

Paper in Response to Questions 4, 11, 18 and 25 in the Law Commission's
Automated Vehicles: Consultation Paper 2 on Passenger Services and Public
Transport

This response has been prepared by Paul Erdunast and Harry Peto, presently pupil barristers in their first six months of pupillage at Temple Garden Chambers (TGC), with the assistance of Alex Glassbrook, Emma Northey and Scarlett Milligan, barristers at TGC. This response does not constitute legal advice and no part of it should be relied upon as such. Nor does it represent the views of any other barristers at Temple Garden Chambers. Temple Garden Chambers is a set of barristers' chambers in London, dealing with a wide variety of cases, including a broad range of public and private law work, as well as health and safety and international criminal cases. Barristers at Temple Garden Chambers have taken a strong interest in the law of automated vehicles, responded to the first Law Commission Consultation on AV law and have published two books on the subject.

Introduction

Focus of our response

1. The Law Commission has once again succeeded in drafting a comprehensive and detailed consultation paper regarding automated vehicles. The topics considered and the questions raised cut across law and public policy in several areas. In forming our response to the Law Commission, we have focused on questions which we consider ourselves most qualified to answer.
2. We have decided to answer Question 4, Question 11, Question 18 and Question 25. For ease of reference, these are the following:

Consultation Question 4 (Paragraph 4.34):

Is the concept of "carrying passengers for hire or reward" sufficiently clear?

Consultation Question 11 (Paragraph 4.124):

Do you agree that HARPS operators should have a legal duty to:

- (1) insure vehicles;*
- (2) supervise vehicles;*
- (3) report accidents; and*
- (4) take reasonable steps to safeguard passengers from assault, abuse or harassment?*

Consultation Question 18 (Paragraph 5.40):

Do you agree that where a passenger-only vehicle is not operated as a HARPS, the person who keeps the vehicle should be responsible for:

- (1) insuring the vehicle;*
- (2) keeping the vehicle roadworthy;*
- (3) installing safety-critical updates;*
- (4) reporting accidents; and*
- (5) removing the vehicle if it causes an obstruction or is left in a prohibited place?*

Consultation Question 25 (Paragraph 6.31):

We provisionally propose that the protections against discrimination and duties to make reasonable adjustments that apply to land transport service providers under section 29 of the Equality Act 2010 should be extended to operators of HARPS. Do you agree?

Definitions and terminology

Levels of automation

- 3. We have used the six levels of automation (0 to 5 inclusive) proposed by the Society of Automotive Engineers International (SAE).¹

Connected and autonomous vehicles: naming convention

- 4. For the purposes of this response, we have followed the Law Commission in using the term “vehicle” to describe connected and autonomous vehicles (CAVs).

¹ Law Commission, *Automated Vehicles: Analysis of Responses to the Preliminary Consultation Paper*, para 1.25.

Where to draw the line between HARPS and other vehicles

5. We note the Law Commission's definition of HARPS and HARPS operator as referring to services where the automated vehicle is authorised as operating with no user-in-charge.² The Law Commission has taken the view that the current law of taxi, private hire and public service vehicle licensing should apply to highly automated passenger transport services with a user-in-charge.³ We agree with the dividing line proposed by the Law Commission, namely whether the vehicle is authorised to operate without a user-in-charge, for three reasons.
6. Firstly, as the Law Commission states, if a vehicle requires someone who is fit to drive, the current rules of private hire are capable of applying to that vehicle and its user-in-charge.
7. Secondly, it is important to recall that the only difference between a given Level 4 vehicle and a Level 5 vehicle may be that the Level 4 vehicle is limited to driving within a certain area.⁴ If the only difference between two HARPS operators running the same vehicles is that one of the operators' vehicles are geofenced to Yorkshire (to give an arbitrary example), while the other has vehicles which operate nationally, it is difficult to see why the local operator should be subject to a licensing scheme designed for non-automated vehicles.⁵
8. Thirdly, the scheme for the direct liability of insurers enacted by the Automated and Electric Vehicles Act 2018 ("AEVA 2018") appears to have been intended to apply to both SAE Level 4 and Level 5 vehicles, but not Level 3 vehicles.⁶ Therefore the

² *ibid.* pp. xi-xii.

³ *ibid.* para 1.32.

⁴ *ibid.* para 1.31.

⁵ *ibid.* para 2.61, using the Law Commission's example.

⁶ Letter from Baroness Sugg to Baroness Randerson, 13 March 2018, (http://data.parliament.uk/DepositedPapers/Files/DEP2018-0264/Baroness_Sugg_Baroness_Randerson_AEV_Bill_2nd_reading.pdf, accessed 21 January 2020). See also section 8(1)(a) of the

distinction proposed by the Law Commission appears harmonious with that apparently created by AEVA 2018 in relation to insurance liability (Levels 4 and 5). We consider that conceptual consistency throughout the regulation of automated vehicles, where possible, is valuable.

Not all HARPS operators are equal, or easily regulated

9. The definition which the Law Commission gives to a HARPS operator is “*a business which carries passengers for hire or reward using highly automated vehicles on the road without the services of a human driver or user-in-charge.*” There are a number of structures which could potentially be classed as a HARPS operator. These include decentralised booking systems where there is not necessarily a legal or natural person, capable of being regulated, behind it. Here are a few fictional examples:
- a. Adele, the owner of a fully automated vehicle, who wants it to make money on the side when she is not using it. So she registers it on an app allowing people to use it in return for payment.
 - b. Bravo, a company which owns a fleet of HARPS vehicles that can be booked online or by phone, analogously to many current taxi companies.
 - c. Charlie-company, the company behind Charlie-app, a ride-sharing app allowing HARPS vehicles to be used in return for payment. The concept is similar to Uber, but for HARPS. Who or what entity decides which customer to accept may be important for the purposes of regulation. Options for this include:
 - i. The vehicle owner must check the app each time a potential rider wishes to ride in her vehicle, to ensure that they are acceptable;
 - ii. The vehicle owner chooses in advance, through the app, only to allow riders with a high rating on the app to ride in her vehicle;
 - iii. The app decides who rides in HARPS vehicle using their own algorithms or AI systems.
 - d. Delta-app, a fully decentralised ride-sharing app. There is no company behind it. A programmer not based in the UK coded the app before leaving it to a community of coders from all over the world, who update it. The decentralised app simply functions as a direct link between consumers and HARPS vehicles.

AEVA 2018, which provides that “a vehicle is ‘driving itself’ if it is operating in a mode in which it is not being controlled, and does not need to be monitored, by an individual”.

