

10 September 2010

C62, 71.13  
JM;rp

The Honourable Ann Bressington MLC  
Parliament House  
North Terrace  
ADELAIDE SA 5000

Attn: Mr Ryan Hidden

Dear Mr Hidden

***Statutes Amendment (Driving Offences) Bill 2010***

I refer to your email of 16 August 2010 addressed to Ms Rosemary Pridmore, Executive Assistant, referring Ms Bressington's amendment to restrict Section 19AD(2)(a) to the driver of the motor vehicle.

The Bill and Ms Bressington's amendment have been considered by the Society's Criminal Law Committee. The Committee has endorsed Ms Bressington's amendment.

The amendment would allay the Society's concerns in relation to s19AD(4)(a). The Criminal Law Committee notes that this provision provides that it is a defence if the defendant proves that he/she was not the driver and did not *consent* to the vehicle being driven in the race. The difficulty with establishing "consent", or a lack thereof will be a problem for both the prosecution and the defendant. The particular difficulty is where there is or might be consent by acquiescence. There will be many instances where a person consents to the vehicle being driven in a race but does not do so by express language or actions. On one level, it may be too easy for a defendant to make out the defence. The reverse could apply. If Parliament wants criminal liability to attach to a defendant who has consented by non-overt conduct, then consideration should be given to defining "consent" to overcome the problem or by replacing it with "object". Some may be reticent about criminal liability for failing to object, however in the context of this proposed offence Parliament would be sending a strong and legitimate message about the offence of drag racing that any involvement in it will be punished even where the consent or approval is only tacit.

The Committee also noted that term "present" in s19AD(s)(a) & (4) is unnecessary and should be deleted.

The Committee has also provided additional comments on the Bill, which are provided below for your information.

**Clause 4(6) – s5AA(5)**

In paragraphs (b) and (c) of the definition of *circumstances of heightened risk* the phrase “*adversely affected*” appears. It is not clear what this term means. This uncertainty is likely to cause problems in assessing whether a matter should be prosecuted, in proving the offence or in defending it. Consideration should be given to defining “*adversely affected*” or using another term. The definition of major defect includes the phrase “serious risk to the safety of any person”. As above, it is not clear what this means or how to prove or defend it if its meaning is known. It raises some questions about the meaning of the phrase as follows

- does it refer to the likelihood an accident will occur that will harm the person to any degree ?
- does "serious risk" mean the likelihood must be a high likelihood an accident will occur? or;
- is "serious risk" a reference to the gravity of the injury of the person?

It seems that the substance of the definition is to capture those who drive a vehicle with a defect in circumstances where there is a real risk that that defect will cause an accident. The mere fact of a risk of an accident necessarily means that a person (including the passenger, a pedestrian or other vehicle inhabitants) is at risk of suffering personal injury. We do not propose to re-draft the definition, but suggest that it should be cast in terms of the nexus between the defect and an accident. We recommend against using the phrase "serious risk". The term "serious" is multi-faceted and does, as a result, tend to confuse. Consideration could be given to the phrase "real risk" or such other term that indicates that the risk is more than just remote or fanciful. Otherwise, we recommend against importing into the definition the fact that there is a risk of personal injury. As indicated, it will be sufficient to link the defect to the risk of an accident. This will provide clarity in the meaning of the provision and the elements necessary to prove (and defend) it.

**Clause 6 – s19AD**

Sections 19AD(1)(a) & (b) - the maximum penalty has no upper limits for the driving disqualification. This replicates the model used for some current offence provisions in the *Criminal Law Consolidation Act*. Where no upper limit is provided, it would be preferable for the legislature to provide some criteria for imposing a penalty above the nominated maximum. This is important in providing guidance to the courts. It will have the effect of certainty, consistency and is likely to limit idiosyncratic and appealable sentences. In addition, it will promote public confidence in the criminal justice system;

