

14 November 2013

Mr Hobbs
Chair
Transport, Housing and Local Government Committee
Parliament House
George Street
BRISBANE QLD 4000

By Post and Email to: thlqc@parliament.qld.gov.au

Dear Chair

Inquiry into Cycling Issues

Thank you for inviting the Queensland Law Society ("Society") to participate in your committee's round table discussion which was held on Wednesday, 16 October 2013. The opportunity to contribute to the committee's deliberations was appreciated.

Thank you also for granting leave to the Society to provide written submissions on the committee's further consideration of the issue of "Strict Liability" or "Default Liability".

Strict Liability or Default Liability

The Society considers it does not matter whether the issue under consideration is called 'Strict Liability' or "Default Liability". It is clear to the Society that default liability and strict liability are the same. This submission refers to the proposal as strict liability for consistency.

It is apparent from the round table discussions that what is being considered under both phrases is a reversal of the onus of proof when determining liability for road traffic accidents or at the very least those involving cyclists (See Mr Shorten – bottom of page 6 and top of page 7 and Mr Grant and Dr Johnson – bottom half of page 15 of transcript). The principle which underpins both terms as explained in the round table discussion is this reversal of the onus.

Your committee is well aware the Queensland legal system is based on the fundamental principle in criminal prosecutions that everyone is innocent until proven otherwise and in civil litigation that liability is only established once fault is shown. These principles should not, in the Society's view, be altered. To reverse the onus is contrary to these principles.

Any decision to reverse the onus of proof in legal responsibility is significant. It should only be recommended by the committee with very careful deliberation and well informed consideration of all issues and consequences that flow from it. The implications of a reversal of the onus of proof for drivers of motor vehicles unfortunately involved in an accident with a cyclist through no fault of their own could be disastrous.

It is a fundamental right that someone defending a claim or charge against them should of course have to meet the claim or charge as made by the prosecution. They should not be required to prove they are not liable for the claim or guilty of the charge simply because it has been made. The current system ensures only claims or charges with some merit are prosecuted, but by their very nature not all succeed. This does not mean the system is not working. It is the Society's view that it is proof of a properly functioning system.

The Society opposes any decision to reverse the onus of proof particularly in the criminal sphere and counsels the committee to carefully consider any recommendation to this effect.

Distinction between criminal responsibility and civil liability

At the round table discussion the Society emphasised the need when considering the issue of strict liability for the committee to make a clear distinction in its considerations on whether it is considering both criminal (including traffic offences) and civil liability in this discussion or just one of them.

- Criminal responsibility

Dr Mark King, Senior Lecturer, CARRS-Q at page 16 of the transcript of proceedings of the round table discussion correctly stated that, the European countries that have strict liability for cycling accidents do so only in relation to civil liability, not criminal. This is of the utmost importance in the Society's view.

The significance of the introduction of strict criminal liability for motor vehicle accidents involving cyclists cannot be underestimated. The Society considers that if changes are to be put in place, a more acceptable and more effective approach would be to adopt principles of the nature that were contained in the Rutgers Report to the Department of Transportation, New Jersey (referred to in Submission 36 from Malcolm Herron and others). Mr Herron's submission refers to the report recommending an increase in legal penalties for driving offences involving vulnerable road users. Consideration of whether the current penalty levels are appropriate combined with the adoption of the one metre rule would in the Society's view be a more effective means of implementing a change in conduct of Queensland motorists' interaction with cyclists, which the Society understands to be the committee's objective. Two examples of effective change of this nature are changes made to the seatbelt laws and driving under the influence laws.

The Society is most willing to expand on the implications of a reversal of the onus in criminal proceedings if the committee considers it would assist its deliberations. A representative of the Society's Criminal Law Committee would be most willing to meet with the committee to answer any questions the committee may have.

- Civil liability

From a civil liability point of view, the introduction of strict liability is referred to in a number of submissions but in particular is mentioned in the CARRS – Q written submission (no. 80 at

page 26). That submission also refers to the fact that strict liability operates in many European nations. As the Society submitted at the round table discussion, an important distinction between the European nations and Queensland is the role the judiciary plays in conducting litigation in the European nations.

The European judges conduct an inquisitorial process and the judges arbitrate the disputes. In this system the judges can gather evidence, subpoena members of the public to give evidence, and direct lines of enquiry before determining the issue in dispute. Each party to the litigation is then availed the opportunity to question the witness. This is not the position in Queensland.

The adversarial system in Queensland is based upon the fundamental principle of innocence until proven guilty. A party bringing a claim must prove his or her case. This ensures only claims with some prospect of success are prosecuted. Unlike the European inquisitorial system, in Queensland a party defending a claim may not know the evidence against him or her until it is given. The reversal of the onus of proof in these circumstances would be a very significant step and not one to implement lightly.

In the current civil system, a greater duty towards their interaction with cyclists is imposed on a driver of a motor vehicle given the disproportionate power imbalance between a motor vehicle and a bike. This duty imposes a higher duty and provides that *'a driver must exercise special care or drive defensively in the presence of pedestrians, or as in this case cyclists, especially if they are children: "Rowes Business Service Pty Ltd v Cowan [1999] NSWCA 268.*

The Society considers that it is of utmost importance that there is no evaluation available to show that strict liability laws adopted in various European countries are effective in reducing cyclist injury risk. This was recognised in the CARRS – Q submission. In the absence of supportive data, the Society sees no justification for the recommendation of changes to the fundamental principles that underpin our existing legal system.

Existing influence of other factors

Finally it is vital to appreciate that an important influence in civil cases when judges are determining the nature of a duty owed (a decision made on the facts of each case) is any mass educational programs and legal changes (e.g. the one metre and 1.5 metre rules discussed at the round table) that have been adopted by Parliament of the nature of that being considered by the committee. All these would be relevant factors taken into consideration by the court when assessing the conduct of any motorist involved in an accident with a cyclist.

Decisions in civil claims can be a catalyst for change in societal conduct. This is demonstrated by claims in Asbestos and Sex Abuse cases. Both areas have seen decisions in civil claims result in greater community awareness, and cause a shift in community attitude. Similarly, there is no reason, in the Society's view, why a change in cyclists' interaction with motorists cannot be effected by a combination of changes in criminal sanctions and laws like the one metre rule, education programs outlining those changes and the prosecution of civil claims following those changes. The changes that the committee are seeking can be achieved by these means rather than the drastic step of a reversal of the onus of proof.

It is therefore the Society's position that the clearly desired outcome of creating a greater awareness of the need to be considerate of vulnerable road users by motorists can be achieved within the fundamental principles that underpin the current legal framework both within the civil and criminal spheres. A change of the significance of a reversal of the onus of proof is not the most appropriate or effective means of achieving that change.

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Of importance on that point is the comment by Dr King at page 16 that in the Asian countries where there is a reversal of the onus of proof in vulnerable road user accidents there has been concern expressed it has fostered an increase in hit and run incidents. This adverse outcome should be avoided at all costs as the best chance of recovery for an injured cyclist must be through immediate first aid.

The Society shares the committee's concern that all possible steps should be taken to ensure the safety of cyclists on our roads and to encourage more people to cycle. It does not believe these objectives will be achieved by the introduction of strict liability principles.

Thank you for the opportunity to provide these comments to you.

Yours faithfully

Annette Bradfield
President