

# ADAPTING ROAD SAFETY TO AUTONOMOUS VEHICLES, JOINT LAW COMMISSION ISSUES REPORT ON LEGISLATIVE CHANGES

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Legal Briefings

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As liability shifts from driver to manufacturer and software developer, a range of new concepts surrounding safety and the marketing of autonomous vehicles will need to be considered.

In 2018, the Centre for Connected and Autonomous Vehicles asked the Law Commission of England and Wales and the Scottish Law Commission (the "**Joint Commission**") to undertake a comprehensive review to enable the safe and responsible introduction of automated vehicles on British roads and public places.

After multiple rounds of consultation, the Joint Commission published the [joint report](#) (the "**Report**") with recommendations for legal reform on 26 January 2022.

If you would like to read more about autonomous vehicles, legal developments and developments in the sector more generally, please visit our [Automotive Hub](#).

## KEY TAKEAWAYS:

- The introduction to the Report states that safety has been at the forefront of the proposals included in the Report, while also seeking to retain the flexibility needed to accommodate future development of this technology.
- The Report's recommendations include approval and authorisation of self-driving

vehicles, ongoing monitoring of their performance on the road, misleading marketing penalties and new criminal and civil offences.

- The recommendations include in particular:
  - writing the test for 'self-driving' into law, with a clear line to distinguish it from driver support features;
  - a new offence to prevent misleading marketing due to the distinction between "driver assistance" and "self-driving";
  - new legal roles for users, manufacturers and service operators, with removal of criminal responsibility for the person in the driver's seat; and
  - holding vehicle manufacturers or software developers and their senior managers criminally responsible for misrepresentation or non-disclosure of safety-relevant information.

## **WHO SHOULD PAY ATTENTION?**

Whilst the Report is not binding, the recommendations of the Joint Commission will be seriously considered by the Parliaments reading the Report and should be expected to form the basis of any future legislation or reform.

The findings will therefore be of interest to any company:

1. already operating in the autonomous vehicle space;
2. intending to expand into this growing industry;
3. which will be involved in manufacturing self-driving software; or
4. which will be involved in the insurance of autonomous vehicles (especially as manufacturers are likely to take out professional insurance if they will have direct liability for malfunctions or accidents).

## WHAT IS MEANT BY AUTONOMOUS/AUTOMATED VEHICLES?

The Report explains that when it refers to "automated vehicles", it means vehicles that are capable of driving themselves without being controlled or monitored by an individual for at least part of a journey.

This has considerable legal consequences, as a human driver will no longer be the sole focus of responsibility for road safety. As a result of cars 'driving themselves', new systems of safety assurance are necessary both before and after vehicles are permitted to drive autonomously throughout the country.

The Joint Commission therefore recommends a new piece of legislation, the 'Automated Vehicle Act', which will set out new regulatory regimes and new actors which will be subject to the law.

## THE PRINCIPAL RECOMMENDATIONS OF THE REPORT

The Report's proposals cover a variety of topics ranging from initial approval and authorisation of autonomous vehicles, ongoing monitoring of their performance whilst on the road, prevention of misleading marketing and new criminal and civil liability (for a full summary of the Report's recommendations, see [here](#)).

### *Writing the test for "self-driving" into law*

The Report recommends that the test for "self-driving" be written into law, with a clear line to distinguish it from cars which have "driver support features" (e.g. functions in the car which help the driver maintain a safe distance from vehicles ahead).

In order for a vehicle to be authorised as having a self-driving feature the authorisation authority must be satisfied that *'[the feature] can control the vehicle so as to drive safely and legally, even if an individual is not monitoring the driving environment, the vehicle or the way that it drives'*. Vehicles that might require a human to take over during a 'clear and timely transition demand' would pass the test, but a car that requires a user to respond in-time to other events in the external environment would fail this test.

There will be three new legal actors involved in self-driving cars:

1. the user-in-charge - the human in the driving seat;
2. the no user-in-charge ("**NUIC**") operator - the organisation that oversees vehicles without a user-in-charge; and
3. the Authorised Self-Driving Entity ("**ASDE**") - the vehicle manufacturer or software developer that puts the vehicle forward for authorisation and takes responsibility for its actions. The Report allows flexibility over the identity of the ASDE: it may be the vehicle

manufacturer or the software developer, or a partnership of the two. However, the ASDE must show that it was "closely involved in assessing the safety of the vehicle" and it must be able to show it has sufficient funds to respond to action by the regulator or organise a recall of the product. Software developers may resist playing this role. Given the need for integration between the software stack and the vehicle hardware, such as LIDAR cameras, the process by which they are assembled into the vehicles could materially affect the software's functionality. With that in mind, the manufacturer that ultimately rolls the vehicle off the assembly line seems to be a more natural contender for the ASDE role, not least because they will be more familiar with dealing with any associated product liability risks, safety recalls and over-the-air updates.

### ***Regulatory and civil liability consequences for drivers of self-driving cars***

Assuming the test for "self-driving" is adopted as drafted, the Report proposes that the person in the driving seat of the vehicle will no longer be a driver but will become a "user-in-charge". This person will have immunity from a range of offences that apply to vehicle drivers, ranging from dangerous and careless driving, to exceeding speed limits or running red lights.

