Transport Industrial Organisation, NSW Branch, 30 October 2019, p 18.

<sup>86</sup> Evidence, Commissioner Samantha Gavel, NSW Privacy Commissioner, 30 October 2019, p 25.

<sup>87</sup> Evidence, Commissioner Samantha Gavel, NSW Privacy Commissioner, 30 October 2019, p 29.

<sup>88</sup> Submission 4, NSW Council for Civil Liberties, p 1.

<sup>89</sup> Submission 1, The Law Society of New South Wales, p 1.



## Chapter 3 Key issues

This chapter discusses the key issues in relation to the Road Transport Amendment (Mobile Phone Detection) Bill 2019 raised during the inquiry.

### The reverse onus of proof

- 3.1** The main provision of the Road Transport Amendment (Mobile Phone Detection) Bill 2019 is contained in Part 1.1 of Schedule 1 to the bill in relation to photographs taken by approved mobile phone detection cameras. This part inserts proposed section 139B into the *Road Transport Act 2013*, as cited previously in Chapter 1. Proposed section 139B reverses the onus of proof in court in relation to mobile phone offences where photographic evidence is taken by an approved mobile phone detection camera.
- 3.2** Currently, in circumstances where a police officer pulls over the driver of a motor vehicle and issues that driver with a fine for the use of a mobile phone whilst driving, the driver can elect to have the matter dealt with in the Local Court as a summary offence. In the Local Court, the presumption is that the person accused of the offence is innocent until proven guilty. To obtain a conviction, the police prosecutor must prove the offence 'beyond reasonable doubt'. That assertion can be rebutted by the defendant, leaving it up to the magistrate to determine whether or not the offence has been proven by the police prosecutor.
- 3.3** Proposed section 139B would reverse this onus of proof for mobile phone offences that have been detected by a fixed or movable approved mobile phone detection camera. Under proposed section 139B(2), if a photograph to which the proposed section applies shows an object held by the driver of a motor vehicle, the object is presumed to be a mobile phone held<sup>90</sup> by the driver for the purposes of a mobile phone use offence. Parties to the inquiry labelled this the 'deeming provision'. If the driver of the motor vehicle elects to have the matter dealt with in the Local Court, under proposed section 139(3), the presumption of innocence until proven guilty is reversed. In practice, the police prosecutor would tender the photo and rely upon the presumption the object 'held' by the driver is a mobile phone. The defendant would be required to adduce evidence to establish 'on the balance of probabilities' that the object was not a mobile phone.
- 3.4** The committee was assisted during the inquiry by two photographs of drivers using a mobile phone whilst driving appended to the written submission of Transport for NSW.<sup>91</sup> The photographs were taken by mobile phone detection cameras during the three-month pilot program. They clearly show drivers holding an object, undoubtedly a mobile phone, either to their ear or in their lap whilst driving. Speaking to the photographs, Mr Hearnden, Hunt and Hunt Lawyers, appearing together with Transport for NSW witnesses, observed:

The benefit of the current amending provisions is that the Crown does not have to prove that it is a cellular telephone. I think you have seen images that are generated by

<sup>90</sup> A mobile phone held by the driver for the purposes of a mobile phone use offence includes held by, or resting on, any part of the driver's body, but does not include held in a pocket of the driver's clothing or in a pouch worn by the driver.

<sup>91</sup> A further photograph was subsequently tabled at the end of the hearing on 30 October 2019 by Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW.

the device. What one can clearly see in most of the images, or in the images that I have seen, is what appears to be a telephone, a mobile phone. In the absence of the presumption, though, the argument could be put against a prosecutor—I think in a majority of the cases—that the prosecutor has not excluded a potential hypothesis that the device that is being the subject of the prosecution is not a mobile phone but, rather, it could be something else such as a Kindle, an MP3 player, what is called an iPod touch. They are in the same body of a mobile phone that is commonly purchased but I do not think you could say, looking at the image, that it excludes those as possibilities. Hence, the need for a successful prosecution, in my view, in most cases is to have the presumption.<sup>92</sup>

**3.5** The committee notes that a number of parties to the inquiry raised concerns about the bill's proposed reversal of the onus of proof in court.

**3.6** In its written submission, the Law Society of New South Wales queried the need for the so-called deeming provision, given the high quality of images that the cameras purportedly produce, and the process of review and verification outlined by the Minister in his second reading speech.<sup>93</sup> This was reiterated by Mr Mantaj, representing the Law Society, in evidence:

We are of the view that this provision is unnecessary, unfair, will erode public confidence in the use of cameras as an enforcement tool and sets a dangerous precedent. It is unnecessary because as the Minister for Roads remarked in his second reading speech the intention is to only issue fines where there is no doubt that the device held by the driver is indeed a mobile phone. If that is the case the existing law perfectly reflects that intention and there is no need to create a fictional presumption of guilt contemplated in section 139B. It is unfair because it abandons the long established fundamental principles of the presumption of innocence and the requirement for the prosecution to prove its case.

While presumptions of this kind already exist in the law, the presumption that any object held by a driver is a mobile phone is particularly egregious because commonly drivers may hold many different items without committing an offence. In that sense this presumption is particularly divorced from reality. It is likely to erode public confidence in the use of cameras as a means of enforcement of traffic law because it will feed into the already existing cynicism in some parts of the community that cameras, for example speed cameras, are more about revenue raising than public safety. Lastly, it represents a dangerous precedent for future laws because it promotes an acceptance of the proposition that it is appropriate to create fundamentally unfair and fictional presumptions in order to make it easier to prosecute an offence.<sup>94</sup>

**3.7** Whilst, as indicated, the photographs available to the committee from the three-month pilot program clearly show a driver holding a mobile phone, Mr Mantaj queried whether the photographic evidence will always be as clear cut.<sup>95</sup>

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<sup>92</sup> Evidence, Mr Brett Hearnden, Partner, Litigation and Dispute Resolution, Hunt and Hunt Lawyers, 30 October 2019, pp 41-42.

<sup>93</sup> Submission 1, The Law Society of New South Wales, p 1.

<sup>94</sup> Evidence, Mr Michal Mantaj, Criminal Law Committee, The Law Society of New South Wales, 30 October 2019, p 10.

<sup>95</sup> Evidence, Mr Michal Mantaj, Criminal Law Committee, The Law Society of New South Wales, 30 October 2019, p 11.

**3.8** Mr Mantaj also advanced the proposition that even where the photographic evidence is not clear cut, fines may be issued anyway, as there is no obligation on the Crown under the proposed reversal of the onus of proof to prove the offence 'beyond reasonable doubt'. Rather, the driver is in the difficult position of having to adduce evidence in court to establish 'on the balance of probabilities' that the object in question was not a mobile phone.<sup>96</sup> As he stated:

... the likelihood is that there will be a whole range of photographs of a whole range of quality and this presumption encourages those reviewing them to err on the side of issuing a fine where there is a doubt rather than not.<sup>97</sup>

**3.9** Similarly, the NSW Council for Civil Liberties submitted that the deeming provision is unjustified and unnecessary, given the quality of the technology, and that the rebuttable presumption in relation to an object being 'held' is too wide, with the potential to capture a range of other objects besides mobile phones.<sup>98</sup> In evidence, Mr Blanks of the NSW Council for Civil Liberties observed:

It is difficult to discern ... that this legislation is an appropriate candidate for reversal of onus of proof. The question to ask is: If the onus of proof were not reversed, would it be impossible to get convictions in appropriate cases? And one just has to have a look at the photographs attached to the department of transport submission ... The photographs which they attached to their submission would be, I would have thought, perfectly sufficient to persuade a magistrate that the offence has been committed. If the quality of those photographs is typical then there is absolutely no need for the reversal of onus of proof.<sup>99</sup>

**3.10** Mr Blanks advocated a more cautious legislative approach to the roll-out of the new technology to see in the first instance how it operates without the reverse onus of proof. If it emerged that there were too many acquittals in circumstances where the evidence for a conviction seemed strong, the Parliament could reverse the onus of proof at a later time.<sup>100</sup>

**3.11** As the bill is drafted, however, Mr Blanks argued that it may lead to unjust outcomes for people trying to access the Local Court seeking to prove that they did not commit a deemed offence.<sup>101</sup> Mr Blanks observed:

And there will be loss of licenses as a result—five penalty points or 10 penalty points on double demerit weekends. It will quite possibly result in quite a number of people losing their licenses in circumstances where no offence has been committed.<sup>102</sup>

<sup>96</sup> Evidence, Mr Michal Mantaj, Criminal Law Committee, The Law Society of New South Wales, 30 October 2019, p 14.

