

Burges Salmon response to joint Law Commission and Scottish Law Commission Consultation Paper 2 dated 16 October 2019 on Automated Vehicles (Passenger Services and Public Transport)



1 INTRODUCTION

- 1.1 Burges Salmon is an independent UK law firm with a market-leading transport law practice across all modes include rail, road transport and highways, aviation and airports and marine and ports.
- 1.2 Burges Salmon has been actively partnering in Connected and Autonomous Vehicles (CAV) research and development projects and trials since 2014. These include the Innovate UK-funded projects VENTURER, FLOURISH, Capri, RoboPilot and MultiCAV.
- 1.3 Burges Salmon has published the following legal reports in conjunction with AXA on CAV issues relating to insurance, safety, civil and criminal liability, data and cyber-security:
- (a) VENTURER Year 1 Report 2016¹
 - (b) FLOURISH Year 1 Report 2017²
 - (c) “Are we ready to ‘handover’ to driverless technology” (VENTURER, April 2018)³
 - (d) “Driverless cars: liability frameworks and safety by design” (VENTURER, June 2018)⁴
 - (e) FLOURISH Year 2 Report 2018⁵
 - (f) FLOURISH Year 3 Report 2019⁶
- 1.4 More generally on highway safety, we produced a report in April 2018 for the RAC Foundation⁷: ‘A Highways Accident Investigation Branch - What Lessons can be learned from the Rail Industry and the Cullen Inquiry?’. Subsequent to that report the RAC Foundation received funding from DfT to run a pilot on highways accident data analysis.
- 1.5 We have previously responded to the Law Commission of England and Wales and Scottish Law Commission Consultation Paper 1⁸ and our response below builds on that.
- 1.6 Should the Law Commissions wish to explore any part of our responses further then we are happy to assist further where we can.

2 GENERAL CORE RESPONSE THEMES

- (a) Generally speaking, we support the proposal for a national scheme for HARPS licensing and regulation
- (b) That scheme however needs to be flexible and able to accommodate a range of different types of AVs, services, use cases and operational and commercial models. One-size fits all licensing would not be appropriate
- (c) We agree that there aspects of the current system of regulation of public passenger transport that do not and should not be ported across to HARPS to avoid stifling innovation

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February 2020

¹ <https://www.venturer-cars.com/wp-content/uploads/2016/07/VENTURER-AXA-Annual-Report-2016-FINAL.pdf>

² http://www.flourishmobility.com/storage/app/media/publication/J381379_Brochure_Flourish%20Report_V14_SPREAD_S.pdf

³ <https://www.venturer-cars.com/legal-and-insurance-report-2017-18/>

⁴ <https://www.venturer-cars.com/wp-content/uploads/2018/06/Year-3-Legal-and-Insurance-Report.pdf>

⁵ http://www.flourishmobility.com/storage/app/media/FLOURISH_Insurance_and_Legal_Report_2018.pdf

⁶ <https://www.burges-salmon.com/-/media/files/publications/open-access/flourish-report-2019.pdf?la=en>

⁷ https://www.racfoundation.org/wp-content/uploads/HAIB_Burges-Salmon_April_2018.pdf

⁸ <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/AV033-Burges-Salmon-LLP.pdf>

3 **CONSULTATION QUESTION RESPONSES**

OPERATOR LICENSING – A SINGLE NATIONAL SYSTEM

Question 1:

Do you agree that Highly Automated Road Passenger Services (HARPS) should be subject to a single national system of operator licensing?

In principle, we agree with the recommendation to implement a single national system for HARPS operator licensing. As the consultation correctly notes, the existing public transport licensing regime is fragmented and may make distinctions based on service type (taxi, PHV, PSV, local bus), vehicle size and fare structures that are increasingly arbitrary and lagging behind technological developments. That said, some of these distinctions may be based on sound operational, policy and risk profile differences, for example, in risk profile of different operational models and vehicle/fleet ownership, use and maintenance arrangements.