This app is modelled on existing decentralised taxi services such as LibreTaxi.⁷

10. We note that extensive duties on HARPS operators would potentially shut individuals such as Adele out of operating their vehicle as a HARPS, in favour of large vehicle-owning companies who have the resources to comply with such duties. Even if companies offering HARPS-compliance services were available to individuals, the hassle, worry, cost and risk of liability may not be worthwhile to someone like Adele.
11. Therefore extensive duties on HARPS operators makes the following more likely:
 - a. more cars parked when not in use, decreasing space on roads;
 - b. inequality between smaller operators and larger ones which can afford HARPS-compliance services; and
 - c. the inability of individuals to make money from owning an automated vehicle, removing an incentive for uptake of automated vehicles.
12. This observation will be relevant to all of the Law Commission's questions relating to what duties should be placed on HARPS operators. This includes those we have not answered such as Consultation Question 9 relating to roadworthiness and "adequate facilities or arrangements" for maintaining vehicles and operating systems "in a fit and serviceable condition".

Legal duties and other types of rules: how should automated vehicles be regulated?

13. There are multiple options for the regulation of automated vehicles, both by law and by

⁷ LibreTaxi (<https://libretaxi.org/>, accessed 22 January 2020). See also R Linnewiel, 'Uber Dismantled By Blockchain: Decentralized Ride-Hailing is Coming' (*Medium*, 20 September 2018) <<https://medium.com/davnetwork/uber-dismantled-by-blockchain-decentralized-ride-hailing-is-coming-9c85d2bba6fa>> accessed 22 January 2020. It is worth considering the regulatory implications if instead of a programmer, an AI coded and updates the decentralised app, such that no human is in the picture. This would be in the medium to long term future, but it is by no means implausible: K Martineau, 'Toward artificial intelligence that learns to write code' (*MIT News*, 14 June 2019) <<http://news.mit.edu/2019/toward-artificial-intelligence-that-learns-to-write-code-0614>>, accessed 22 January 2020.

agencies.⁸ Regulation can be accomplished solely by statutory duties, by such duties supplemented with guidance, or by a general power given to an agency, which produces its own guidance.⁹ Even these solutions can be subdivided by whether Parliament or an agency chooses to create rules or standards. If they decide to make rules, there is a question as to what character the rules should have. Julia Black provides a helpful delineation of the different types of rules which a legislator or regulator may make:

*“Substance (what the rule says); character (whether it is permissive or mandatory: may or shall); status (its legal force and the sanction attaching to it) and structure. The last is the most complex, and has four aspects; the scope or inclusiveness of the rule; precision or vagueness (the degree to which behaviour under the rule is prescribed); simplicity or complexity (the degree to which the rule may be easily applied to concrete situations) and clarity or opacity (the degree to which the rule contains words with well-defined and universally accepted meanings). Rule type is a function of only three of the dimensions: character, status/sanction and structure.”*¹⁰

14. As a preface to our answers to the Law Commission’s questions below, and particularly questions 11 and 18, we note that the regulation of automated vehicles is still at an early stage. What form (i.e. substance, character, status/sanction and structure) the relevant rules should take is likely to depend on many factors which we are not yet in a position to know. Therefore in our view it is premature to make final recommendations that specific legal duties be in place, apart from where such a duty is inevitable, or clearly better than any other conceivable approach. We look forward to the Law Commission’s detailed consideration of the pros and cons of such duties, while recalling that all

⁸ For an outline of the additional regulatory measures required for automated vehicles, see E Northey, ‘The New Regulators’ in A Glassbrook, E Northey and S Milligan, *A Practical Guide to the Law of Driverless Cars* (2nd edn, Law Brief Publishing 2019).

⁹ See the considerable literature on regulation and regulators for the multitude of options in relation to the structures, powers and cultures of regulators: for example, G Richardson, A Ogus and P Burrows, *Policing Pollution: A Study of Regulation and Enforcement* (Clarendon Press, 1982); BM Hutter, *The Reasonable Arm of the Law? The Law Enforcement Procedures of Environmental Health Officers* (Clarendon Press, 1988); T Prosser, *Law and the Regulators* (Clarendon Press, 1997).

¹⁰ J Black, “‘Which arrow?’ Rule type and regulatory policy’ [1995] P.L. 94, 96.

options are available at this stage. We would like to encourage all stakeholders to continuously consider what kinds of rules and standards ought to apply to automated vehicles, including HARPS.

15. With these caveats, we attempt to answer the questions below as best we can.

Question 4

4: Is the concept of “carrying passengers for hire or reward” sufficiently clear?

16. S. 1(1) of the Public Passenger Vehicles Act 1981 (“PPVA 1981”) defines a public service vehicle (“PSV”) as a motor vehicle other than a tramcar which is adapted to carry more than 8 passengers and is used for carrying passengers for hire or reward, or a vehicle not so adapted and is used for carrying passengers for hire or reward at separate fares in the course of a business of carrying passengers. S.12(1) of PPVA 1981 states that anyone who uses a PSV “*on a road for carrying passengers for hire or reward*” must do so under a PSV operator’s licence, as granted by a traffic commissioner. The meaning of “hire or reward” is therefore integral to the question whether a particular individual or company requires a PSV operator’s licence – this question will remain important in the event that a similar licensing scheme be put in place for HARPS.
17. The concept of carrying passengers for hire or reward has been explored in case law. The cases of *DPP v Sikondar*¹¹ and *Rout v Swallow Hotels Ltd*¹² concern s.12 of PPVA 1981, but both (purport to) follow *Albert v Motor Insurers’ Bureau*¹³ in their interpretation of the words “for hire or reward”, a case which predates PPVA 1981 though discusses extensively the interpretation of these words. *Albert v Motor Insurers’ Bureau* is central, therefore, to the question whether the concept of “hire or reward” is sufficiently clear so as to warrant a similar definition of PSVs and a licensing regime to go with it for HARPS.

¹¹ [1993] RTR 90.

¹² [1993] RTR 80.

¹³ [1971] 2 All ER 1345.

Outline

18. This case concerned a dock worker who carried colleagues to and from work in his car with the expectation that they would pay him something in cash or in kind. The question facing the House of Lords was whether this arrangement fell under s.203(4) of the Road Traffic Act 1960 as carriage for hire or reward, which would require the driver to have the requisite insurance. The High Court and the Court of Appeal had ruled that there had to be a contract for the provision to apply.
19. Viscount Dilhorne stated that the relevant provision “*certainly could have been better drafted*” given there are “*uncertainties about its interpretation*”,¹⁴ and this is reflected in the differing treatment it is given by the various judges. Lord Donovan states that “*[a]t one extreme is the interpretation which would impose liability to insure a passenger who was carried as an act of kindness on an isolated occasion, if the passenger voluntarily undertook at the outset of the journey to pay for the costs or part of the cost of the petrol. At the other is the interpretation which would require the carriage to be for ‘hire or reward’ representing a contractually binding obligation*”.¹⁵ Between these “extremes”, then, a line must be drawn that differentiates PSVs from private vehicles. Lord Donovan continues: “*[n]o difficulty arises with regard to the private driver giving a lift as a social kindness, even if some recompense is arranged at the outset*”.¹⁶ Yet his Lordship also states, “*I confess I have not identified the case where ‘passengers are being carried for hire or reward otherwise than in the course of a business of carrying passengers’ [quoting a provision in the Road Traffic Act 1960, though which is not replicated in the PPVA 1981]. I feel it must be some exceptional case which is here in mind, and, if so, the words quoted ought not to control the present problem of construction.*”¹⁷ The test, then, is described as a “*business test*”:

¹⁴ *ibid.* at 1356.

