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Attention: Automated Vehicle Team

National Transport Commission
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Dear Automated Vehicle Team

Submission responding to the National Transport Commission's *Consultation Regulation Impact Statement: Safety Assurance for Automated Driving Systems*

The Law Institute of Victoria (the 'LIV') thanks the National Transport Commission (the 'NTC') for the opportunity to provide submissions responding to its *Consultation Regulation Impact Statement: Safety Assurance for Automated Driving Systems* (the 'RIS').

The LIV's paramount concern is that the endorsed option for a Safety Assurance System in Australia prioritises safety and offers the highest level of protection for consumers and road users, in particular ensuring the preservation of the full spectrum of insurance rights.

We understand the RIS seeks a response to the 21 consultation questions outlined in the paper. The LIV considers it can provide the most comprehensive and meaningful response by making submissions which respond to the RIS as a whole, rather than specifically addressing the individual questions provided, particularly given the LIV supports the NTC's preferred option (Option 4).

The LIV notes section 2.2 of the RIS which outlines the risk of market failure to deliver a socially desirable level of safety risk management. At the NTC Information Session held in Melbourne on 1 June 2018, much of the discussion surrounded the commercial and regulatory costs of implementing a Safety Assurance System. The LIV submits that the broader social and safety costs must remain the overriding principle in design and implementation of a Safety Assurance System, and agrees with the NTC's view in section 2.2 that:

"Without specific safety regulation and effective after-market mechanisms (such as insurance and legal liability), there is a risk of market failure to deliver a socially desirable level of safety risk management". (p.17)

The options outlined by the NTC

- Option 1: Current approach (the baseline option) – does not introduce a safety assurance system. It uses existing regulatory processes to manage the safety of automated vehicles.
- Option 2: Administrative safety assurance system – introduces a safety assurance system using administrative processes under existing regulation. It requires an automated driving system entity ('ADSE') to self-certify against principles-based safety criteria.

- Option 3: Legislative safety assurance system – introduces a safety assurance system with a dedicated national agency for automated vehicle safety. It requires an ADSE to self-certify against principles-based safety criteria. It includes offences and compliance and enforcement tools that are specific to safety assurance.

- Option 4: Legislative safety assurance system plus a primary safety duty – introduces a safety assurance system with a dedicated national agency for automated vehicle safety. It requires an ADSE to self-certify against principles-based safety criteria. It includes offences and compliance and enforcement tools that are specific to safety assurance and a general duty on ADSEs to ensure safety ('primary safety duty').

The preferred option:

The NTC has concluded that option 4: legislative safety assurance system plus a primary safety duty is the preferred option.

The LIV refers to its submission responding to the NTC's discussion paper *Regulatory options to assure automated vehicle safety in Australian, Discussion Paper June 2017* ("the discussion paper") in which the LIV submitted that in considering which regulatory option would be preferable, the paramount criteria should be:

- Safety, including ongoing safety over the lifespan of the vehicle as well as certainty about responsibility for testing, validating, and managing safety risks; and
- Accountability and probity, including transparency of decision making and the existence of an entity to be legally liable for the automated driving system.

In accordance with these paramount criteria the LIV supports option 4 as the preferred option for a Safety Assurance System in Australia, for the reasons outlined below.

1. Safety

The LIV's position, as in its previous submissions, is that the safety of road users is paramount in considering any measures for regulating automated vehicles. A legislative Safety Assurance System under option 4 ensures that there is clarity and consistency in certification, regulation and enforcement measures.

Notably, the RIS outlines in section 2.2 the risks that may arise as a result of a failure to closely regulate ADSEs to ensure optimal safety outcomes. The LIV submits that the inclusion of a primary safety duty as provided in option 4 should ensure that ADSEs are always obligated and responsible to guarantee a high base level safety standard for automated vehicles. Of significance to the LIV is that the primary safety duty captures new technology as it comes to market and provides a proactive approach to compliance of automated vehicles from importation to vehicle disposal.