However, the user-in-charge will retain other driver duties, such as responsibility for arranging insurance and checking the load of the vehicle. The user-in-charge may also be required to take over driving in response to a "transition demand" if the vehicle encounters a problem it is unable to handle.

For the purposes of civil liability, the Automated and Electric Vehicles Act 2018 will apply. Victims who suffer injury or damage will not need to prove that anyone was "at fault", the insurer will simply compensate the victim directly.

### ***Preventing misleading marketing***

The Report claims that because the distinction between "driver assistance" and "self-driving" is so very crucial, the boundary between the two must be clear to drivers. If products are advertised as "self-driving", it could give drivers the misleading impression that they do not need to monitor the road whilst driving, even though the technology is not actually able to be fully autonomous.

The Report therefore proposes for it to be a criminal offence to engage in a commercial practice which:

- uses certain terms ("self-drive", "self-driving", "drive itself", "driverless" and "automated vehicle") in connection with driving automation technology that is:

1. not authorised under the recommended scheme; and
  2. designed for use on roads or in public places; or
- is likely to confuse drivers into thinking that an unauthorised vehicle does not need to be monitored when used on a public road or place.

### ***Liability of the company and of senior managers of ASDEs and NUIC operators***

As criminal responsibility of the user-in-charge is to be removed, the Report recommends new legal roles for OEMS and service operators. The Report highlights that safety assurance will rely heavily on the information provided by an ASDE and NUIC operator to the regulator, and this process is will require full candour from these bodies. The Joint Commission therefore proposes specific criminal offences where misrepresentations and non-disclosures by ASDEs and NUIC operators have consequences on safety.

As the concept of ASDE covers both vehicle manufacturers and software developers, both will need to ensure they are complying with their obligations when putting a driverless vehicle on the road.

### ***Liability of the company***

The Report suggests imposing a duty of candour where an ASDE puts forward a vehicle for authorisation, or a NUIC operators applies for a licence (or either are responding to questions from the regulator). It would be a criminal offence to:

- fail to provide information to the regulator; or
- provide information to the regulator that is false or misleading in a material way, particularly where that information is relevant to the evaluation of the safety of the vehicle.

There would be a defence of "due diligence" if the ASDE/NUIC operator could prove that it took reasonable precautions and exercised all due diligence to prevent any wrongdoing.

### ***Liability of Senior Managers***

Senior managers would face prosecution for breaches of the duty of candour in certain circumstances: this is intended to incentivise companies to adopt a "safety-first culture, operating on the basis of openness and transparency".

The Joint Commission defines a senior manager as a person who plays a significant role in: (i) the making of decisions about how the ASDE/NUIC operator is managed or organised; or (ii) the management of the safety assurance process.

Therefore, a person fulfilling this role could face prosecution if the offence took place with their "consent or connivance": the prosecution would have to prove that the senior manager knew about the wrongdoing or decided to turn a blind eye to it, it would not suffice to simply show "neglect".

There would also be an aggravated offence where the breach results in death or serious injury. If a corporation or senior manager committed one of the proposed offences above, that offence would be aggravated where the misrepresentation or non-disclosure:

- related to an increased risk of a type of adverse incident; and
- an adverse incident of that type occurred; and
- the adverse incident caused death or serious injury.

## **CONCLUSION**

The Report is an exhaustive consideration of the Joint Commission's views of necessary legal changes for autonomous vehicles to be used safely throughout Great Britain. It introduces a range of new concepts to differentiate between different kinds of autonomous vehicles and responsibilities for the organisations feeding into their design and manufacture.

Software developers have traditionally taken a back seat role in autonomous vehicles, with vehicles being sold and marketed by the manufacturers rather than by reference to the underlying driving technology. Given that the proposals in the Report allow manufacturers and software developers flexibility in who requests ASDE status, we believe that software developers may resist assuming this responsibility on the basis that they are not directly responsible for integrating their software into the vehicle hardware, less closely involved in the overall safety assessment, largely separate to the actual distribution of the products and less able to organise a recall in the event of defects. This will nonetheless be an issue for negotiations between manufacturers and software developers in the contracts for development of autonomous vehicles, with associated impacts on costs and warranties and indemnities (all of which will need careful consideration).

Companies operating in this space or considering developing driverless cars should pay particular attention to the envisaged changes relating to liability of manufacturers and software designers and their senior managers. All companies engaged in manufacturing driverless vehicles or their software should make sure they are adopting a "transparent" and "safety-first" approach as regards the manufacturing, licensing and marketing of their products, to avoid falling foul of these potential future regulations.

As liability shifts from driver to manufacturer and software developer, we expect insurers will be asked to stand behind the manufacturer and developer liabilities. This is likely to further influence the sector as insurers impose additional requirements or restrictions on their policies. The Report also does not address liability issues in the event of a collision involving two autonomous vehicles: as driverless cars become more common, this may develop into a significant issue without guidance, which could lead to disputes on liability between individuals, insurers, ASDEs or NUICs.

## NEXT STEPS

The Report has been laid before Parliament and the Scottish Parliament. The UK, Scottish and Welsh Governments will decide whether to accept the Report's recommendations and introduce legislation to bring them into effect.

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