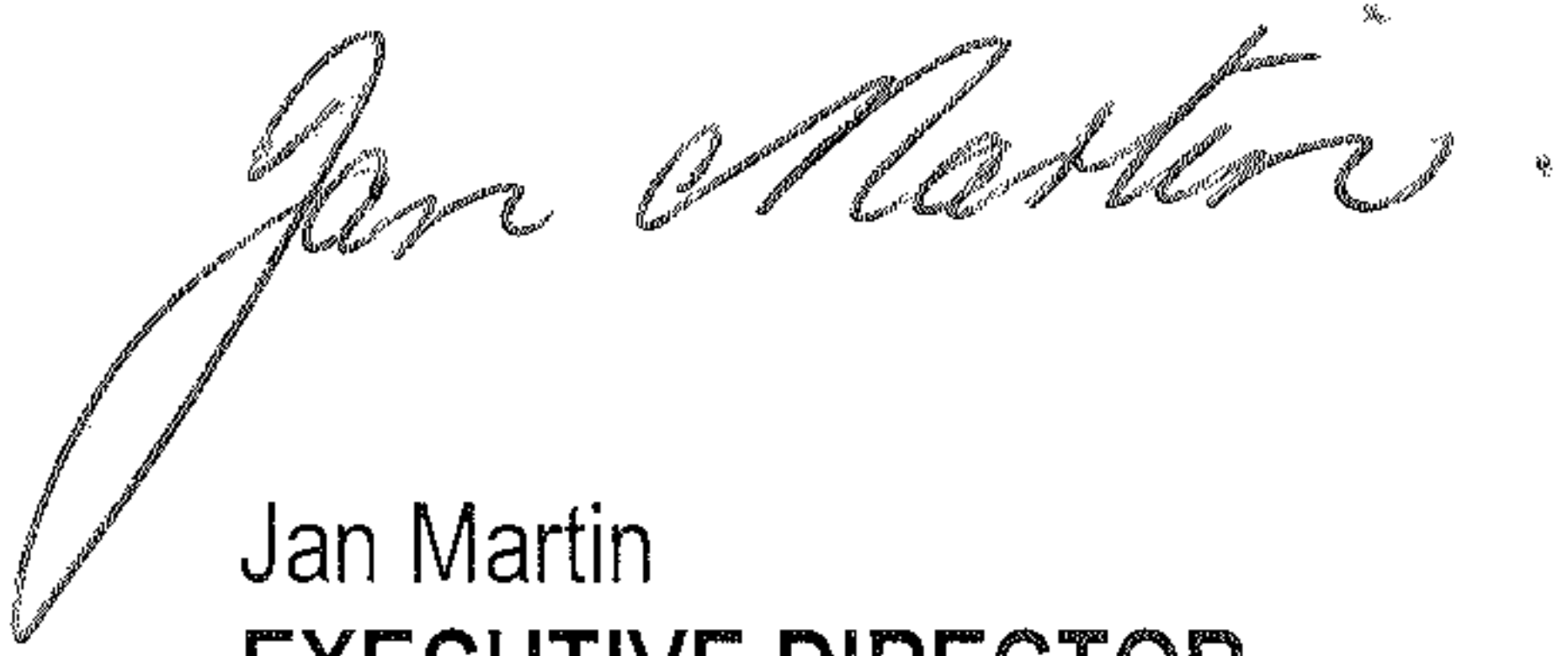
**Clause 8 - s44B(1)**

This section criminalises driving behaviour if the person operates a motor vehicle “so as to” produce or cause a certain result. In this respect it is the same as the existing s44B. It can be difficult to prove that a person operates a motor vehicle with the intention of causing those results (particularly with proposed s44B(1)(c)). We recommend that consideration be given to having recklessness as the relevant state of mind of the driver. We do not propose to draft the provision, but it would be along the lines that the driver operated the vehicle and was reckless as to whether it produced one of the results mentioned in paragraphs in (a) to (c).

I trust this is of assistance.

Thank you for referring the Bill to the Society for consideration.

Yours sincerely

A handwritten signature in cursive script that reads "Jan Martin". The signature is written in black ink and is positioned to the left of the typed name.

Jan Martin  
**EXECUTIVE DIRECTOR**