<sup>97</sup> Evidence, Mr Michal Mantaj, Criminal Law Committee, The Law Society of New South Wales, 30 October 2019, p 15.

<sup>98</sup> Submission 4, NSW Council for Civil Liberties, pp 3-5.

<sup>99</sup> Evidence, Mr Stephen Blanks, Treasurer, NSW Council for Civil Liberties, 30 October 2019, p 34.

<sup>100</sup> Evidence, Mr Stephen Blanks, Treasurer, NSW Council for Civil Liberties, 30 October 2019, p 35.

<sup>101</sup> Evidence, Mr Stephen Blanks, Treasurer, NSW Council for Civil Liberties, 30 October 2019, p 36.

<sup>102</sup> Evidence, Mr Stephen Blanks, Treasurer, NSW Council for Civil Liberties, 30 October 2019, p 36.

**3.12** The submission from the Safety and Policy Analysis Institute also expressed concern how a driver of a motor vehicle is to establish that an object in a photograph was not a mobile phone when notice of the alleged offence is mailed some days or weeks after the event.<sup>103</sup>

**3.13** However, other parties to the inquiry expressed support for the proposed reversal of the onus of proof in the bill. Of note, Mr Hugh McMaster, Secretary/Treasurer of the Australian Road Transport Industrial Organisation, NSW Branch, observed:

We have no problem with the reverse onus of proof. It is not often that we would take that decision. We say that because the technology has obviously proven itself to be effective in detecting what somebody is doing in a motor vehicle. It might not always be and, I guess if there is doubt about the quality of the photograph, it is reasonable to say, "Has an offence being committed in the first place?" But if it is clear that a mobile phone is on somebody's lap or on the seat where they are driving and they are using it—their eyes are not focused on the road ahead—that to me is clear cut. Proposed section 139B provides an opportunity to say, "It might look like a mobile phone, but it was actually a wallet or a purse or something else of a similar shape and similar characteristics and I just happened to be handling it at the time". To us, there is an adequate safeguard and our association does not believe that there is a need to amend those provisions at all.<sup>104</sup>

**3.14** In its submission, Transport for NSW advanced a number of arguments in support of the proposed reversal of the onus of proof. These arguments were supplemented by evidence given by witnesses from Transport for NSW and associated witnesses during the hearing on 30 October 2019.

**3.15** First, it was argued that the new camera technology proposed to be rolled out provides good quality images which clearly depict drivers holding objects that look like a mobile phone and which are being held in a manner consistent with using the functions of a mobile phone such as talking or texting. As outlined in Chapter 2, such images are subject to detailed review whether a mobile phone is being used illegally by a driver. That review incorporates initial assessment by AI software, and subsequently further review by personnel of the MPDC program with specialist training, who can access a cropped and 'zoomed in' image focusing on the driver's behaviour. A final review is undertaken by an officer from Revenue NSW. In addition, at no cost, a driver can request a review by Revenue NSW of a case. On that basis, Transport for NSW submitted that the bill's provisions appropriately reverse the onus of proof.<sup>105</sup>

**3.16** Second, Transport for NSW submitted that provisions placing the burden of proof on the defendant in relation to offences are not new in Australia. For example, there are so called 'designated offences' for camera recorded offences and parking offences. Other States and the Commonwealth also use deeming provisions in their legislation related to camera recorded offences.<sup>106</sup> This was also observed by Ms Michalko, Department of Communities and Justice, in evidence:

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<sup>103</sup> Submission 6, Safety and Policy Analysis International, p 2.

<sup>104</sup> Evidence, Mr Hugh McMaster, Secretary/Treasurer, Australian Road Transport Industrial Organisation, NSW Branch, 30 October 2019, p 19.

<sup>105</sup> Submission 7, Transport for NSW, p 5.

<sup>106</sup> Submission 7, Transport for NSW, pp 5-7.

... typically the criminal onus and onus in a criminal prosecution rests with the Crown. That is always the case in respect of all offences generally. However, it is not something that is completely unknown to the criminal law of the State or this country, to in some circumstances in respect of some offences introduce a reversal of a notice or an onus on an accused person in some circumstances.<sup>107</sup>

**3.17** Ms Michalko subsequently observed that the onus of proof is most commonly reversed in situations where there is a significant risk of the conduct occurring, where the conduct in question involves risk of significant harm to the individual and to others, and where there is a strong public interest in preventing the conduct occurring.<sup>108</sup>

**3.18** Third, Transport for NSW argued that the bill does not wholly shift the burden of proof. The Crown is still required to prove several elements of the offence, including that the object presumed to be a mobile phone was being held by the driver. The defendant may seek to establish 'on the balance of probabilities' rather than 'beyond reasonable doubt' that the object was not a mobile phone. As such, it was submitted that there is 'reasonable opportunity for a driver to rebut the evidence'.<sup>109</sup>

**3.19** Finally, Transport for NSW submitted that reversal of the onus of proof is legitimate if used in circumstances where it is reasonable, proportionate and necessary in the pursuit of a legitimate objective. In this regard, Transport for NSW emphasised that the bill is part of a suite of new measures proposed by the Government in a concerted attempt to change the culture around the use of mobile phones whilst driving and to reduce significantly the road toll from their misuse.<sup>110</sup> In evidence, Assistant Commissioner Corboy, Traffic and Highway Command, NSW Police, observed:

Distraction kills people. We need a physical deterrent to change the culture. The reverse onus, which will say that if you are distracted in the car by using something that is a mobile phone or can distract you as a mobile phone does, to me is critical to the deterrence factor in relation to changing the culture of mobile phone use. This is about deterrence.<sup>111</sup>

**3.20** Similarly, Mr Carlon, Executive Director, Centre for Road Safety at Transport for NSW, argued that the change is necessary to save lives, and that the 'change is proportionate, given the size and significance of the safety risks created by the unlawful use of mobile phones when driving'.<sup>112</sup>

<sup>107</sup> Evidence, Ms Larisa Michalko, Director, Criminal Law Specialist, Department of Communities and Justice, 30 October 2019, p 50.

<sup>108</sup> Evidence, Ms Larisa Michalko, Director, Criminal Law Specialist, Department of Communities and Justice, 30 October 2019, p 51.

<sup>109</sup> Submission 7, Transport for NSW, pp 6-7.

<sup>110</sup> Submission 7, Transport for NSW, pp 5-7.

<sup>111</sup> Evidence, Assistant Commissioner Corboy, Traffic and Highway Command, NSW Police, 30 October 2019, p 46.

<sup>112</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 41.

## The impact of the bill on the workload of the Local Court

- 3.21** A significant issue raised during the inquiry was the impact of the Road Transport Amendment (Mobile Phone Detection) Bill 2019, if enacted, on the workload of the Local Court where drivers elect to take their matters to court.
- 3.22** As noted in Chapter 2, NSW Police issued around 37,500 penalty notices for mobile phone use offences in 2018, in circumstances where a police officer directly witnessed the offence. In his evidence, Mr Carlon, Executive Director, Centre for Road Safety at Transport for NSW, indicated that currently about 3 per cent of the matters that police issue infringement notices for, under this offence, are challenged in the Local Court.<sup>113</sup>
- 3.23** The committee presumes this will continue, assuming police continue to pull over drivers for using mobile phones at approximately the same rates (although potentially the rate may decline in the long term if the MPDC program is a success).
- 3.24** However, where this bill is important is the additional impact on the Local Court caused by a new stream of penalty notices issued in relation to offences detected by mobile phone detection cameras.
- 3.25** In its submission, the Law Society of New South Wales argued that the bill will lead to additional disputes being court elected resulting in an increase in work and costs for the Local Court.<sup>114</sup> In evidence, Mr Mantaj of the Law Society of New South Wales observed that there might be a financial incentive to challenge a penalty notice involving five demerit points, particularly where a person's income depended on them having a licence. Mr Mantaj said:

... I would not be surprised if there were several thousand additional hearings throughout the State if this bill becomes law.<sup>115</sup>

- 3.26** By contrast, Ms Michalko, Department of Communities and Justice, testified that deterring court action is one of the reasons for the proposed reverse onus of proof.<sup>116</sup> Ms Michalko gave evidence that less litigation was anticipated with defendants being aware of the need to establish on the balance of probabilities that an object depicted in a photograph is not a mobile phone:

... it is reasonable to suggest that there will be less litigation with the presumption because a person will know: Here is what this shows. I am actually going to have to front up to some degree, to a lower degree than beyond reasonable doubt, but on the balance of probabilities I am going to have to front up and demonstrate that this was not a phone.<sup>117</sup>

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<sup>113</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 46.

