15 June 2020

The Hon Stephen Knoll MP  
Minister for Transport  
Department of Planning, Transport and Infrastructure  
GPO Box 1815  
ADELAIDE SA 5001

via email: Kathy.Towsty@sa.gov.au

Dear Minister

Statues Amendment (Transport Portfolio Bill) 2020

1. I refer to the email from your office of 26 May 2020 advising the Department for Planning, Transport and Infrastructure is currently working on a number of proposals with respect to various pieces of transport legislation. The proposals have been set out in the draft Statutes Amendment (Transport Portfolio) Bill 2020 (“the Bill”) which was provided to the Society for its feedback.

2. Enclosed with the email of 26 May 2020 was a list of 12 proposals (as set out in the Bill). The Society will address the proposals of concern below. The comments below are informed by Members of the Society’s Criminal Law Committee who specialise in traffic law.

Proposal 1

3. The Society notes proposal 1 is an amendment to section 47GA of the Road Traffic Act 1961 (SA) (“Road Traffic Act”), to disallow the use of that defence for drinking during the 3 hour presumptive period in section 47K.

4. The Society strongly opposes this amendment on the basis that it seeks to remove the defence of subsequent drinking and is likely to lead to miscarriages of justice. The defence of subsequent drinking is available to a defendant, where they can provide evidence that they consumed alcohol after driving, but before the breath analysis. A key element in proving the offence of drink driving is that a defendant had a reading of more than 0.05 grams of alcohol in their blood at the time of driving the motor vehicle.

5. For example, the proposed amendment could result in a situation where police can breath test a person drinking in a pub on the basis that they were driving 2.5 hours ago, and because of the 3 hour presumptive period, the blood alcohol concentration (BAC) is deemed to be their BAC for the three proceeding hours. This person cannot rely on a defence that they consumed alcohol after they drove. This would clearly lead to miscarriages of justice.
6. Furthermore, the Society considers the wording of the amendment as set out in the Bill should be reconsidered. As currently drafted, the effect of the amended wording is that the defence doesn’t apply during the 3 hour period after driving, however, it does apply if a driver is tested more than 3 hours after they have driven. This makes little sense and requires amendment.

7. Finally, if the intent of the Bill is simply to amend the presumption (as set out in proposal 3), then the Society considers there does not need to be any amendment at all to 47GA of the Road Traffic Act.

Proposal 3

8. The Society notes proposal 3 seeks to amend section 47K of the Road Traffic Act to extend the presumption during which breath analysis results are valid from 2 hours to 3 hours.

9. The Society queries what scientific evidence/rationale, if any, informs this proposal. The Society notes the presumption has been 2 hours for a number of decades. It is suggested the only reason for a 3 hour delay between driving and breath testing would be police delay.

10. The Society seeks further information as to why this proposal is being pursed.

Proposal 4

11. Proposal 4 seeks to amend section 79B of the Road Traffic Act to replace the current statutory declaration system with an online nomination system, to nominate another person as the driver of a vehicle for the purposes of camera-detected offences and parking fines.

12. The Society suggests that an option should remain for a person to request a statutory declaration, as many drivers may not have access to an online nomination system. Given there are legal consequences for failing to nominate another driver, removing the statutory declaration option entirely puts those drivers at risk of being found guilty of an offence, despite the fact that they could have nominated another driver given the opportunity. Therefore, it is important that drivers have an option to request a statutory declaration where they do not have access to the online nomination system.

Proposal 7

13. The Society notes that proposal 7 seeks to amend clause 8 of Schedule 1 of the Road Traffic Act, to allow de-identified oral fluid and blood samples to be used for research purposes, including research into other types of drugs of abuse that are in drivers’ systems.

14. The Society has some concerns about this amendment, in particular its potential to encroach on privacy. While the legislation may seek to “de-identify” samples, the very nature of samples is that they can be identifiable through DNA. The Society suggests further safeguards and privacy provisions should be considered.

Proposal 12

15. The Society has serious concerns around proposal 12 which seeks to amend Schedule 1, clause 8(2) of the Road Traffic Act, to allow for a drug screening test, oral fluid analysis or blood test to be admissible in proceedings for an offence against the Controlled Substances Act 1984 (SA) (particularly Part 7 – Search, seizure, forfeiture and analysis).
16. The Society notes the amendment will allow SA Police (SAPOL) to use an indicative drug screen to search a vehicle and/or premises, when there are no other reasonable suspicion grounds to warrant that search.

17. Drivers are initially submitted to a drug screening test, which is known as a “lick test”. This is a presumptive test (similar to the initial alcotest), which merely enables police to make a person undergo a far more accurate and reliable oral fluid analysis. Presently, the drug screening test cannot be considered to be any evidence of drug consumption. The Society notes there is also scientific evidence that demonstrates the drug screening test gives a very high rate of false positives.

18. In addition, legislative changes in 2018 has resulted in SAPOL no longer conducting the more accurate “oral fluid analysis”. Rather, SAPOL collects the oral fluid which is then sent to Forensic Science SA for analysis. This means that the more accurate test results are not available for a few days after the conduct giving rise to the taking of the oral fluid. The proposed amendment would allow SAPOL to search a driver’s home several days after the alleged drug driving offence solely on the basis that the driver returned a positive drug result a few days earlier.

19. The Society notes the Statutes Amendment (Drink and Drug Driving) Bill 2017, which sought to allow SAPOL to search drivers and their cars for drugs, if the driver returned a positive indicative drug test. The Bill was unsuccessful and was opposed by the Liberal Party at the time. The Society considers there to be clear parallels between proposal 12 and the 2017 Bill.

20. The Society notes that searches conducted on grounds set out in proposal 12 would currently be unlawful, due to the lack of “reasonable suspicion” of an offence being committed at a time proximate to the alleged conduct. The Society raised such concerns respect to the Bill introduced in 2017.

21. The Society opposes proposal 12 for the reasons set out above: it is not appropriate for an indicative drug screening test which is known to be inaccurate, to be utilised in this way. No information has been provided as to why this amendment is sought, nor have any weaknesses or issues in the current legislation been identified.

Yours sincerely

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