The LIV refers to its previous submission to the discussion paper that the primary safety duty must be sufficiently flexible to allow the adaptive use of an automated vehicle and that consideration should be given to how a primary safety duty may apply over the service life of an automated vehicle, especially with respect to servicing, modification and repair.

The LIV submits that options 1, 2 and 3 are insufficient; any less than the highest level of oversight might produce uncertain or inadequate regulations for ADSEs. The LIV submits that lesser scrutiny and more ambiguity will lead to lower standards of safety and higher social costs (including lower standards of safety over the life of the automated vehicle) as highlighted in the RIS in section 2.4.

2. Accountability and Probity

The LIV considers that option 4 ensures the highest level of accountability and probity of all the outlined options due to the dedicated national agency for automated vehicle safety, the inclusion of offences, compliance and enforcement tools as well as the inclusion of the primary safety duty to ensure ongoing best practice.

The LIV makes the following specific comments in relation to the obligations outlined in sections C.3.1, C.3.2 and C.3.3 found on pages 87 through 89 of the RIS respectively:

C.3.1 refers to data recording and sharing and recommends that relevant data (including data relating to crashes and near-misses) must be recorded and provided by the ASDE to relevant parties (such as police, insurers, road agencies and consumers) as necessary. In particular, the NTC recommends that automated vehicles should record whether the human driver of the automated driving system ('ADS') was in control at a particular time and the level of automation engaged and that ASDEs should facilitate consumer access to this data for the purpose of disputing liability. The NTC requires the applicant to outline the data it will record and how it will provide data to the relevant parties as well as ensuring a number of fundamental criteria are met before it will receive a Statement of Compliance. The LIV submits that the ability of consumers and third parties to access relevant and meaningful data will be vitally important in dealing with issues of fault involving automated vehicles. Access to event data could rationalize the process of insurance claims and reduce litigation. This would be favorable to all parties and reduce the burden of protracted and complicated litigation on the public purse. Regulation of early access to data will also be important for community acceptance of automated vehicle technology, as concern around unfair disadvantage in assignment of fault after an accident could result in a reduced uptake of the technology. We only need look to the US National Transport Safety Board's preliminary report into the Uber crash, which occurred on 18 March 2018 and resulted in the death of a pedestrian, to see how early and transparent access to data can assist in quickly and efficiently establishing relevant facts and circumstances for the purposes of criminal enforcement and legal liability.¹

C.3.2 and C.3.3 outline the requirement that an ADSE must provide evidence that it has a corporate presence in Australia and that it fulfils minimum financial requirements. The LIV submits that any corporate presence in Australia and financial accountability must be an *ongoing* requirement for ADSEs, ensuring that the rights of consumers and road users are protected throughout the life of the vehicle with a right of recourse against a legally liable and financially viable entity in Australia.

Consistent with previous submissions, and in particular the LIV's submission responding to the *NTC Discussion Paper: Changing Driving Laws to Support Automated Vehicles* dated 1 December 2017, the LIV supports the position that state based compensation schemes such as the Transport Accident

¹ National Transportation Safety Board, *Preliminary Report, Highway, HWY18MH010* (24 May 2018) <<https://goo.gl/2C6ZCH>>.

Commission in Victoria should maintain their status as the statutory insurer for personal injuries suffered due to transport accidents (whether caused by an ADS or human driver). Regardless of the option adopted in the current RIS, the LIV continues to advocate that any national regulatory framework established must ensure that any injured person is no worse off in terms of their rights under existing compensatory statutory schemes.

The LIV again thanks the NTC for the opportunity to provide further submissions in response to this consultation. If copies of previous LIV submissions referred to are required, please let us know and we will provide them.

If you have any queries or would like to discuss further please contact Irene Chrisafis by email at ichrisafis@liv.asn.au or by telephone on 96079386.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'Belinda Wilson', with a long horizontal stroke extending to the right.

Belinda Wilson
President
Law Institute of Victoria