<sup>114</sup> Submission 1, The Law Society of New South Wales, p 2.

<sup>115</sup> Evidence, Mr Michal Mantaj, Criminal Law Committee, The Law Society of New South Wales, 30 October 2019, p 14.

<sup>116</sup> Evidence, Ms Larisa Michalko, Criminal Law Specialist, Department of Communities and Justice, 30 October 2019, p 50.

<sup>117</sup> Evidence, Ms Larisa Michalko, Criminal Law Specialist, Department of Communities and Justice, 30 October 2019, p 50.

- 3.27** The submission of Transport for NSW cited as one of the benefits of the reverse onus of proof provisions generally the efficient operation of matters within the public sphere.<sup>118</sup>
- 3.28** The committee was advised by Transport for NSW that it expects to undertake approximately 135 million<sup>119</sup> vehicle checks using this technology each year. If, as occurred in the pilot program, 1.8 per cent<sup>120</sup> of these checks identified an offence then the number of infringement notices issued in the first year would be 2,430,000. Even if just 3 per cent of these were challenged in the Local Court (as is the rate with current mobile phone infringement notices issued by the police) then this would see some 72,900 cases filed.
- 3.29** Even if these numbers are not able to be relied upon with certainty, they provide the evidence available to the committee on the impact of this scheme as it rolls out. A simple review of these numbers indicates that this program runs the risk of overwhelming the Local Court regardless of whether or not a reverse onus is in place. Its effect on the driving population of New South Wales will also be significant. In these circumstances the impact of a reverse onus provision must be very carefully considered.

### **The decision not to sign post mobile phone detection cameras**

- 3.30** The use of warning signs in relation to a road safety camera, including warning signs alerting motorists to an upcoming fixed or mobile speed camera, is currently a matter of policy and not a legal requirement.<sup>121</sup>
- 3.31** In its submission to the inquiry, Transport for NSW indicated that warning signs at mobile phone detection camera sites were not used during the pilot of the MPDC program from January to June 2019, and that this was clearly communicated to the community from the outset of the pilot.<sup>122</sup>
- 3.32** Similarly, warning signs indicating camera locations are not proposed to be used when the full MPDC program is rolled out. Instead, general signage, indicating that mobile phone detection cameras are being used across NSW will be installed on key routes to ensure that drivers are alerted to the risks of using a mobile phone illegally whilst driving and the presence of camera based enforcement.<sup>123</sup> As stated by the Hon Andrew Constance MP, Minister for Transport and Roads, in his second reading speech:

I also want to be clear about the advisory signage. The Government wants everybody who backs a car out of their driveway into the road network to know that they could be caught anywhere at any time. A significant number of signs will advise motorists around

<sup>118</sup> Submission 7, Transport for NSW, p 6.

<sup>119</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 43. In evidence, Mr Carlon originally cited a figure of 123 million. Transport for NSW subsequently notified the committee that the correct figure is 135 million.

<sup>120</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 47.

<sup>121</sup> Submission 7, Transport for NSW, p 10.

<sup>122</sup> Submission 7, Transport for NSW, p 11.

<sup>123</sup> Submission 7, Transport for NSW, p 11.

New South Wales that they can be detected by these cameras, but that could occur anywhere at any time.<sup>124</sup>

**3.33** Parties to the inquiry took different views of this approach. Associate Professor Boufous of the Transport and Road Safety Research Centre at the University of NSW submitted that the use of cameras to detect mobile phone use whilst driving should be coupled with the use of warning signs, at least during the first stages of implementation of the program. He cited speed control research showing that the use of warning signs to raise the visibility of enforcement activities is effective in reducing speeding as well as increasing public awareness of the issue.<sup>125</sup>

**3.34** The Australian Road Transport Industrial Organisation (ARTIO) NSW Branch submitted that different drivers respond to different types of messages. ARTIO advised that general warnings about the new laws proposed in the bill should be used alongside signs specifying where mobile phone detection cameras are located. It submitted that the use of more than one type of message would ensure a greater capacity to capture more drivers given the different responses to signs as well as the greater exposure.<sup>126</sup>

**3.35** By contrast, Road Freight NSW did not support the use of signs at specific mobile phone detection camera sites, arguing that enforcement will be a more effective driver of cultural change. Road Freight NSW CEO, Mr Simon O'Hara, stressed the importance of driving cultural change. Describing road signage as the carrot and enforcement action as the stick, Mr O'Hara said:

In relation to mobile phones we need to see cultural change happen as quickly as possible and that is why we need a bit of a stick with this one.<sup>127</sup>

**3.36** The Law Society of New South Wales indicated in its evidence that the decision about whether or not to use signage may depend on the particular aim that the MPDC program is trying to achieve. If the aim is to detect and punish mobile phone use by drivers whilst driving then providing warning signs will have a dampening effect on the detection of offences and would not be advisable. However, Mr Mantaj of the Law Society of New South Wales gave evidence that the use of signs at mobile phone detection camera sites may be defensible:

... where the primary purpose may be not to detect the use of mobile phones but to encourage people to put them away. For example, if you had a particular black spot where there was a particular problem, you might prioritise that ...<sup>128</sup>

**3.37** In its submission, Transport for NSW argued that it is not true that warning signs act as effective deterrents when seeking to deter behaviour across the road network. Indeed, it was submitted that there is considerable evidence to suggest that warning signs are counter-productive. They create a 'halo effect' in relation to speeding with many people slowing down only while believing

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<sup>124</sup> The Hon Andrew Constance MP, Second reading speech: Road Transport Amendment (Mobile Phone Detection) Bill 2019, 24 September 2019.

<sup>125</sup> Submission 5, Transport and Road Safety (TARS) Research Centre, University of NSW, pp 1-2.

<sup>126</sup> Submission 3, Australian Road Transport Industrial Organisation NSW Branch, p 2.

<sup>127</sup> Evidence, Mr Simon O'Hara, Chief Executive Officer, Road Freight NSW, 30 October 2019, p 22.

<sup>128</sup> Evidence, Mr Michal Mantaj, Criminal Law Committee, The Law Society of New South Wales, 30 October 2019, p 15.

they are under scrutiny.<sup>129</sup> A similar effect might occur with people putting their phone away only when warned of the presence of a camera.

**3.38** Transport for NSW further cited analysis conducted by the Monash University Accident Research Centre (MUARC) on the MPDC program, which indicated that overt signage revealing the location of the cameras would reduce the benefits of the program by around 80 per cent.<sup>130</sup> In considering the rate at which safety benefits might be achieved through the use of mobile phone detection cameras, the research showed that the benefits achieved within one year by a program that has no overt signage would take five years to achieve with a program using overt signage. In evidence, Mr Carlon, Executive Director, Centre for Road Safety at Transport for NSW said:

... it is on that basis that we have recommended that there not be site specific signage but general deterrence signage across the network.<sup>131</sup>

**3.39** The committee also notes the evidence of Mr Carlon that:

It is not a black spot related program. This is a behaviour that is happening right across the whole of the network and, although we have had a very high rate of detection at two fixed locations—more than 95,000 people in 90 days—there clearly is a problem right across the whole of the network, and that increases your risk of a crash at the rate of four times at the basic level.<sup>132</sup>

## Privacy concerns in relation to the bill

**3.40** The committee notes that the capture and storage of high definition photos of drivers and their passengers inside their vehicles, in what would usually be considered a semi-private space, potentially raises privacy concerns.