We assume that the proposed system will itself be delivered through a single national licensing authority and that would be the preference. Our experience of current local public transport licensing authorities is that there can be significant variations in approach between them, even where the same licensing regulations and guidelines may be applicable. Such disparities would likely be exacerbated where licensing requirements may be highly technical and require specialist resources to validate. As noted in the case of safety standards (below), such a system would drive licensing applications to the more highly resourced or more innovative authorities such that the benefit of mobility innovation will not be available to all parts of the UK and all segments of society (per the Future of Mobility: Urban Strategy).

In general, we agree that when legislating for new technology and new public transport modes, there is no logical legal reason for recreating idiosyncrasies in existing regulation of public transport modes. We appreciate however that the appropriate regulatory regime may (certainly in early adoption phases) have to be set in the context of wider transport policy and regulation, not least where new modes will compete commercially with existing modes. In policy terms, a parallel process may therefore be required to revisit the regulatory regime for taxis, PHVs, buses and coaches to ensure that these modes can also benefit from mobility innovation developments for the benefit of the overall transport system and consumers.

Our views regarding a single national system of operator licensing assumes that that system will nevertheless provide appropriate licensing routes for sub-categories of what may be non-arbitrary differences in categories of HARPS. The licensing system needs to be flexible enough and able to accommodate and appropriately license operation of slow-moving passenger pods as well as full-size automated buses, for example. The risk otherwise is that the licensing system takes a “one-size fits all” approach that stifles innovation or is too permissive of certain types of HARPS operation.

OPERATOR LICENSING – A SINGLE NATIONAL SYSTEM

Question 2:

Do you agree that there should be a national scheme of basic safety standards for operating a HARPS?

Yes in principle. For similar reasons to those set out in response to Question 1, we agree that there should be a national scheme of basic safety standards for operating a HARPS.

We would expect that what are described as “basic safety standards” are assessed and validated to be minimum safety standards genuinely applicable to all HARPS categories

operations. We would then expect to see, as a reflection of different safety cases and profiles, a series of different additional standards at national level applicable to operation of slow moving pods as opposed to full-size automated buses for example.

Standards applied at national level should be defined at minimum levels underpinning the operator licensing system and maintained and verified by a single national safety authority. Standards in this context should also include safety obligations and in particular we highlight from the perspective of safety management the importance of the sharing of safety data.

Although we agree in principle that differences in approach between authorities could lead to 'regulatory shopping', we cannot rule out that local conditions may give rise to a genuine safety need of local authorities to apply additional enhanced standards to some extent. These should always build on the national mandatory framework but other than that we have no particular view as to how preservation of at least some local flexibility as regards safety is achieved. We note, for example, that even as regards AV trialling, TfL has issued its own additional guidance⁹ on aspects of safe operation in London. The particular views of local authorities and transport authorities will be key.

We reiterate from our previous response to the 1st CAV consultation and our CAV project reports our views as regards a national safety authority/regulator and an independent accident investigation body. Those comments apply equally to HARPS as to any other AV.

OPERATOR LICENSING – SCOPE AND CONTENT

Scope of the new scheme

Question 3:

Do you agree that a HARPS operator licence should be required by any business which:

- 1 carries passengers for hire or reward;
- 2 using highly automated vehicles;
- 3 on a road;
- 4 without a human driver or user-in-charge in the vehicle (or in line of sight of the vehicle)?

The question appears to contemplate 5 criteria as opposed to 4 in that the relevant HARPS operator is firstly stated to be a "business". It is not clear what the Law Commissions' definition of a business is in this context but it is worth noting that there is some controversy around the role of 'non-profit' organisations providing road passenger services and whether those services are for 'non-commercial' purposes¹⁰.

It is not clear from the consultation paper whether or not "business" is intended to operate as a distinct separate (and primary) test as opposed to being a facet of defining "hire or reward" in the context of *Albert v MIB* for example. If not, then "person" may have been the intended term.