¹⁵ *ibid.* at 1350.

¹⁶ *ibid.* at 1353.

¹⁷ *ibid.* at 1353.

whether a case goes “*beyond the bounds of mere social kindness*”.¹⁸

20. Two examples are given by Viscount Dilhorne which cannot be described as mere kindness but nor as business ventures. First is the example of a group of people who go on holiday together and share the expenses of a car. Second is a group of parents who take it in turns to drive all their children to school (presumably meeting their own expenses, though this is not made explicit). These arrangements can be described as mutually beneficial, and therefore not “mere kindness”. Yet this is not enough to describe them as commercial ventures either. Viscount Dilhorne’s view is that neither of these examples fall within the “carriage for hire or reward” provision, describing them as “*mere social arrangement[s]*”.¹⁹ Yet he states that if a driver regularly takes passengers “*on the understanding that he will receive something for doing so, [...] the regularity of the operation may show that it had a business or commercial character*”.²⁰ Regularity is not itself enough, then, to convert what would otherwise be a mutually beneficial arrangement into a business venture. We will return later to the issue of regularity, but it is enough here to note that Viscount Dilhorne’s analysis does not sit easily with Lord Donovan’s insofar as non-business ventures are concerned.
21. Lord Pearson acknowledged that the word “reward” could be applied to mutually beneficial arrangements of a similar kind to those described above, also giving the example of the parents and the school run.²¹ Yet he says “*it would be quite unreasonable*” to interpret these cases as examples of “*passengers being carried for hire or reward, so as to impose on the owner-driver the obligation to take a more extensive insurance policy than the one appropriate to private cars as such*”,²² thus appealing to the purpose of the provision in interpreting the words “hire or reward”. For Lord Pearson, the driver must engage in a “*business activity*” for the provision to

¹⁸ *ibid.* at 1353.

¹⁹ *ibid.* at 1361.

²⁰ *ibid.* at 1361, emphasis added.

²¹ *ibid.* at 1364.

²² *ibid.* at 1364.

apply.²³

22. Finally, Lord Cross of Chelsea's view was that there must be an agreement that is sufficiently certain such that it would constitute a contract but for any express or implied term that the agreement has no legal consequences.²⁴ Lord Cross does not answer the question whether a lack of intention to create legal relations takes an agreement outside the scope of the provision, giving a prima facie affirmative but stating he is 'not entirely satisfied' and choosing not to conclude on this point given he finds that there was a proper contract in the case.²⁵ While for Lord Cross there must at least be a potential contract before the provision applies, there is "*considerable*" difficulty in drawing a line between business and non-business activity. His Lordship understood Parliament, when drafting the legislation, to have accepted *Tyler's Case* 1938, which did not involve a business, and therefore "hire or reward" applies whether there is a business activity or not.²⁶

Discussion

23. It is evident that the concept of "carriage for hire or reward" has room for clarification should it be adopted in any legislation for the licensing of automated PSVs. Lord Donovan sees no difficulty with cases of kindness where recompense is arranged beforehand, but it is submitted that it is not clear how courts are to distinguish between "kindness-for-recompense" and "mere kindness". There are clearly cases which go "beyond the bounds of mere social kindness" that, though this is labelled a "business" test by Lord Donovan, should not properly be described as business scenarios. Lord Donovan struggles to see how cases might fall within the provisions without being business ventures, apparently not noting the category of examples which cannot properly be described as (only) kindness or business. Lord Pearson states that "[s]o long as the owner-driver is taking passengers because he likes to oblige his friends and acquaintances and likes to have company on his journeys, he is not carrying passengers

²³ *ibid.* at 1364.

²⁴ *ibid.* at 1369.

²⁵ *ibid.* at 1369.

²⁶ *ibid.* at 1371.

for hire or reward'.²⁷ Yet this does not provide clarity: the motivation of the driver should not be the determining factor, but rather the law should prescribe whether a non-business arrangement which entails both an element of recompense and a social element should fall under the 'carriage for hire or reward' provisions or not.

24. The lack of clarity found in *Albert v Motor Insurers' Bureau* is evident when considering *DPP v Sikondar*.²⁸ This case concerned a parent who took children to and from school, receiving occasional payments from parents to cover petrol, though not demanding such payments and sometimes not receiving any. This case is similar to an example offered by two of their Lordships in *Albert v Motor Insurers' Bureau*, except that in this case the driver remained constant and received ad hoc payments rather than parents taking it in turns to drive and meeting the expenses. This difference does not result in a greater benefit to the driver, as he is only receiving the payments because he is meeting the expenses. It is submitted that such an arrangement is not unlike the examples given by Lord Pearson²⁹ which are described as social arrangements falling outside the scope of the provisions. However, the business test from *Albert v Motor Insurers' Bureau* was applied in *DPP v Sikondar* such that, because the arrangement went beyond the bounds of mere social kindness, the driver was found to have breached the provisions regarding licences for PSVs.³⁰ No view is expressed here as to whether such arrangements should be subject to PSV licensing for the purpose of HARPS, but it is submitted that there is confusion in the case law as to whether "carriage for hire or reward" is to cover situations that cannot be described as instances of kindness but also do not involve carriage for profit (and therefore are co-operative, non-business arrangements). As one textbook points out, it is difficult to view *DPP v Sikondar* as a "reward" case given the parent probably made losses on the transaction.³¹ We would add that while businesses of course can make losses, the parent probably also *expected* to make a loss, which differentiates the arrangement from commercial ones. The same

²⁷ *ibid.* at 1364.

²⁸ [1993] RTR 90.

²⁹ [1971] 2 All ER 1345, at 1364.

³⁰ [1993] RTR 90, at 97.

³¹ K McCormac, P Brown, P Veits, N Watson and J Woodhouse (eds), *Wilkinson's Road Traffic Offences* (28th ed 2017), paras. 13-130 to 13-137.

textbook also points out that the provision in the 1960 Act that allows for non-business ventures to be caught by “carriage for hire or reward” (which Lord Donovan found difficulty with, per above) was not replicated in PPVA 1981.³² It is unclear, then, whether the provisions in PPVA 1981 were intended to cover any non-business endeavour. Finally, it is pointed out in the textbook that there was a case of a group of parents who acquired a minibus jointly and took it in turns to drive children to school, meeting their own expenses, which never came to be prosecuted. The position is not settled, though of course this is a similar case to that which is raised as an example in *Albert v Motor Insurers’ Bureau* and which in that case was said not to be carriage for hire or reward. It is submitted that future legislation must make clearer the position in cases such as this and *DPP v Sikondar*.

The Relevance of Regularity

25. It is worth noting that there is some unclarity in the case law regarding one-off occasions on which a private vehicle is used as a carriage for hire or reward, or a PSV is used as a private vehicle. Viscount Dilhorne states that using a car “*even on one isolated occasion for that purpose [passengers being carried for hire or reward] makes the car a vehicle in which passengers are carried for hire or reward*”.³³ Yet his Lordship further says that “[i]f the driver of a car takes with him two strangers as passengers on the understanding that they will make a payment for the journey, the conclusion may be reached that they are being carried for hire or reward but such use of a car on one isolated occasion may not suffice to show that the operation was of a business or commercial character”.³⁴ As stated above, Viscount Dilhorne views regularity as a factor weighing in favour of viewing an arrangement to be commercial and therefore within the provisions, yet the latter quotation here sits in tension with the first. Clarity on whether regularity is a factor in any assessment (should such assessment be relevant under new provisions) of commerciality would be welcome, as well as on what constitutes regularity itself.

26. Lord Cross provides a clearer view: a vehicle generally used to carry passengers for

³² Ibid.

³³ [1971] 2 All ER 1345, at 1356.

³⁴ *ibid.* at 1361.

hire or reward will not be caught by the provisions when used on isolated occasions for other purposes, but a one-off payment for carriage in a vehicle generally used for private purposes will fall within the provisions.³⁵ Yet Lord Pearson does not concur: “[i]f there is only one isolated occasion on which he has carried a passenger for a money payment, that can reasonably be regarded as incidental to the use of a private car as such and not as constituting carriage of passengers for hire or reward”.³⁶ Both agree, though, that a vehicle needn’t be normally or habitually used for carrying passengers for hire or reward for the provisions to apply.³⁷ It is important that future legislation makes clear whether the “hire or reward” provision applies when an automated PSV is used on an occasion as a private vehicle, and whether the provision applies when a private vehicle is used on an occasion for hire or reward.

27. Given the rise in car sharing businesses, whereby car owners can rent out their vehicles on an ad hoc basis to members of the public,³⁸ and given that automated vehicles are likely to suit these businesses well because there is no need for users to get used to any controls, it is important that future legislation makes clear who needs a licence in cases where vehicles have multiple uses on an ongoing basis. Lords Donovan and Cross each pointed out that buses driving empty would still fall within the hire/reward provisions.³⁹ It is vital that licensing for automated PSVs takes this problem into account, as it may become less clear what counts as a “bus running empty” if automated vehicles have ever-changing purposes.

Conclusion

28. There are a variety of arrangements whereby passengers might be carried:
- a. Under a commercial contract;
 - b. Under a contract, though not as part of a commercial endeavour;
 - c. Under an agreement, commercial or otherwise, which would be a contract but

³⁵ *ibid.* at 1371.

³⁶ *ibid.* at 1364.

³⁷ *ibid.* Lord Pearson at 1365 and Lord Cross at 1370.

³⁸ See, for example: <https://www.telegraph.co.uk/travel/advice/carpooling-sharing-companies-rated/>. Accessed 20/01/20.

³⁹ [1971] 2 All ER 1345, Lord Donovan at 1352 and Lord cross at 1371.

- for an express or implied term that the agreement carries no legal consequences;
- d. Under a non-commercial, non-contractual agreement which is in some way mutually beneficial or co-operative;
 - e. Under an agreement which can properly be described as nothing more than an act of kindness, though providing for regular carriage;
 - f. Under an agreement which is a mere isolated occasion of kindness.
29. It is submitted that any future legislation regarding the licensing of PSVs for HARPS should clarify which of the above types of arrangement are to fall under “carriage for hire or reward”, and the clarification should extend to non-CAV PSVs too. This is of course a question of policy. Viscount Dilhorne is correct, it is submitted, to view cases as neither kindness or business where a group shares the expense of a vehicle for a shared social purpose. But this tells us nothing of whether these are “hire or reward” cases. While Lord Pearson thinks not, his interpretation relies partly on his view of the purposes of the legislation which was then in question. In drafting new provisions for the licensing of automated PSVs (and potentially amending provisions for non-CAV PSVs), it would be useful if it were made clear whether mutually beneficially arrangements fall under “carriage for hire or reward”. Alternatively, Lord Cross’s view may be taken, i.e. that the relevant question is whether there is a contract. Again, the legislation should make this clear if such a policy is to be adopted, including whether an agreement that would be a contract but for a lack of intention to create legal relations should be caught by the provision.
30. Lord Cross of Chelsea said in *Albert v Motor Insurers’ Bureau* of the words “hire or reward”: “[w]hatever they mean in one section they must mean in the other”.⁴⁰ The case law on both the 1960 Act and the 1981 Act is likely, for this reason, to continue to inform the courts in their interpretation of “hire or reward” should such a phrase be repeated in any licensing scheme for HARPS PSVs. Lord Pearson’s purposive approach is useful, and should highlight the importance of bearing in mind the principled reason for requiring a licence in the case of HARPS vehicles. The purpose of such licences is a matter of policy, but should inform the drafting of any provisions designed to mirror

⁴⁰ *ibid.* at 1366.

those already in place for PSVs. This means making clear how the courts are to deal with vehicles whose purpose might change from day to day, as well as what the nature of a vehicle's purpose must be for the licence to be required, whether the relevant factor be commercial, contractual, mutually beneficial, or merely regularity of service. As Lord Pearson notes, the word "reward" is added because it is wider than "hire", "*apt to cover some forms of remuneration or some arrangements for which the words "for hire" might not be appropriate*".⁴¹ In the gig economy, and with the benefits that automated vehicles promise to bring,⁴² it is likely that automated vehicles will be utilised in new forms of social arrangements and business arrangements, making the forms of reward more flexible and the nature of their use more fluid. It is important, then, that the legislation be as clear as possible in defining "hire or reward", which means clarifying the matters addressed above with regard to the so-called business test and one-off uses.

Question 11

11(1): should HARPS operators have a legal duty to insure vehicles?

The current system

31. For public service vehicles, as the Law Commission notes, s.14ZC(1)(b) of the Public Passenger Vehicles Act 1981 requires that the Traffic Commissioner be satisfied that adequate arrangements will be in place for securing compliance with legal requirements.⁴³ One such legal requirement is to obtain insurance for the vehicle, whether that be done by the driver or operator.
32. By contrast, the system is less centralised for private hire vehicles.⁴⁴ Legislation enables licensing authorities to set out specific record-keeping obligations.⁴⁵ Retaining

⁴¹ *ibid.* at 1362.

⁴² Such as users not needing to familiarise themselves with new controls or not requiring a driving licence.

⁴³ Law Commission, *Automated Vehicles: Consultation Paper 2 on Passenger Services and Public Transport*, para 4.9.

⁴⁴ *ibid.* paras 3.12ff.