**3.41** In its submission, Transport for NSW indicated that it is the custodian of the data collected by the MPDC program, and that it and Revenue NSW are aware of their privacy obligations under the *Privacy and Personal Information Protection Act 1998* (PPIP Act). Transport for NSW indicated that as part of the program, it has adopted the following privacy and data security measures:

- image files are digitally encrypted and transferred via secure networks
- all contractors are subject to background criminal history police checks and specialised training
- access to the system requires usernames and passwords, and all access to images is traceable

<sup>129</sup> Submission 7, Transport for NSW, p 11.

<sup>130</sup> Submission 7, Transport for NSW, p 11.

<sup>131</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 52.

<sup>132</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 43.

- the decision making process to determine whether there is evidence of a mobile phone offence or if an image should be deleted during the review process is traceable and auditable
- only the minimum amount of data required to detect and enforce offences is retained
- images which do not contain evidence of an offence will be erased
- the artificial intelligence software must automatically analyse images and identify those that are likely to show a driver using a mobile phone within 60 minutes
- images that the system deems unlikely to contain an offence are automatically and irretrievably deleted
- there are controls over physical access to the camera sites.<sup>133</sup>

**3.42** Transport for NSW also indicated in its submission that it has worked with the Information and Privacy Commission and undertook a Privacy Impact Assessment to inform the operation of the Pilot which ran from January to June 2019.<sup>134</sup>

**3.43** The NSW Privacy Commissioner, Commissioner Samantha Gavel, did not make a submission to the inquiry, but appeared and gave evidence before the committee on 30 October 2019. The Commissioner indicated:

Overall I consider that the bill can operate within the framework of the State's privacy regime. The Information Commissioner and I have requested to be consulted further in respect of the design of the broader program as it moves into the enforcement stage.<sup>135</sup>

**3.44** When questioned by the committee whether she had been consulted in relation to the roll out of the full MPDC program, or the work of Revenue NSW in issuing fines, the Commissioner was not able to fully satisfy the committee as to privacy concerns, but did indicate:

I have certainly explored what would happen in the enforcement stage in terms of the information that is sent to Revenue and I think I did touch on the fact that there is [an] information sharing framework in place between Transport and Revenue currently for other camera programs—the red light camera and speed camera—and a similar agreement will be in place for the purposes of this project, and of course Revenue already has processes in place for keeping camera images secure from those other programs.<sup>136</sup>

**3.45** The Committee notes that it received further correspondence from Commissioner Gavel addressing consultation to date between her office and Transport for NSW in relation to data administration for the pilot program. In that correspondence, the Privacy Commissioner

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<sup>133</sup> Submission 7, Transport for NSW, p 4.

<sup>134</sup> Submission 7, Transport for NSW, p 10.

<sup>135</sup> Evidence, Commissioner Samantha Gavel, NSW Privacy Commissioner, 30 October 2019, p 25.

<sup>136</sup> Evidence, Commissioner Samantha Gavel, NSW Privacy Commissioner, 30 October 2019, p 29.

conveyed her forward plans to consult with Transport for NSW about the MPDC program during November 2019 as the program moves into enforcement.<sup>137</sup>

- 3.46** While noting these assurances, the committee acknowledges the significant privacy concerns raised during the inquiry, with parties submitting that the bill should include specific privacy provisions.
- 3.47** In his evidence, Mr Mantaj, representing The Law Society of New South Wales, expressed concern that the bill provides no legislative or legally binding obligation to permanently delete the photographs which do not give rise to the issue of a fine. He said there should be a legal requirement that photographs be deleted if they do not give rise to a fine.<sup>138</sup>
- 3.48** Similarly, the NSW Council for Civil Liberties expressed disquiet in relation to the lack of protections proposed to ensure that the information captured is for law enforcement/road safety purposes only, noting that privacy protections and restrictions for use are not specifically detailed in proposed section 139B.<sup>139</sup> The NSW Council for Civil Liberties submitted that there should be clear proposals in the bill in relation to how the data may be used, accessed, stored, when it will be deleted and by whom. It argued that the bill should be amended to redress its lack of privacy protections before it is passed.<sup>140</sup>
- 3.49** The committee raised these concerns with the Privacy Commissioner during the hearing on 30 October 2019. Commissioner Gavel indicated that:
- The *Fines Act 1996* provides for sharing of offence related information between RMS and Revenue NSW. TfNSW advised that it has established systems with Revenue NSW to support and secure information exchange for other programs .e.g. speeding and red-light cameras.
- Any disclosure of images or other personal information should be governed by an appropriate data sharing agreement between RMS and Revenue NSW. The Privacy Commissioner will continue to consult with TfNSW about these aspects of the program during November 2019.<sup>141</sup>
- 3.50** In light of the substantial privacy concerns raised by stakeholders and inherent in a program that relies on high definition photographic images taken of the inside of people's motor vehicles it was disappointing to receive limited assistance from the Privacy Commissioner. Given her role as the principal advocate for privacy protection, the Parliament is entitled to expect more from this office.

<sup>137</sup> Correspondence from Commissioner Samantha Gavel, NSW Privacy Commissioner, to Chair, 5 November 2019 [received 6 November 2019].

<sup>138</sup> Evidence, Mr Michal Mantaj, Criminal Law Committee, The Law Society of New South Wales, 30 October 2019, pp 14-15.

<sup>139</sup> Submission 4, NSW Council for Civil Liberties, p 3.

<sup>140</sup> Submission 4, NSW Council for Civil Liberties, p 6.

<sup>141</sup> Correspondence from Commissioner Samantha Gavel, NSW Privacy Commissioner, to Chair, 5 November 2019 [received 6 November 2019].

## The use of artificial intelligence in mobile phone detection camera technology

- 3.51** The committee notes the evidence of Mr Stephen Blanks of the NSW Council for Civil Liberties that the MPDC program's use of artificial intelligence (AI) to identify potential criminal behaviour may be the first use of AI for such a purpose in Australia.
- 3.52** This raises certain concerns about whether the algorithm used is working properly, and not, for example, exhibiting unintended bias. As stated by Mr Blanks in his evidence:
- ... one of the issues that somebody may wish to deal with in a court challenge to a charge is whether the algorithm has behaved appropriately and fairly in coming to the conclusion that it has. Because of private companies being engaged here and the algorithm is going to be completely secret it seems that there is going to be no real opportunity to understand the way in which the algorithm works.<sup>142</sup>
- 3.53** Mr Blanks further argued that implementation of AI requires consideration of ethical frameworks and of the way the algorithm actually works. For example, it is not easily determined whether it unintentionally discriminates against certain groups of people or whether it operates objectively across the population as a whole.<sup>143</sup> Mr Blanks advised a cautious approach, with the use of a sunset clause to allow observation of the operation of the algorithm before committing its use to legislation.<sup>144</sup>
- 3.54** This is the first occasion that the Parliament is proposing to legislate on the assumption that a significant part of the task of identifying criminal conduct is being handled by artificial intelligence. While it is acknowledged that there will be human intervention and review prior to any infringement notices being issued, the task of winnowing down millions of images to identify *prima facie* criminal conduct will still be handled by artificial intelligence. Given this, there should be transparency in how the artificial intelligence identifies potential offenders including the ability to test whether or not the algorithms contain any inadvertent or inherent biases. These are matters that should be addressed by the Government in the debate in the House.

## The education campaign

- 3.55** In its written submission, Transport for NSW indicated that the launch of the full MPDC program will be accompanied by a significant education campaign to advise road users of the new mobile phone detection technology. The program will incorporate advertising and information on social media, online videos, radio and variable message signs, as well as information on Transport for NSW websites.<sup>145</sup>
- 3.56** The committee notes that there was broad-ranging support from all parties to the inquiry for such an education campaign, including from Associate Professor Boufous of the Transport and

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<sup>142</sup> Evidence, Mr Stephen Blanks, Treasurer, NSW Council for Civil Liberties, 30 October 2019, p 34.

