



Law Council
OF AUSTRALIA

Office of the President

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Kirsten McKillop
Project Manager
National Transport Commission
Level 3/600 Bourke Street
MELBOURNE VIC 3000

By email: enquiries@ntc.gov.au

Dear Ms McKillop

Changing Driving Laws to Support Automated Vehicles

1. Thank you for the opportunity to comment on the National Transport Commission's (the **Commission**) Discussion Paper in relation to changing driving laws to support automated vehicles, dated October 2017 (**Discussion Paper**).
2. Due to time constraints regarding the preparation of this submission, the Law Council is not a position to offer comments on all of the questions set out in the Discussion Paper. However, we offer the following comments on some significant aspects of the consultation for your consideration, which have been adopted from the input provided to the Law Council by Law Society of South Australia, one of its constituent bodies.¹ The Law Council is also grateful for the assistance of its National Insurance Lawyers Group of the Legal Practice Section and the Law Society of New South Wales in the preparation of this submission.
3. The Discussion Paper seeks feedback on how driving laws should provide for the public deployment of automated vehicles, new legal obligations that may be required, and the establishment of legal obligations for automated driving system entities (**ADSEs**).
4. The Law Council has considered the Discussion Paper from the perspective of ensuring persons injured in accidents involving automated vehicles, will be entitled to appropriate levels of compensation. The following comments in relation to this issue are set out below.

¹ The Law Council exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law. Through its constituent bodies and sections, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

Definition of driving and impact on State and Territory third party and national insurance schemes

5. The Discussion Paper notes that a detailed analysis of how changes to the definition of 'drive' and 'driver', and recognition of ADSEs, would affect existing State and Territory compulsory third party and national insurance schemes, and other laws, was outside of the scope of the Discussion Paper. These issues are proposed to be addressed in the next stage of the Commission's program for reform, to be delivered in May 2018.
6. The Commission, did however, highlight the need to work closely with the states and territories to aim for a consistent approach to the definition of 'driving' in driving legislation and compulsory third-party insurance legislation. The Law Council notes and supports the Commission's recognition of 'the desirability of a consistent approach in transport legislation as well as legislation outside the transport portfolio'.² The Law Council supports previous submissions from one of its Constituent Bodies, the Law Society of New South Wales, that advocate for laws across all Australian states and territories to be uniform in their approach to autonomous vehicles so consumers are aware of their rights and entitlements irrespective of where the vehicle travels.³
7. Section 5.6 of the Discussion Paper considers the prospective legislative approaches to recognise an automated driving system (**ADS**) and ADSEs.
8. The Commission submits that ADSEs should only be held legally responsible for the activities of the ADS that it can control – that is, the safe operation of the ADS and its performance of the dynamic driving task. The Commission has identified three approaches to achieve this outcome:
 - a) Expand the definition of driver in Acts that deal with the dynamic driving task to include the ADS when it is engaged and make the ADSE responsible for the actions of the ADS.
 - b) Exclude the ADS from the definition of driver, and make the ADSE responsible for the safe driving of the vehicle, including compliance with dynamic driving tasks obligations when the ADS is engaged.
 - c) Create a new Act for automated vehicles that establishes the dynamic driving tasks obligations. Make the ADSE responsible for the non-compliance with those obligations by the ADS when it is engaged.
9. The Commission indicates its initial assessment is that the approach noted above in paragraph 8(a), the expansion of the definition of driver in legislation that deals with the dynamic driving task, may be the most efficient approach.
10. The Law Society of South Australia has noted that the policy of insurance under the current legislative scheme operating in South Australia provides as follows:

The insurer insures the owner of the motor vehicle and any other person who at any time drives or is a passenger in or on the vehicle, whether with or

² The National Transport Commission, *Changing Driving Laws to Support Automated Vehicles* (October 2017), p. 19.

³ The Law Council has adopted this position directly from the Law Society of New South Wales submission provided to the Law Council.

*without the consent of the owner, in respect of all liability that may be incurred by the owner or other person in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle in any part of the Commonwealth.*⁴

11. There are similar provisions in some other jurisdictions.
12. Therefore, if the definition of 'driver' in legislation dealing with the dynamic driving tasks do include the ADSE, it would appear *prima facie*, that the compulsory third party insurance scheme would meet any liability of the ADSE in respect of bodily injury or death of another person.

Establishing fault

13. However, the Law Council notes that the system in South Australia (and some other jurisdictions) is a fault based system, and the body of law that has built up in relation to 'fault' arises from uniquely human experiences.
14. In fact, often purely mechanical failure may result in there being no fault established, and no cause of action on the part of the injured person. For instance, if there is a failure of some mechanical part which caused a driver to lose control of the vehicle, which failure will not have been within the normal responsibilities of the driver or owner of the vehicle, then it may be that no fault would be established against the driver, and the person injured as a consequence has no cause of action.
15. The Law Council has concerns with respect to how 'fault' would be established in respect of the ADSE or the 'ADS driver'. Whilst the issue of fault may be obvious in many cases, there may be some situations where it may not be easily determined.
16. Similarly, a situation may arise where both an ADSE and a human participant in a collision are at fault. It is not clear how contribution is to be assessed or how the departure from the required standard of care on the part of a human to an operational failure of an ADS is to be dealt with.
17. The Law Society of South Australia has submitted that consideration may need to be given to a limited 'no fault' compulsory third party insurance scheme applicable to vehicles with an automated driver system when the ADS is engaged. The Law Council does not yet have a concluded position of national application on this issue.

Potential for hacking should be addressed

18. The Law Council also notes with concern that the Discussion Paper does not address the consequences of hacking into the automated driver system software where such hacking could lead to a motor vehicle accident. Such an issue should carefully be considered by the Commission through a public consultation process.

⁴ *Compulsory Third Party Insurance Regulation Act 2016 (SA).*

19. The Law Council will consider providing more substantive comments when the issue of compulsory third party insurance is considered in the next stage of the Commission's reform program.
20. The Law Council trusts that these comments are of assistance. Please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division (natasha.molt@lawcouncil.asn.au or on (02) 6246 3754) in the first instance with any questions.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Fiona McLeod', written in a cursive style.

Fiona McLeod SC
President