⁴⁵ *ibid.* para 3.44. Local Government (Miscellaneous Provisions) Act 1976, s 56 (2); in London, Private Hire Vehicles (London) Act 1998, s 4(3)(c).

insurance records is typically one of these obligations.⁴⁶ Since it is vehicles that are insured, rather than drivers, both taxi companies and private drivers can obtain insurance for their vehicles. This allows a number of possible business structures, which is reflected in the private hire market.

Considerations relevant to a future system

33. We base our answer to this question on the assumption that automated vehicles will be classified as “motor vehicles” for the purposes of the Road Traffic Act, such that the system of compulsory insurance will apply to them.⁴⁷ The regime of liability shifting introduced by the AEVA 2018 implies that this will be the case.⁴⁸
34. We note the distinction between ordinary car insurance and hire and reward insurance. In the UK, all drivers of vehicles available for hire must have a private hire vehicle licence to cover the activities of their vehicle when it is operating for hire or reward. This includes Uber drivers.⁴⁹ We consider that in the future there is likely to be an analogous distinction between ‘ordinary’ insurance and insurance covering the activity of a HARPS vehicle. We have taken this as an assumption in our response.
35. The lack of a driver in a HARPS vehicle means that the current driver-operator distinction will no longer apply. The Law Commission considers that a new licensing system will be required.⁵⁰ We agree. We reiterate the Law Commission’s statement that

⁴⁶ See for example, Transport for London, ‘Apply for a private hire operator licence’ (<https://tfl.gov.uk/info-for/taxis-and-private-hire/licensing/private-hire-operator-licence>, accessed 22 January 2020).

⁴⁷ We do not make any assumptions regarding whether such a system will be fault-based. One can imagine a no-fault liability scheme such as exists in New Zealand applying to certain risks associated with automated vehicles: J Turner, *Robot Rules* (Palgrave Macmillan 2019), pp. 102-105. See further our response to Question 25 as to the desirability of fault-based liability in relation to installing updates.

⁴⁸ As for the difficulty of current liability regimes applying to automated vehicles, see S Milligan, ‘Product Liability Claims’ in A Glassbrook, E Northey and S Milligan, *A Practical Guide to the Law of Driverless Cars* (2nd edn, Law Brief Publishing 2019).

⁴⁹ Uber, ‘Private Hire motor insurance and Uber’ (<https://www.uber.com/en-GB/drive/resources/private-hire-insurance/>, accessed 22 January 2020).

⁵⁰ Law Commission, *Automated Vehicles: Consultation Paper 2 on Passenger Services and Public Transport*, paras 4.31-4.32.

any future regulatory system for HARPS must be adaptable and should not hamstring innovation.⁵¹

36. However, in our view a legal obligation requiring every HARPS operator to obtain insurance would either be under-inclusive or over-inclusive, depending on whether the entity behind a ride-sharing app would fit within the definition of “HARPS operator”.⁵²
37. If Charlie-company counts as a HARPS operator, i.e. a “business which carries passengers for hire or reward”, then both Charlie-company and the individual operator would count as ‘operators’ in relation to the same car. If there is a legal duty on HARPS operators to take out insurance then both HARPS operators may be required to take out the same insurance on the same car. This would represent an impractical outcome of “double insurance”, which should be avoided.
38. If Charlie-company does not count as a HARPS operator, then only the individual HARPS operator would come under any legal requirement to take out insurance. In this situation, Charlie-company would not, without more, have a legal duty to ensure that its contracting HARPS operators have insurance. This would potentially lead to fraud, where people put their cars on Charlie-company’s app without having the relevant insurance.
39. While it might be suggested that record keeping requirements applying to companies such as Charlie-company could solve this issue, a difficulty would exist in relation to decentralised apps like Delta-app. Since there may not be an entity capable of regulation behind Delta-app, record-keeping duties could be impossible to apply to such an app. If Charlie-company is subject to potentially costly record-keeping requirements but Delta-app is not, then this would represent an unfair competitive advantage for Delta-app. Any system of regulation applying to HARPS would need to operate fairly as regards centralised and decentralised apps.

⁵¹ *ibid.* para 4.127.

⁵² We assume that individuals such as Adele who put their HARPS vehicles on the app would count as HARPS operators. This appears likely, since otherwise people could register their cars to an app for profit without having any duties as to insurance, licensing and so on.

40. In light of these complexities in relation to regulating apps hosting HARPS vehicles, it may be sensible instead to place record keeping requirements elsewhere, such as on HARPS operators or HARPS vehicle insurers. One can envisage a centralised registry of HARPS operators, which would record whether insurance has been taken out on any HARPS vehicle, and if so, whether such insurance extends to hire or reward. Such a system would be similar to that operated by the DVLA, which records the insurance status of vehicles.⁵³
41. We anticipate that the same general issues as regards defining HARPS operators, and the difficulties in terms of regulating HARPS operators and ride-sharing apps, would apply to Consultation Question 9.

Conclusion

42. It is important that consideration as to flexible regulation of HARPS operators takes place, in order to capture the different structures which such operators may take. We agree that there should be a legal requirement for insurance to be taken out somewhere in the chain. The difficulty will be in designing a system of regulation which takes into account the needs of, and the problems posed by, all stakeholders.

11(2): should HARPS operators have a legal duty to supervise vehicles?

43. The Law Commission defines a supervisor as a “human in front of the screens”, whose role might include responding to a request and deciding a course of action for the vehicle to implement.⁵⁴ A supervisor may additionally act as an emergency driver who may be required to perform a manoeuvre, although this brings in challenges such as connectivity and real-time awareness.⁵⁵ Therefore the Law Commission appears to be considering remote supervisors, rather than human attendants in the vehicle, when discussing a legal duty to supervise vehicles. For this reason we have decided to focus on remote supervisors in our answer to this question. For our views on the possibility

⁵³ Gov.uk, ‘Get vehicle information from DVLA’ (<https://www.gov.uk/get-vehicle-information-from-dvla>, accessed 22 January 2020).

⁵⁴ Law Commission, *Automated Vehicles: Consultation Paper 2 on Passenger Services and Public Transport*, paras 4.94ff and in particular para 4.99.

⁵⁵ *ibid.* paras 4.98 and 4.100ff.

of supervisors inside the vehicle, please see our response to Consultation Question 25.

44. The Law Commission concluded that legislation should “state the principle that HARPS operators should ensure that vehicles are adequately supervised.”⁵⁶ This would mean that operators should know the location of their vehicles and should remove them if they are stopped in inappropriate places.⁵⁷ The Law Commission envisages that “the agency operating the licensing scheme” should develop statutory guidance on safe and efficient supervision.⁵⁸
45. In our view, the issue of supervision appears not to be HARPS-specific, but rather it is common to all automated vehicles. It is likely that people and companies will use their privately owned automated vehicles to drive their friends or family to various locations, or run errands without anyone in the car. Consider in addition a potential food delivery company, in the mould of Deliveroo, using automated vehicles and motorcycles. None of the above examples would constitute a “road passenger service” and so would not be a HARPS. There is a strong argument that such legal and natural persons ought to ensure that their automated vehicles do not block traffic while stopped, or park in a prohibited place. This would particularly be the case where there are passengers on board, whose safety is of prime importance.
46. To address the point of the question, in our view we are at too early a stage to know whether a *legal duty* to supervise a HARPS vehicle would be beneficial or not. The Law Commission rightly notes that “remote supervision for HARPS is a step into the unknown. We do not know what challenges it will pose.”⁵⁹ Perhaps remote supervision will no longer be viewed as a sensible way to move forward in five years’ time, on account of its challenges. We simply do not know, and on this basis it would be premature to recommend or discount the possibility of such a duty.