As regards the other 4 criteria:

- 1 Subject to comments in reply to Question 4 below, we would agree in principle with retaining a flexible "hire or reward" concept

⁹ <https://tfl.gov.uk/corporate/publications-and-reports/connected-and-autonomous-vehicles>

¹⁰ See recent case in context of Regulation (EC) 1071/2009 of R (on the application of Bus & Coach Association) v Secretary of State for Transport and Ors [2019] EWHC 3319 (Admin)

- 2 We agree that any HARPS operator should only use highly automated vehicles and only for the purposes of providing HARPS within the vehicles' operational design domain. AVs should never be used as HARPS vehicles beyond the boundary of their operational design domain.
- 3 We note the proposed requirement relating to "on a road". The Law Commissions note that in practice "*most places where HARPS will drive will be on roads*" however this is not necessarily the case either for every given AV, journey, operator or use case. The point is that the use of the word "on a road" appears in the first instance and as a matter of policy, to exclude innovation and use cases where highly automated vehicles may operate on surfaces which are more readily defined as "public space" than "road". The Law Commissions will be aware in particular that there are vehicles in development that are functionally able to and/or are designed to operate in public space (at least in part) either as potentially a core part of a use case or to provide additional benefits to those with particular mobility impairments. This appears to be precluded by the Law Commissions' position without obvious justification. In the circumstances, rather than starting from the narrower definition, our preference would be not to discount the possibility of HARPS operator licences being approved for use cases on public space as well as roads.
- 4 We agree that HARPS operation should be without a human driver or user-in-charge in the vehicle (or in line of sight of the vehicle) – noting that supervision from a remote-control centre does not in the Law Commissions' consultation paper fall within either. We agree that there are challenges to demonstrating the effectiveness and safety of remote operation but welcome that the Law Commissions are not precluding those challenges being met for HARPS.

Finally it is not clear from this if it is intended that any person who may allow their vehicle to be used by a HARPS operator (temporarily or otherwise) is himself a HARPS operator by definition. If such persons are also to be HARPS operators, we consider that this requirement should also make absolutely clear that a HARPS operating licence is required to provide such services at any time (e.g. even if vehicles are only being used to occasionally provide such services). The Law Commissions will be aware of concepts being contemplated where AVs are partly put to use as taxis when not in private use or modular vehicles which may change use from passenger carrying to goods carrying to mobile workspace, etc.

OPERATOR LICENSING – SCOPE AND CONTENT

Scope of the new scheme

Question 4:

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

We consider that the concept (as developed by the courts) provides sufficient clarity for now and is adaptable enough to cover new paradigms of passenger carriage introduced by AVs as they emerge. Alternatively if not sufficiently adaptable, legislation can be introduced as and when the nature of future use, commercial, and payment models become clearer.

We would expect the 'edge cases' to continue to be those cases where an otherwise private vehicle is made available for use by others beyond owners and their families. In this context, the idea of "*social kindness*" (as posited in *Albert v MIB* and *DPP v Sikondar*) may well be developed further in light of new technology where the personal cost of a "*social kindness*" to the owner falls significantly in light of the fact that the owner is no longer having to do the driving task.

It is regularly commented on that one of the perceived disbenefits of private car ownership is inefficient utilisation with private cars spending some 95% of the time parked¹¹. In light of this, those individuals who may own or lease AVs will potentially have the opportunity to deploy their vehicles elsewhere during the time that they and their families are not personally passengers in them. Models may arise whereby this unutilised capacity is distributed through peer to peer ownership or sharing networks or 'surplus capacity' use agreements with HARPS operators. Or an owner's "social kindness" may see the vehicle being used extensively by acquaintances for little to no demonstrable reward to an owner since the vehicle is otherwise not being used.

For the time being however we would not propose a departure from the "hire or reward" test.

OPERATOR LICENSING – SCOPE AND CONTENT

Exemptions

Question 5:

We seek views on whether there should be exemptions for community or other services which would otherwise be within the scope of HARPS operator licensing.

This is fundamentally a policy question. However, in principle, we can understand that the same policy reasoning underpinning these exemptions in the case of conventional transport operations could apply equally to operation of HARPS.