<sup>143</sup> Evidence, Mr Stephen Blanks, Treasurer, NSW Council for Civil Liberties, 30 October 2019, p 35.

<sup>144</sup> Evidence, Mr Stephen Blanks, Treasurer, NSW Council for Civil Liberties, 30 October 2019, p 35.

<sup>145</sup> Submission 7, Transport for NSW, p 12. The committee notes that Transport for NSW has been running education programs in relation to the dangers of the use of mobile phones whilst driving since 2013. In its submission, Transport for NSW cited the 'Know the Rules' webpage, the 'Get Your Hand Off It' campaign, and the 'Stop It or Cop It' campaign.

Road Safety Research Centre at the University of NSW,<sup>146</sup> the Australian Road Transport Industrial Organisation NSW Branch<sup>147</sup> and Mr White from the Australian Road Safety Foundation.<sup>148</sup>

- 3.57** In particular, the committee notes that a number of parties to the inquiry, including Mr McMaster from the Australian Road Transport Industrial Organisation NSW Branch<sup>149</sup> and Mr White from the Australian Road Safety Foundation,<sup>150</sup> pointed to the need to implement a cultural change similar to that which has been achieved in relation to drink driving.

### Forms of distraction other than mobile phones

- 3.58** While there is considerable evidence demonstrating the dangers of mobile phone use whilst driving, due to driver distraction, the inquiry heard of growing concern about other forms of driver distraction that are not addressed by the bill.

- 3.59** The Centre for Accident Research & Road Safety, QLD (CARRS) submitted that the bill applies just to mobile phones, but that cameras may have (or forthcoming versions could have) the ability to detect other forms of distraction that are potentially as prevalent and risky as mobile phone use, such as interacting with in-vehicle information systems and smartwatches.<sup>151</sup>

- 3.60** CARRS observed that in-vehicle information systems (IVIS), able to be used in tandem with driving tasks, are becoming increasingly common, and that with regards to crash risk, a recent study found that the use of IVIS increases the odds of a crash by 4.6 times.<sup>152</sup>

- 3.61** Mr White of the Australian Road Safety Foundation also expressed concern about the difficulty for legislators responding to the speed of development of new forms of technology that may present a safety challenge due to driver distraction. He gave evidence about the dangers of using a smartwatch while driving:

They will buzz in the same way that a phone would. They will display part of a message or maybe ask the person to interact with that. That is the challenge we have ... If they have to tap that face that is another physical distraction and also a visual one.<sup>153</sup>

- 3.62** Addressing the question of whether there is a need to update the road rules to address different forms of technologically driven driver distraction, Transport for NSW indicated that there is

<sup>146</sup> Submission 5, A/Professor Boufous, Transport and Road Safety Research Centre, University of NSW, p 2.

<sup>147</sup> Submission, 3, Australian Road Transport Industrial Organisation, NSW, p 2.

<sup>148</sup> Evidence, Mr Russel White, Chief Executive Officer, Australian Road Safety Foundation, 30 October 2019, p 6.

<sup>149</sup> Evidence, Mr Hugh McMaster, Secretary/Treasurer, Australian Road Transport Industrial Organisation NSW Branch, 30 October 2019, p 18.

<sup>150</sup> Evidence, Mr Russel White, Chief Executive Officer, Australian Road Safety Foundation, 30 October 2019, p 6.

<sup>151</sup> Submission 2, The Centre for Accident Research & Road Safety – Queensland, p 1.

<sup>152</sup> Submission 2, The Centre for Accident Research & Road Safety – Queensland, p 1.

<sup>153</sup> Evidence, Mr Russel White, Chief Executive Officer, Australian Road Safety Foundation, 30 October 2019, p 9.

currently national consideration by the Australian Road Rules Maintenance Group about keeping the road rules up to date with the new technologies. Mr Carlon of Transport for NSW said:

There is a project happening nationally right now in terms of the national road rules—which the New South Wales road rules are based on—to review and update all of the road rules associated with new technologies.<sup>154</sup>

- 3.63** One issue that was raised in evidence was whether or not Road Rule 300 should be broadened to cover some of those things which are still causing driver distraction, such as ipods, calculators or other electronic devices, in addition to mobile phones. When asked about the benefit of the reverse onus provision, Assistant Commissioner Corboy noted:

However, there are a number of things that do distract people in the car and our position is that they need to keep their hands off those devices, whether it be a cellular mobile phone or a device that could be capable of that, or whether it is a device that distracts them somehow, video streaming or looking at photos—the widest possible interpretation I can put on that is that a mobile phone is a mobile phone. From our perspective, the deeming provisions are required because the reverse onus will be on them to come along and say that they are not that. For a reasonable and prudent person to say, "I held a calculator to my ear", to me, that is not appropriate.<sup>155</sup>

- 3.64** While this may be the case from a practical perspective, the relevant road rule as presently drafted relates only to mobile phone use. It is an open question whether or not the same objective sought to be achieved by the reverse onus, namely to prevent people relying on the excuse that the device is an electronic device other than a mobile phone, could be achieved by expanding the reach of Road Rule 300 to incorporate all electronic devices. However this is a matter relevant to the House's consideration of the necessity of the reverse onus.

## Sunset provision

- 3.65** In its submission, Safety and Policy Analysis International (SAPAI) recommended that a sunset provision be inserted into the bill to allow for a review of the impact of the legislation. SAPAI submitted that such a procedure is not unheralded when innovative new road safety and traffic policing measures are introduced. For example, the *Traffic Amendment (Street and Illegal Drag Racing) Act 1996* provided for new policing powers and penalties in dealing with instances of illegal street racing and illegal drag racing. The Act included a statutory provision for the Joint Standing Committee on Road Safety (Staysafe) to review the operation of the Act. The Committee reported in 1997, recommending that the legislation continue. Parliament accepted that recommendation, and the street racing provisions remain in force to this day.<sup>156</sup>
- 3.66** SAPIA advocates that a similar process be adopted for the mobile phone detection bill, suggesting that a 12-month sunset period apply, and that during this time analyses be conducted

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<sup>154</sup> Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 44.

<sup>155</sup> Evidence, Assistant Commissioner Michael Corboy, Traffic and Highway Patrol Command, NSW Police, 30 October 2019, p 43.

<sup>156</sup> Submission 6, Safety and Policy Analysis International, p 4.

on the policing, technology, legal and safety outcomes of the MPDC program to inform a relevant assessment body prior to the lapse of the sunset provision.<sup>157</sup>

### **Committee comment**

- 3.67** The committee has attempted in this report to set out the background and key provisions of the Road Transport Amendment (Mobile Phone Detection) Bill 2019.
- 3.68** In general terms, the committee fully supports the full roll-out of the MPDC program, accompanied by an appropriate education program. The committee, like others, was surprised and disappointed by the evidence from the pilot program of the significant rate of mobile phone usage by drivers whilst driving. The evidence concerning the impact of this use on the cognitive capacity of drivers is unambiguous. While the costs of such illegal mobile phone usage are clearly harder to quantify, any program which leads to a reduction in lives lost on the roads as a result of mobile phone usage is welcome. The committee notes in particular the modelling undertaken by Monash University which was provided to it by Transport for NSW, which show the significant benefits of the program, even if the rate of reduction of mobile phone use by drives is only 30 to 40 per cent. Hopefully higher rates of reduction can be achieved.
- 3.69** Nevertheless, the committee is aware of concerns in relation to the provisions of the bill, primarily relating to the reversal of the onus of proof and privacy issues. The committee refers the evidence that it received on these two matters to the House for further consideration.

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### **Recommendation**

That the Legislative Council proceed to consider the Road Transport Amendment (Mobile Phone Detection) Bill 2019, including any amendments in relation to the reverse onus of proof, the use of artificial intelligence and privacy.

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<sup>157</sup> Submission 6, Safety and Policy Analysis International, p 4.



## Appendix 1 Submissions

No.	Author
1	The Law Society of New South Wales
2	Centre for Accident Research and Road Safety – Queensland (CARRS-Q)
3	Australian Road Transport Industrial Organisation NSW Branch
4	NSW Council for Civil Liberties
5	Transport and Road Safety (TARS) Research Centre, University of NSW
6	Safety and Policy Analysis International
7	Transport for NSW

## Appendix 2 Witnesses at hearing

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
<b>Wednesday 30 October 2019 Jubilee Room Parliament House, Sydney</b>	Mr Russell White	Chief Executive Officer, Australian Road Safety Foundation
	Mr Michal Mantaj	Criminal Law Committee Member, Law Society of NSW
	Mr Hugh McMaster	Secretary/Treasurer, Australian Road Transport Industrial Organisation NSW Branch
	Mr Simon O'Hara	Chief Executive Officer, Road Freight NSW
	Commissioner Samantha Gavel	NSW Privacy Commissioner
	Mr Stephen Blanks	Treasurer, NSW Council for Civil Liberties
	Mr Bernard Carlon	Executive Director, Centre for Road Safety, Transport for NSW
	Ms Kate Watts	Deputy General Counsel, Regulatory & Employment, Transport for NSW
	Mr Roger Weeks	Director Compliance, Transport for NSW
	Mr Brett Hearnden	Partner, Litigation & Dispute Resolution, Hunt and Hunt Lawyers
	Ms Larisa Michalko	Director, Criminal Law Specialist, NSW Department of Communities
	Assistant Commissioner Michael Corboy	Traffic and Highway Patrol Command, NSW Police Force

## Appendix 3 Minutes

### Minutes no. 10

Thursday 17 October 2019  
 Portfolio Committee No. 5 - Legal Affairs  
 Room 1136, Parliament House, Sydney, at 9.03 am

#### 1. Members present

Mr Borsak, *Chair*  
 Ms Jackson  
 Mr Khan  
 Mrs Maclaren-Jones  
 Mr Moselmane  
 Mrs Ward

#### 2. Previous minutes

Resolved, on the motion of Mrs Maclaren-Jones: That draft minutes nos 4, 5, 6, 7, 8, and 9 be confirmed.

#### 3. Correspondence

The committee noted the following items of correspondence:

##### **Received:**

- 23 September 2019 – Email from Ms Lyvia Devine, Executive Officer, Office of the Commissioner, NSW Police, to the secretariat, advising that the Police Commissioner is only available on Monday 28 October 2019 during the week of supplementary hearings.
- 24 September 2019 – Letter from the Hon David Elliott MP, Minister for Police and Emergency Services, to the secretariat, requesting that the footnote on page 10 of the transcript clarifying Police Commissioner Michael Fuller's evidence be amended to note that the Commissioner's comment be disregarded from his evidence.
- 25 September 2019 – Letter from Mr Peter Severin, Commissioner, Department of Communities and Justice, to the Chair, providing clarification to his evidence during the Counter Terrorism and Corrections hearing on Monday 9 September 2019.
- 27 September 2019 - Letter from Ms Tanya Raffoul, Chief of Staff, Office of the Hon David Elliott MP, Minister for Police and Emergency Services, to the Chair, responding to reiterated request for documents.
- 1 October 2019 – Email from Mr James Malin, Policy Advisor, Office of the Hon Gareth Ward MP, Minister for Families, Communities and Disability Services, to the secretariat, providing an updated version of answers to supplementary questions.
- 2 October 2019 – Letter from the Hon Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption, to the Chair, advising that the commission is conducting a preliminary investigation in relation to the Hon John Sidoti MP, Minister for Sport, Multiculturalism, Seniors and Veterans.
- 9 October 2019 – Letter from Mr Michael Coutts-Trotter, Secretary, Department of Communities and Justice, to the Chair, responding to reiterated request for documents.

##### **Sent:**

- 12 September 2019 – Email from the secretariat to Mr Chris Spence, Office of the Hon Anthony Roberts MP, Minister for Corrections and Counter Terrorism, attaching transcript of evidence with questions on notice highlighted, supplementary questions and instructions on how to correct the transcript and return answers to questions.
- 17 September 2019 – Email from the secretariat to Ms Nicolle Nasr, Office of the Hon John Sidoti MP, Minister for Sport, Multiculturalism, Seniors and Veterans, attaching transcript of evidence with

questions on notice highlighted, supplementary questions and instructions on how to correct the transcript and return answers to questions.

#### 4. Inquiry into Budget Estimates 2019-2020

##### 4.1 Answers to questions on notice and supplementary questions

The committee noted the following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice and supplementary questions from Hon David Elliott MP, Minister for Police and Emergency Services, received 24 September 2019.
- answers to questions on notice and supplementary questions from Hon Mark Speakman MP, Attorney General and Minister for the Prevention of Domestic Violence, received 26 September 2019.
- answers to questions on notice and supplementary questions from Mr Robert Fitzgerald AM, Ageing and Disability Commissioner, received 27 September 2019.
- answers to questions on notice and supplementary questions from Hon Anthony Roberts MP, Minister for Counter Terrorism and Corrections, received 3 October 2019.
- answers to questions on notice and supplementary questions from Hon Geoff Lee MP, Acting Minister for Sport, Multiculturalism, Seniors and Veterans, received 8 October 2019.

The Chair noted that during the Budget Estimates hearing on 29 August 2019, Commissioner Michael Fuller of the NSW Police Force had made an undertaking to personally inquire into matters pertaining to licence suspensions and firearms seized for non-compliance with the NSW Firearm Registry's *Reduce Your Risk* guide raised by the Chair. The Chair further noted that he had subsequently received correspondence from the Acting Manager, Secretariat, Office of the Commissioner of the Police advising that "the matter has been referred to the relevant command within the NSW Police Force for review" and had received no further contact from the Commissioner.

Resolved, on the motion of Mr Moselmane: That the committee authorise the Chair to write to Commissioner Michael Fuller, Police Commissioner, to request that he answer the Chair's question regarding licences suspended and firearms seized for non-compliance with the *Reduce Your Risk* guide and prioritise the matter for his personal attention, per the undertaking during the hearing on 29 August 2019.

##### 4.2 Request for documents

The committee considered:

- correspondence from Ms Tanya Raffoul, Chief of Staff, Office of the Hon David Elliott MP, Minister for Police and Emergency Services, again declining to provide a number of documents in relation to the Firearms registry, the *Lessons learnt* internal report on strip searches, and the *Authorised strength* report response to the second request from the committee
- correspondence from Mr Michael Coutts-Trotter, Secretary, Department of Communities and Justice, again declining to provide the *Review into concerns about bullying and harassment in Victims Services* in response to a second request from the committee.

The Chair indicated his intention to pursue the documents through the House via the procedure set out under standing order 52.

##### 4.3 Clarifications to evidence

Resolved, on the motion of Mr Khan:

- That the committee authorise the publication of the following correspondence:
  - The Hon David Elliott MP, Minister for Police and Emergency Services, dated 24 September 2019, requesting that the footnote on page 10 of the transcript clarifying Police Commissioner Michael Fuller's evidence be amended to note that the Commissioner's comment be disregarded from his evidence on Thursday 29 August 2019.
  - Mr Peter Severin, Commissioner, Department of Communities and Justice, providing additional information and correcting errors in evidence provided to the committee on 9 September 2019.

- That the committee authorise the amendment of a footnote on page 10 of the transcript for the Police and Emergency Services hearing on Thursday 29 August 2019 noting that the Commissioner has requested that the comment be disregarded
- That the committee authorise the addition of a footnote to the evidence of Mr Peter Severin, 9 September 2019, reflecting his clarification of evidence.

#### 4.4 Transcript corrections

Resolved, on the motion of Mr Khan:

- That the committee authorise the publication of transcript correction to replace the words 'cannabis warnings' with 'cannabis cautions' made by the Hon David Elliott MP, Minister for Police and Emergency Services for the transcript on 29 August 2019.
- That the committee authorise the addition of footnotes to the evidence of the Hon David Elliott's transcript of evidence for the Police and Emergency Services hearing on 29 August 2019 to reflect three additional requests for transcript corrections.

#### 4.5 Supplementary hearings

Ms Jackson moved: That the committee hold supplementary hearings for the following portfolios:

- Police and Emergency Services (Elliott)
- Attorney General and Prevention of Domestic Violence (Speakman)
- Families, Communities and Disability and Services (Ward)
- Counter Terrorism and Corrections (Roberts)
- Sport, Multiculturalism, Seniors and Veterans (Lee, acting Minister).

Question put.

The committee divided.

Ayes: Ms Jackson, Mr Moselmane.

Noes: Mr Borsak, Mr Khan, Mrs Maclaren-Jones, Mrs Ward.

Question resolved in the negative.

## 5. Inquiry into the provisions of the Road Transport Amendment (Mobile Phone Detection) Bill 2019

### 5.1 Terms of reference

The committee noted the following terms of reference:

That:

- the provisions of the Road Transport Amendment (Mobile Phone Detection) Bill 2019 be referred to the Portfolio Committee No. 5 – Legal Affairs for inquiry and report,
- the bill be referred to the committee upon receipt of the message on the bill from the Legislative Assembly,
- that the committee report by Tuesday 12 November 2019, and
- on the report being tabled, a motion may be moved immediately for the first reading and printing of the bill and that the bill proceed through all remaining stages according to standing and sessional orders.

### 5.2 Stakeholder list

The committee noted the following proposed stakeholder list:

- Transport for NSW (including NSW Centre for Road Safety)
- RMS
- NSW Police
- DPP
- Privacy Commissioner
- Council for Civil Liberties

- Law Society of NSW
- NSW Bar Association
- NRMA
- NSW Taxi Council
- National Motorists Association Australia
- Australian Road Safety Foundation
- Australian Transport Safety Bureau
- Australian Driver Trainers Association
- UNSW Transport and Road Safety Research Centre.

Resolved, on the motion of Ms Jackson: That committee members submit any additional stakeholder suggestions by 5.00 pm Thursday 17 October 2019 and that the secretariat write to stakeholders to invite them to provide a submission to the inquiry.

## 6. Adjournment

The committee adjourned at 9.23 am, *sine die*.

Jenelle Moore  
Clerk to the Committee

## Minutes no. 11

Wednesday 30 October 2019  
Portfolio Committee No. 5 - Legal Affairs  
Jubilee Room, Parliament House, Sydney, at 9.19 am

### 1. Members present

Mr Shoebridge, *Deputy Chair*  
Mr Farlow (substituting for Mrs Maclaren-Jones)  
Mr Graham (participating, substituting for Ms Jackson, from 10:01 am to 12.24 pm)  
Ms Jackson (until 10:01 am, from 12:24 pm)  
Mr Khan (substituting for Mr Farraway)  
Mr Martin (substituting for Mrs Ward) (until 11:35 am)  
Mr Moselmane

### 2. Apologies

Mr Borsak, *Chair*  
Mr Farraway  
Mrs Ward

### 3. Election of Temporary Deputy Chair

Resolved, on the motion of Mr Khan: That Ms Jackson act as Temporary Deputy Chair in the absence of the Deputy Chair during the hearing on 30 October 2019.

### 4. Previous minutes

Resolved, on the motion of Mr Moselmane: That draft minutes no. 10 be confirmed.

### 5. Correspondence

The committee noted the following items of correspondence:

**Received:**

- 22 October 2019 – Letter from the Hon Natasha Maclaren-Jones MLC, Government Whip, to the secretariat, advising that the Hon Scott Farlow MLC will substitute for the Hon Natasha Maclaren-Jones MLC for the inquiry into the Road Transport Amendment (Mobile Phone Detection) Bill 2019 hearing on 30 October 2019.
- 24 October 2019 – Email from Ms Millicent Voegt, Executive Officer to the Deputy Secretary, Revenue NSW, advising that Revenue NSW will not attend the hearing for the inquiry into the Road Transport Amendment (Mobile Phone Detection) Bill 2019 on 30 October 2019.
- 25 October 2019 – Email from Sam Giddings, Senior Manager Partnerships, NRMA, to the secretariat, asking if there are any alternative hearing dates to 30 October 2019.
- 28 October 2019 – Email from Sam Giddings, Senior Manager Partnerships, NRMA, to the secretariat, advising that the NRMA will not be available to attend the hearing on 30 October 2019.
- 29 October 2019 – Email from Ms Cara Punch, Office of the Opposition Whip, to the secretariat, advising that the Hon John Graham MLC will substitute for the Hon Rose Jackson MLC from 10.00 am until 12.30 pm and will participate for the remainder of the time for the inquiry into the Road Transport Amendment (Mobile Phone Detection) Bill 2019 hearing on 30 October 2019.
- 30 October 2019 – Email from the Hon Natasha Maclaren-Jones MLC, Government Whip, to the secretariat, advising that the Hon Taylor Martin MLC will substitute for the Hon Natalie Ward MLC and the Hon Trevor Khan MLC will substitute for the Hon Sam Faraway MLC and the Hon Sam Faraway MLC for the inquiry into the Road Transport Amendment (Mobile Phone Detection) Bill 2019 hearing on 30 October 2019.

**Sent**

- 22 October 2019 – Letter from the chair to Commissioner Michael Fuller, Police Commissioner, requesting an answer to a question on licences and firearms relating to a question asked in Budget Estimates.

**6. Inquiry into the Road Transport Amendment (Mobile Phone Detection) Bill 2019****Inquiry timeline**

Resolved, on the motion of Mr Moselmane: That the committee adopt the following timeline for the administration of the inquiry:

- Wednesday 30 October – full day hearing
- Friday 8 November – Chair's draft report circulated to committee
- Monday 11 November 2019 (1:00 pm – 2:00 pm) – report deliberative
- Tuesday 12 November 2019 – table report.

**6.1 Public submissions**

The committee noted they had previously agreed to a closing date for submissions of Thursday 24 October 2019, and that submissions nos 1 to 7 were published by the committee clerk under the authorisation of the resolution appointing the committee.

**6.2 Conduct of the inquiry**

Resolved, on the motion of Mr Moselmane:

- That there be no questions on notice taken at the public hearing on Wednesday 30 October or supplementary questions from members.
- That members submit any dissenting statement by 9.00 am Tuesday 12 November 2019.

**6.3 Public hearing**

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The Chair declared the public hearing for the inquiry into the Road Transport Amendment (Mobile Phone Detection) Bill 2019 open for examination.

The following witness was sworn

- Mr Russell White, Chief Executive Officer, Australian Road Safety Foundation (*via teleconference*).
- Mr White tendered the following document:

- Document entitled 'Mobile Phone Use: A Growing Problem of Driver Distraction'.
- The evidence concluded and the witness withdrew.

The following witness was sworn

- Mr Michael Mantaj, Criminal Law Committee Member, Law Society of NSW.
- The evidence concluded and the witness withdrew.

The following witnesses were sworn:

- Mr Hugh McMaster, Secretary, Australian Road Transport Industrial Organisation
  - Mr Simon O'Hara, Chief Executive Officer, Road Freight NSW.
- The evidence concluded and the witnesses withdrew.

The following witness was sworn:

- Commissioner Samantha Gavel, NSW Privacy Commissioner.
- The evidence concluded and the witness withdrew.

The following witness was sworn:

- Mr Stephen Blanks, Treasurer, NSW Council for Civil Liberties.
- Mr Blanks tendered the following document:

- Document entitled 'Artificial Intelligence: Australia's Ethical Framework (A Discussion Paper)'.
- The evidence concluded and the witness withdrew.

The following witnesses were sworn:

- Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW
- Ms Kate Watts, Deputy General Counsel, Regulatory & Employment, Transport for NSW
- Mr Roger Weeks, Director Compliance, Transport for NSW
- Mr Brett Hearnden, Partner, Litigation & Dispute Resolution, Hunt and Hunt Lawyers
- Ms Larisa Michalko, Director, Criminal Law Specialist, NSW Department of Communities
- Assistant Commissioner Michael Corboy, Assistant Commissioner, Traffic and Highway Patrol Command NSW Police Force.

The evidence concluded and the witnesses withdrew.

Mr Bernard Carlon Executive Director, Centre for Road Safety, Transport for NSW tendered the following documents:

- Document by Monash University entitled 'Modelling the potential trauma reductions of automated mobile phone enforcement in NSW'
- Photo of a driver using a mobile phone while driving.