⁵⁶ *ibid.* para 4.111.

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid.* para 4.99.

11(3): should HARPS operators have a legal duty to report accidents?

The current system

47. As the Law Commission notes, currently drivers are legally required to report accidents, while PSV operators are under certain additional duties, for instance to report ‘near misses’ (which we consider below).⁶⁰ The specific rules for drivers are found in s170 of the Road Traffic Act 1988. In short, drivers are required to give their name, address and number plate to anyone who has reasonable grounds for requiring them at the scene of the accident. If the driver is not the owner of the vehicle, the details of the owner must be given at this point. If they do not give the relevant details at the scene, they must report the accident to the police within 24 hours. If they do not, that is a criminal offence. Furthermore, drivers have the responsibility to report the accident to their insurance company.
48. The aim of this system appears to be the speedy and non-fraudulent resolution of road traffic insurance claims.

Considerations relevant to a future system

49. Firstly, we agree that the key function of the current system ought to be kept: swift reporting of an accident.
50. In the future, many, and possibly most or all automated vehicles, will have advanced sensors capable of detecting damage sustained and communicating between vehicles. This may well make reporting accidents, including all the details set out above, automatic and instant in the majority of accidents.
51. If so, then consideration ought to be given as to whether creating a duty on a HARPS operator to report accidents would effectively risk duplicating reports. In our view, it would be better if HARPS operators were under a duty to ensure that accidents are reported. This rule would not only encompass the automation of accident reporting, but would also easily apply to less advanced automated vehicles.

⁶⁰ *ibid.* para 4.112.

52. There are the remaining questions as to whether the duty would be criminal or civil, and if it is civil, what the penalty would be. We do not offer a definitive opinion. Nonetheless, we consider that a helpful approach might be that which the Law Commission takes to supervision of vehicles, namely a general duty in legislation, which can be filled out by regulation.⁶¹ This would work if the penalty is not criminal, and therefore not required to be on the face of an Act. The precise content of what must be reported could be a matter for regulation, potentially allowing for increased flexibility and responsiveness, since amendments would not be required to go through both Houses of Parliament.
53. We note that PSV operators are under additional duties to report “near misses” or where a failure is “calculated to affect the safety” of occupants or others using the road.⁶² In light of the capabilities of automated vehicles noted above, we see a strong case for encouraging potentially dangerous failures and near misses to be reported, both by HARPS vehicles and privately owned automated vehicles. However, not having specific expertise in this area of policymaking, we do not offer a definitive opinion on this matter. Nor do we draw any conclusions as to whether such encouragement should take the form of laws, regulatory rules or standards, or what those rules should look like in the sense outlined by Julia Black, quoted in the introduction to this response.

11(4): should HARPS operators have a legal duty to take reasonable steps to safeguard passengers from assault, abuse or harassment?

54. We answer this question in brief, rather than providing a full treatment. Consultation question 11(4) suggests creating a broad tortious safeguarding duty on HARPS operators. This duty would be unprecedented, being a general duty on HARPS operators and by extension their employees (or those in a relationship akin to employment) to protect against criminal acts of unknown third parties. Accordingly, its consequences ought to be considered fully. This is beyond the scope of our response, not least because it would require a thorough analysis of the “omissions” and “rescuer” principles of negligence.

⁶¹ *ibid.* para 4.111.

⁶² *ibid.* paras 4.112-4.113; s20(1) Public Passenger Vehicles Act 1981.

55. It is right that the most rigorous steps be taken to ensure that HARPS vehicles are safe for everyone, including vulnerable people. We would agree with the Law Commission's suggestion that all staff employed by HARPS operators who come into contact with passengers should undergo criminal record checks.⁶³ For all staff who are employed or whose relationship is "akin to an employment relationship" there may be liability placed on their employer if they assault, abuse or harass a passenger.⁶⁴ The limits to vicarious liability are: (1) that the relationship may not be sufficiently akin to employment; and (2) whether the connection between the position in which the individual is employed and the wrongful conduct is sufficiently close to make it right for the employer to be held liable.⁶⁵ The recent trend has been to interpret the connection between the wrongful conduct and the employment in a broad manner. For example, in the Supreme Court case of *Mohamud v WM Morrison Supermarkets* a supermarket which owned a petrol station was found liable for the actions of its employee who subjected a customer to a racist assault.⁶⁶
56. A straightforward case would be if an employee of a HARPS taxi operator, whose role is to ride with vulnerable passengers for their safety and comfort, assaults a passenger. However, there will be cases which do not clearly fall one side of the line or another. Furthermore, vicarious liability as it currently stands has little relevance to the question of whether there should be a new duty on HARPS operators to protect passengers from assault, abuse and harassment.⁶⁷ This is because the duty not to harm others by the actions of your employees, within the scope of their employment, is different to a duty to protect others against harm by the actions of third parties, including other passengers.

⁶³ Law Commission, *Automated Vehicles: Consultation Paper 2 on Passenger Services and Public Transport*, para 4.119.

⁶⁴ *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56.

⁶⁵ For more detail, see S Milligan, 'Employers' Liability Claims' in A Glassbrook, E Northey and S Milligan, *A Practical Guide to the Law of Driverless Cars* (2nd edn, Law Brief Publishing 2019) pp.210ff.

⁶⁶ [2016] UKSC 11.

⁶⁷ For legal duties potentially owed to disabled people by equality legislation, see our response to Consultation Question 25 below.

57. There is a strong argument that further steps should be taken to ensure that HARPS vehicles are as safe as possible, through many different means such as attendants in the vehicle or CCTV in appropriate circumstances. However, it is a different question whether a novel tortious duty which is uncertain in scope and application would achieve this. Such a duty on HARPS operators may additionally raise questions regarding other automated means of transport. For example, ought TfL owe the same duty to those travelling on driverless trains such as the DLR? What about autonomous trams and other light rail systems?⁶⁸ We would welcome further proposals as to the steps HARPS operators can take to safeguard passengers. We would be similarly interested to read detailed discussion of how to encourage HARPS operators to safeguard passengers properly, whether through legal duties or otherwise.

Question 18

18(1): Do you agree that where a passenger-only vehicle is not operated as a HARPS, the person who keeps the vehicle should be responsible for insuring the vehicle?