There will be a core of operational requirements in relation to safety, competence and maintenance, etc that even "non-commercial" operators cannot be exempted from, however, there will equally be some requirements applicable to commercial operators that should not, as a matter of policy, apply to these types of operators. Alternatively, if they were applied to such operators, then operators would be so unlikely to comply with them that it is probable that these services would not be provided all to the material disbenefit of the public or a section of it (who may be a particularly vulnerable class).

The Future Mobility Urban Strategy and Inclusive Transport Strategy appears consistent with a policy of maintaining such exemptions even for new modes of public transport.

OPERATOR LICENSING – SCOPE AND CONTENT

Exemptions

Question 6:

We seek views on whether there should be statutory provisions to enable the Secretary of State to exempt specified trials from the need for a HARPS operator licence (or to modify licence provisions for such trials).

We are familiar with the provisions described by the Law Commissions and with the CAV trialling environment through our projects and interactions with others in the industry.

We would strongly advocate for a provision in any HARPS regulations to allow the Secretary of State to grant an exemption for HARPS trials subject to usual safety case requirements where the requirement and/or desirability for data and research from such trial operations can be demonstrated.

¹¹ <https://fortune.com/2016/03/13/cars-parked-95-percent-of-time/>

This would bring such regulations into line with existing provisions on trialling vehicles and permit the trialling of not just the technology but complete HARPS solutions (including interaction at scale with the travelling public) ahead of their deployment under a full operator licence.

Exemptions would be expected to come with conditions and guidance appropriate to the environment and particularly as regards engagement with members of the public using the services.

Given the crucial link between testing, data and development in this area, not providing for the possibility of exemptions would probably stifle innovation in this area.

OPERATOR LICENSING – SCOPE AND CONTENT

Operator requirements

Question 7:

Do you agree that applicants for a HARPS operator licence should show that they:

- 1 are of good repute;
- 2 have appropriate financial standing;
- 3 have suitable premises, including a stable establishment in Great Britain; and
- 4 have a suitable transport manager to oversee operations?

We agree in principle that HARPS operators should be required to demonstrate *appropriate* competence, good standing, assets and resourcing and financial viability to a level and scale reflecting their proposed operations.

The requirements for PSV operator licences are intended to achieve that in respect of PSVs. However, we would caution against importing these requirements wholesale from PSVs (or any other mode of public transport) to HARPS as that approach is likely to be too limiting. Similarly, if HARPS as a headline category is intended to cover sub-categories of HARPS ranging from slow single passenger pods to full-size automated buses there will need to be flexibility and differentiation within the HARPS requirements themselves. The difference in operating licence requirements between PSV operators (large and small fleet) and PHV operators is not arbitrary and HARPS requirements will need to reflect this within sub-categories.

Suitable requirements as to 'good repute', 'fit and proper person' and 'appropriate financial standing' are basic requirements that are common across public transport modes. They are relevant across modes and are generally understood and accepted. It is unlikely to be too difficult to apply similar concepts to HARPS operators and the flexibility in the concepts allows it to cover different types of HARPS operation. Some adjustments would be required to deal with more novel aspects of AVs however (e.g. relevance of offences under the Computer Misuse Act and any other relevant legislation pertaining to the security of systems).

The concept of requiring an effective and stable establishment in Great Britain is also likely to be relevant however we highlight the Law Commissions' intention that "*suitable premises*" are to be assessed according to the operators' own operations and model. The requirement needs to be sufficient to demonstrate effective and stable establishment but not impose inflexible requirements as to premises that may not be necessary for the operations in question. For example, in respect of the PHV regulatory framework we are aware from our experience of PHV licensing authorities that some continue to require PHV operators to provide for physical booking offices open to the public even when the operational model is an entirely app-based booking service.

The Law Commissions cite an example of premises required to keep or garage vehicles when not deployed but this assumes a model where the operator owns, keeps and manages the fleet (much more common for PSVs). It is however unclear for example whether 'virtual' type HARPS operators could emerge as they have in private hire (small) vehicle operations where the operator may not have direct control of the vehicles or keep them. