

Submission  
No 4

## INQUIRY INTO ROAD TRANSPORT AMENDMENT (MOBILE PHONE DETECTION) BILL 2019

**Organisation:** NSW Council for Civil Liberties

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New South Wales  
Council for Civil Liberties

**NSW Council for Civil Liberties  
Submission regarding the Road  
Transport Amendment (Mobile  
Phone Detection) Bill 2019**

21 October 2019

Contact: Rebecca McMahon

### **About NSW Council for Civil Liberties**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

NSWCCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

### **Contact NSW Council for Civil Liberties**

<http://www.nswccl.org.au>

[office@nswccl.org.au](mailto:office@nswccl.org.au)

Street address: Level 5, 175 Liverpool St, Sydney, NSW 2000, Australia

Phone: 02 8090 2952

**NSWCCL Submission:  
Inquiry into the Road Transport Amendment (Mobile Phone Detection) Bill 2019**

**Introduction**

The New South Wales Council of Civil Liberties (*NSWCCL*) welcomes the opportunity to make a submission to the Inquiry into the Road Transport Amendment (Mobile Phone Detection) Bill 2019 (*the Bill*).

The intention of the Bill is clear – to use surveillance technology (approved traffic enforcement devices) in the enforcement of mobile phone offences. NSWCCL agrees with the spirit of restrictions on mobile phone use for those in charge of a vehicle, in order to provide a safer environment for road users and pedestrians. However, the scope of the Bill is too wide and privacy protections are not detailed in section 139B.

We oppose the “deeming” provision which essentially reverses the onus of proof. This provision is unjustified and unnecessary, given the quality of the technology being introduced. The rebuttable presumption in relation to the object” being “held” by the driver is also too wide. The language of this provision has the potential unintended consequence to capture a range of objects which may lead to unnecessary prosecutions and waste of resources for police, courts, legal services and defendants.

NSWCCL does not support the Road Transport Amendment (Mobile Phone Detection) Bill 2019 as currently drafted.

**The new provision:**

**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.

## Use of Approved Surveillance Technology

In his second reading speech The Hon Andrew Constance stated, in relation to the quality of the technology to be used:

*"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."*

Minister Constance then goes on to assure the community:

"As with all New South Wales camera enforcement programs, infringements for mobile phone use offences will not be issued based on the technology alone. 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."

If the quality of the technology is high and if the procedure for issuing infringements ensures that infringements are only issued where there is no doubt a phone is being used, there is no need or justification for a rebuttal presumption that the "object" which the photo depicts is a phone.

The Minister's justification for the rebuttal presumption in his speech is as follows:

"Despite the strong photographic evidence available from these cameras, which is verified before an infringement is issued, offenders may challenge the offence in court claiming that the prosecution has not conclusively established that the object they were using while driving was a mobile phone"

If the photographs which form part of the prosecution case clearly depict a phone, and the photograph(s) are available to the defendant, it is unlikely that a person would go to the time and trouble of defending a charge on the basis that the object was not a phone. It would, it is submitted, be a waste of their time and potentially open them to costs orders.

## Extension of 'held'

The current draft of the Bill attempts to broaden the definition of held to include 'resting on, any part of the driver's body'. Our concern is that this may capture a range of items which the drafters do not intend. There is a risk, despite the intention to only issue infringements where there is no doubt that a person is holding a phone, may be implemented inconsistently and possibly in some cases, issuing infringements where there is uncertainty as to what the object is (which is not the intention of parliament). This would lead to the courts, police, prosecutors and defendants bearing the cost and time of unnecessary prosecutions. The best way to protect against this is to remove the rebuttal presumption which is clearly not necessary if the quality of the technology is high.

## **Reversing the onus of proof**

The rebuttable presumption in the Bill reverses the onus of proof. We are concerned about this because:

- a) There is no clear policy reason why the onus of proof is essentially reversed. Where there is no good policy reason established, the prosecution should prove charge beyond a reasonable doubt.
- b) as stated above, it is inconsistent with the Minister's intention that infringements will only be issued where they are internally verified as being phones, "beyond doubt" – if infringements are only issued in these circumstances, why could the prosecution not prove the charge beyond reasonable doubt based on the photos which have been internally verified?

### **Recommendation 1:**

**NSWCCL does not support the Bill. It is unnecessary and in particular, we oppose the reversal of the onus of proof.**

## **Privacy Issues**

NSWCCL expresses concern in relation to the potential use of data collected/used and stored in relation to this Bill, and the lack of protections proposed to ensure that the information captured is for law enforcement/road safety purposes only.

The Minister notes:

*'Images that the system deems unlikely to contain an offence can be quickly, automatically and irretrievably deleted. The system does not in any way interfere with, or monitor, a mobile phone signal from the vehicle or the driver's hand.'*

However, privacy protections and restrictions for use are not specifically detailed in section 139B.

In addition, the second reading speech says this in relation to privacy:

*“In relation to privacy, information relating to drivers and passengers is captured for law enforcement and road safety purposes only. As committed to during the introduction of the Road Transport Legislation Amendment (Road Safety) Act 2018, Transport for NSW undertook detailed consultation with the NSW Privacy Commissioner during the pilot of the program, and will continue to engage with both the Privacy Commissioner and the Information Commissioner on the rollout of the program.”*

The intention to “engage with the Privacy Commissioner” is an inadequate assurance that privacy will be protected. There should be clear proposals in the Bill in relation to how the data may be used, accessed, stored and when it will be deleted (and by whom).

**Recommendation 2:**

**If the Bill is to be passed, it should be amended to redress its lack of privacy protections.**

We thank you for the opportunity to make this submission.

This submission was prepared by Rebecca McMahon and Malcolm Ramage on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Legislative Council’s Portfolio Committee.

Yours sincerely

**Therese Cochrane**  
**Secretary**  
**NSW Council for Civil Liberties**

**Contact in relation to this submission Rebecca McMahon: email**