The current system

58. The Law Commission has explained the current position in relation to duties attaching to private vehicle owners. In short, the law places duties on registered keepers.⁶⁹ Where duties are phrased in terms of “owner” in certain statutes, the keeper is presumed as the owner.

Considerations relevant to a future system

59. It would appear to make sense that duties in the future would fall on a registered keeper. Such a keeper would be likely to be the HARPS operator, for the reasons outlined above

⁶⁸ A Glassbrook, ‘Equality’ in A Glassbrook, E Northey and S Milligan, *A Practical Guide to the Law of Driverless Cars* (2nd edn, Law Brief Publishing 2019) pp.229-230. Department for Transport published a call for evidence on opportunities for such means of transport in February 2019: Department for Transport, *A Call for Evidence on the opportunities available to introduce new Light Rail Systems or other rapid transit solutions into towns and cities in England* (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/776601/light-rail-and-other-rapid-transit-solutions-a-call-for-evidence.pdf, accessed 23 January 2020).

⁶⁹ Law Commission, *Automated Vehicles: Consultation Paper 2 on Passenger Services and Public Transport*, para 5.23.

with regard to the difficulties of pinning HARPS operator status to an app (whether decentralised or not), when responding to Consultation Question 11(1). We consider it important that duties to insure a private automated vehicle fall on the same person or entity as would come under any legal duty to insure a HARPS vehicle. This is because otherwise there would be a duty on two different entities to insure the same vehicle, which would lead to “double insurance”. In any event, in our view regulation for private users ought to be considered in light of regulation for HARPS operators, and vice versa.

Consistency in duties between HARPS operators and other owners of automated vehicles will be critical in relation to Consultation Questions 18(2) (keeping the vehicle roadworthy), 18(4) (duties to report accidents) and 18(5) (removing the vehicle if it causes an obstruction or is left in a prohibited place)

60. We do not provide full responses to the questions set out above, aside from noting our agreement that it will be important to impose consistent duties on the registered keeper whether they are a HARPS operator or not. We reiterate the point that any duties relating to private users should dovetail with duties, or regulation, on HARPS operators. Therefore we anticipate that it will be useful to compare the responses to 18(2) and 9 (duty on HARPS operators to keep the vehicle roadworthy) with each other.
61. The same principles apply to 18(4), to which we provide the same answer, with the subject of comparison being 11(3) (duties report accidents), and to 18(5), which should be compared with 11(2) (duties to supervise vehicles, including removing them when they cause an obstruction or are left in a prohibited place). We therefore do not answer these questions separately.
62. It is especially important to consider 18(5) alongside 11(2) because all sorts of legal and natural person will be using automated vehicles. This would include but not be limited to private persons, and companies such as the Deliveroo-style company mentioned above with regard to question 11(2). Such people and entities should ensure that their vehicles neither cause an obstruction nor are left in a prohibited place. It would in our view be confusing for all stakeholders if different obligations applied depending on whether the automated vehicle is a HARPS vehicle or not. This is particularly the case because it will not necessarily be obvious at first sight whether or not a vehicle is

a HARPS.

18(3): Do you agree that where a passenger-only vehicle is not operated as a HARPS, the person who keeps the vehicle should be responsible for installing safety-critical updates?

Introduction

63. The Law Commission explains the proposed safety assurance system pertaining to automated driving systems (ADS), which are to be backed by an “Automated Driving System Entity” (ADSE). They note that the Government Centre for Connected and Autonomous Vehicles has set out a workstream to take their proposals forward.⁷⁰ The safety assurance scheme would operate after autonomous vehicles are brought onto the roads, which, according to this proposed regulatory design, would have the powers to apply regulatory sanctions to ADSEs.⁷¹
64. When considering the role of ADSEs subsequent to the first consultation, the Law Commission noted that several respondents asked for further clarity on how the responsibilities of an ADSE would interact with those of users-in-charge and keepers.⁷² The Chartered Institution of Highways and Transportation specifically raised this issue as regards software updates.⁷³ The Law Commission noted that responses focused on the difficulty of allocation of responsibility across the various actors in the system. This includes the suggestion that full responsibility should not be placed on an ADSE unless they are in control of both installation and maintenance.⁷⁴
65. We agree with these responses. There appear to be multiple unknowns at this early stage, in particular regarding the functionality of the hardware and software of automated vehicles. These unknowns make it difficult to draw conclusions at this early stage as to who should be the subject of duties to install safety-critical updates. In our view, the key unknown which is relevant to this question is whether an update can be installed while it is operating, or whether a vehicle must be parked in order to install an

⁷⁰ *ibid.* para 1.11.

⁷¹ *ibid.* para 1.12.

⁷² *ibid.* para 4.55.

⁷³ *ibid.*

⁷⁴ *ibid.* para 4.56-57.

update.

Discussion

66. If updates can be installed while a vehicle is operating, then updates would not cause any inconvenience to the user. In such circumstances, it is difficult to conceive of reasons why keepers should be given a choice about when an update is installed. If there is no such choice, there would seem no basis to place a duty on keepers. Rather, the duty should fall on ADSEs as the producers of the updates to ensure that they are installed. In other words, where there is no choice for keepers, there can be no responsibility, or duty, placed on keepers.
67. By contrast, if vehicles must be parked during installation, then there are strong reasons for giving keepers the choice as to when to install an update. Consider the example of a HARPS ambulance rushing a critically ill person to hospital. If the vehicle parks itself to install an update, the health of the patient will be jeopardised. This does not apply just to ambulances: imagine the same situation but with a private automated vehicle owner rushing their family member to hospital. There is therefore a compelling social policy (and human) reason for vehicles in such a situation not to immediately park themselves to install an update.
68. There is a distinction between this suggestion, and the question as to what, if any, duties should govern the installation of updates.
69. If vehicles give keepers the choice as to when to install an update, then in our view appropriately flexible duties could be placed on keepers to install safety-critical updates. If a keeper fails to install a safety-critical update without good reason, then they endanger the lives of other road users. This would be likely to become a particular problem with regard to those who fail without reasonable excuse to install such updates. We might term these failures to install updates “negligent”, and contrast these with the ambulance example above, which would not be “negligent”.
70. There therefore appears to be a compelling policy reason for the creation of duties to install updates. If an innocent person is injured by an automated vehicle because its

keeper repeatedly failed to install an update, then they should be able to obtain compensation. Having a duty to install such updates would create a means by which compensation could be awarded. Such a duty might be limited to applying only where a keeper fails to install an update without good reason. An alternative would be no-fault liability.

No-fault liability?

71. There appears an arguable case for a system of no-fault liability for failing to install safety-critical updates, based on the principle that full compensation should be available for innocent victims of accidents where compulsory insurance exists.⁷⁵ If an innocent person is injured because in non-negligent circumstances a user-in-charge decided not install a safety-critical update, it is arguable that they should nonetheless be compensated for their loss. It seems preferable that everyone pays slightly higher insurance premiums than for some people to be injured or killed without compensation as the “price” of running automated vehicles.
72. If full compensation motivated by compulsory insurance is to be a guiding principle motivating the form of the duty to install safety-critical updates, then that should be explicitly acknowledged when designing the relevant rules. Regardless of what approach is eventually taken, the relevant law or regulation must provide clarity about the situations in which keepers will be found in breach of their duties to install safety-critical updates.