The public hearing concluded at 3.04 pm.

#### **6.4 Tabled documents**

Resolved, on the motion of Mr Moselmane: That the committee accept and publish the following documents tendered during the public hearing:

- Document entitled 'Mobile Phone Use: A Growing Problem of Driver Distraction', tendered by Mr Russell White
- Document entitled 'Artificial Intelligence: Australia's Ethical Framework (A Discussion Paper)', tendered by Mr Stephen Blanks

- Documents entitled 'Modelling the potential trauma reductions of automated mobile phone enforcement in NSW', tendered by Mr Bernard Carlon
- Photo of a driver using a mobile phone while driving, tendered by Mr Bernard Carlon.

## 7. Adjournment

The committee adjourned at 3.05 pm, until 1.00 pm Monday 11 November 2019, Room 1136 (report deliberative).

Stephen Frappell  
**Clerk to the Committee**

## Draft minutes no. 12

Monday 11 November 2019  
 Portfolio Committee No. 5 - Legal Affairs  
 Room 1136, Parliament House, Sydney, at 1.00 pm

### 1. Members present

Mr Shoebridge, *Deputy Chair*  
 Mr Farraway  
 Ms Jackson  
 Mrs Maclaren-Jones  
 Mr Moselmane  
 Mrs Ward

### 2. Apologies

Mr Borsak, *Chair*

### 3. Previous minutes

Resolved, on the motion of Ms Jackson: That draft minutes no. 11 be confirmed.

### 4. Correspondence

The Committee noted the following items of correspondence:

#### *Received*

- 5 November 2019 – Correspondence from Commissioner Samantha Gavel, NSW Privacy Commissioner, providing additional information to the committee on the Road Transport Amendment (Mobile Phone Detection) Bill 2019.
- 11 November 2019 – Email from Hon Robert Borsak's office, to secretariat, advising that Mr Borsak will not attend the 1pm deliberative meeting on 11 November.

Resolved, on the motion of Ms Jackson: That the correspondence from Commissioner Samantha Gavel be published.

## 5. Inquiry into the Road Transport Amendment (Mobile Phone Detection) Bill 2019

### 5.1 Consideration of Chair's draft report

The Deputy Chair submitted the Chair's draft report, entitled *Road Transport Amendment (Mobile Phone Detection) Bill 2019*, which, having been previously circulated was taken as being read.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 1.6:

The Minister stated that: The high-resolution images captured by the camera clearly depict drivers holding objects that have the form of a mobile phone and are being held in a manner consistent with using the functions of a mobile phone, such as talking, texting or touching a screen.[FOOTNOTE: The Hon Andrew Constance MP, Second reading speech: Road Transport Amendment (Mobile Phone Detection) Bill 2019, 24 September 2019]

Mr Shoebridge moved: That the following new paragraph be inserted after paragraph 2.31:

'In terms of the specific privacy issues raised by the bill, the Privacy Commissioner's evidence was of minimal assistance to the committee. Despite being asked directly, the Commissioner was unable to inform the committee which privacy principles would be impacted by the bill. In terms of the specific provisions in the legislation, and what if any privacy concerns were raised with its implementation by Revenue NSW, the Commissioner was unable to assist the committee. She advised the committee that her experience was 'more about the pilot program and there was not a need to consult with Revenue because Revenue was not involved in the pilot program...'. [FOOTNOTE: Evidence, Commissioner Samantha Gavel, NSW Privacy Commissioner, 30 October 2019, p 29]

Mrs Ward moved: That the question be amended by inserting the following paragraph before Mr Shoebridge's paragraph:

'The committee notes that given the tight timeframe of the inquiry, the committee resolved that witnesses not be able to take questions on notice during the hearing on 30 October 2019. However, the committee was assisted by additional correspondence from Commissioner Gavel dated 5 November 2019.'

Question: That the amendment of Mrs Ward be agreed to – put and passed.

Question: That the amendment of Mr Shoebridge, as amended, be agreed to – put and passed.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.22 be amended by omitting '...are court elected' and inserting instead 'are challenged in the Local Court'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraphs be inserted after paragraph 3.27:

'The committee was advised by Transport for NSW that it expects to undertake approximately 135 million vehicle checks using this technology each year. If, as occurred in the pilot program, 1.8 per cent of these checks identify an offence then the number of infringement notices issued in the first year would be 2,430,000. Even if just 3 per cent of these were challenged in the Local Court (as is the rate with current mobile phone infringement notices issued by the police) then this would see some 72,900 cases filed.' [FOOTNOTE: Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 43. In evidence, Mr Carlon originally cited a figure of 123 million. Transport for NSW subsequently notified the committee that the correct figure is 135 million.] [FOOTNOTE: Evidence, Mr Bernard Carlon, Executive Director, Centre for Road Safety, Transport for NSW, 30 October 2019, p 47.]

Even if these numbers are not able to be relied upon with certainty, they provide the evidence available to the committee on the impact of this scheme as it rolls out. A simple review of these numbers indicates that this program runs the risk of overwhelming the Local Court regardless of whether or not a reverse onus is in place. Its effect on the driving population of New South Wales will also be significant. In these circumstances the impact of a reverse onus provision must be very carefully considered.'

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 3.47:

' In light of the substantial privacy concerns raised by stakeholders and inherent in a program that relies on high definition photographic images taken of the inside of people's motor vehicles it was

disappointing to receive limited assistance from the Privacy Commissioner. Given her role as the principal advocate for privacy protection, the Parliament is entitled to expect more from this office.'

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 3.50:

'This is the first occasion that the Parliament is proposing to legislate on the assumption that a significant part of the task of identifying criminal conduct is being handled by artificial intelligence. While it is acknowledged that there will be human intervention and review prior to any infringement notices being issued, the task of winnowing down millions of images to identify *prima facie* criminal conduct will still be handled by artificial intelligence. Given this, there should be transparency in how the artificial intelligence identifies potential offenders including the ability to test whether or not the algorithms contain any inadvertent or inherent biases. These are matters that should be addressed by the Government in the debate in the House.'

Resolved, on the motion of Mr Shoebridge: That the following new paragraphs be inserted after paragraph 3.58:

One issue that was raised in evidence was whether or not Road Rule 300 should be broadened to cover some of those things which are still causing driver distraction, such as ipods, calculators or other electronic devices, in addition to mobile phones. When asked about the benefit of the reverse onus provision, Assistant Commissioner Corboy noted:

'However, there are a number of things that do distract people in the car and our position is that they need to keep their hands off those devices, whether it be a cellular mobile phone or a device that could be capable of that, or whether it is a device that distracts them somehow, video streaming or looking at photos—the widest possible interpretation I can put on that is that a mobile phone is a mobile phone. From our perspective, the deeming provisions are required because the reverse onus will be on them to come along and say that they are not that. For a reasonable and prudent person to say, "I held a calculator to my ear", to me, that is not appropriate.' [FOOTNOTE: Evidence, Assistant Commissioner Michael Corboy, Traffic and Highway Patrol Command, NSW Police, 30 October 2019, p 43.]

While this may be the case from a practical perspective, the relevant road rule as presently drafted relates only to mobile phone use. It is an open question whether or not the same objective sought to be achieved by the reverse onus, namely to prevent people relying on the excuse that the device is an electronic device other than a mobile phone, could be achieved by expanding the reach of Road Rule 300 to incorporate all electronic devices. However this is a matter relevant to the House's consideration of the necessity of the reverse onus.'

Resolved, on the motion of Mr Shoebridge: That recommendation 1 be amended by inserting ', the use of artificial intelligence' after 'proof'.

Resolved on the motion of Mr Moselmann: That:

- The draft report, as amended, be the report of the committee and that the committee present the report to the House;
- The transcripts of evidence, submissions, tabled documents and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat by 2.30 pm Monday 11 November 2019;
- That the report be tabled on Tuesday 12 November 2019.

**6. Adjournment**

The committee adjourned at 1.34 pm, *sine die*.

Stephen Frappell  
**Clerk to the Committee**