Question 25

25: We provisionally propose that the protections against discrimination and duties to make reasonable adjustments that apply to land transport service providers under section 29 of the Equality Act 2010 should be extended to operators of HARPS. Do you agree?

Introduction

⁷⁵ See the analogous comments of Lord Denning MR in *Nettleship v Weston* [1971] 2 Q.B. 691 at 703 in relation to the standard of care applied to learner drivers.

73. The protections provided by the Equality Act 2010 against discrimination are not limited to disabled persons. However, those with disabilities are expected, and intended, to be a key beneficiary of the move towards autonomous vehicles. These vehicles, including HARPS, provide the promise of increased mobility and autonomy. We applaud the decision of the Law Commission to create specific accessibility outcomes applying to HARPS, which we agree should be a central focus of the move towards passenger-only vehicles.⁷⁶
74. As the Law Commission notes, s29 of the Equality Act 2010 provides the requirement not to discriminate, and to create reasonable adjustments. This provision applies to the categories of land transport service providers listed in paragraph 34 of Schedule 3 to the Act. The Law Commission states this paragraph will need to be updated to include HARPS vehicles if they are to apply to these service providers.⁷⁷ The Law Commission have asked whether consultees agree with extending the s29 duty to HARPS operators, or whether doing so may lead to any unintended consequences.⁷⁸ We therefore address this question, rather than the prior question of whether HARPS operators could be implied within the current definitions in paragraph 34 of Schedule 3.
75. In short, we agree with the proposal of the Law Commission to extend the operation of s29 Equality Act 2010 to HARPS operators. If the definition did not include all HARPS operators, then there would be a risk that certain categories of HARPS vehicles would be exempt from the duties which currently apply to land transport service providers. This loophole would likely entail significant undesirable unintended consequences for disabled persons using HARPS vehicles.
76. We do not identify any negative unintended consequences associated with the Law Commission's proposal. However, we wish to note one potential result of extending equality duties to HARPS vehicles: that human presence may be required in certain

⁷⁶ Law Commission, *Automated Vehicles: Analysis of Responses to the Preliminary Consultation Paper*, paras 6.57ff.

⁷⁷ *ibid.* para 6.27.

⁷⁸ *ibid.* para 6.30.

vehicles by the operation of the Equality Act 2010.

Example: wheelchair spaces on HARPS buses

77. One important example exists in relation to wheelchair spaces on buses, where a person with a pushchair is in a space required by a boarding wheelchair user. The Supreme Court case of *FirstGroup Plc v Paulley* concerned this precise question.⁷⁹ In *Paulley* a bus company was held to have failed to make reasonable adjustments under s29(2) Equality Act 2010. The relevant circumstances were that under a policy which did not give priority to wheelchairs over pushchairs, the bus driver asked the pushchair owner to move from the wheelchair space, but did not subsequently rephrase his request into a requirement when she refused to move.⁸⁰ Although the Supreme Court were split on other issues, such as whether the policy itself was in breach of s29(2), they were unanimous that the bus driver had not done enough.
78. Therefore the *Paulley* case turned on the actions of the bus driver. This has clear implications for what happens in the absence of a bus driver. It is arguable from *Paulley* that the Equality Act 2010 may require an official to be present on passenger-only buses, since otherwise there would be no-one with a duty to enforce an accessibility policy.⁸¹ In the absence of such a human presence, it is likely that many disabled people will be put off from riding on passenger-only buses.
79. Another obvious matter is security. Vulnerable people, including but not limited to those with disabilities, are unlikely to be as willing to travel on public transport provided by HARPS if no official is present to guarantee their safety and security.⁸²
80. We would additionally note the role which apps and other tech-based services can play

⁷⁹ [2017] UKSC 4. For a full outline of its implications to driverless cars, see A Glassbrook, 'Equality' in A Glassbrook, E Northey and S Milligan, *A Practical Guide to the Law of Driverless Cars* (2nd edn, Law Brief Publishing 2019) pp.225ff.

⁸⁰ *FirstGroup Plc v Paulley* [2017] UKSC 4 at [67]-[68].

⁸¹ A Glassbrook, 'Equality' in A Glassbrook, E Northey and S Milligan, *A Practical Guide to the Law of Driverless Cars* (2nd edn, Law Brief Publishing 2019) pp.229.

⁸² But see our discussions regarding vicarious liability above.

in this. For example, if an app knows in advance that a wheelchair user has already been picked up by a vehicle with only one space for a wheelchair user, then the service could allocate a different HARPS vehicle to a request by another wheelchair user.

The relevance of the public sector equality duty to whether a human presence, or other similar solution, is required on certain HARPS services

81. The public sector equality duty, provided by s149 Equality Act 2010, will be of significant relevance to a HARPS bus service operator, if the operator exercises a public function. s149 states as follows:

149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.*

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.

82. It is strongly arguable that entities running HARPS services, which exercise a public function, are required to consider whether their services should have an official on board, as part of their “due regard” duty. The decision as to whether to place an official on HARPS bus services may affect large numbers of vulnerable people, many of whom fall within one or more of the protected groups. Therefore the due regard to the s149 equality duty in this instance is “very high”.⁸³
83. Furthermore, an entity considering a passenger-only HARPS service must have due regard to the need to achieve the goals outlined in s149 both before and at the time that

⁸³ *R (Hajrula) v London Councils* [2011] EWHC 448 (Admin) at [62].

a policy comes into effect.⁸⁴ Among other needs identified by s149, the question of whether an official should be on board a HARPS bus is clearly relevant to the need to minimise disadvantages shared by those with a protected characteristic and those without it.

84. We note that it is possible to conceive of other measures than an official on board. These might include strategically placed or ‘roaming’ operators who could attend an emergency call to a vehicle, or be forewarned that a disabled or otherwise vulnerable passenger is being picked up. Such operators will then be able to attend to assist. Whether having such operators would satisfy s29 or s149 is likely to be highly fact-specific, depending in particular on the extent to which the outcome is satisfactory for the end-users involved.
85. To conclude, the requirements in s149 will determine the factors involved in the consideration of whether an official should be placed on all HARPS bus services where the operator exercises a public function. These factors will themselves guide the outcome of the due regard process, in our view towards an official on-board human presence or other satisfactorily functioning solution. There is therefore a strong argument that the Equality Act, by indirect means, compels a HARPS bus operator carrying out a public function to place an official on its services, or provide another satisfactory solution. This is an example of different sections of the Equality Act, s29 and s149, dovetailing with one another to protect those with protected characteristics.

Paul Erdunast and Harry Peto
Temple Garden Chambers
31 January 2020

⁸⁴ *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); [2009] PTSR 1506 at [91].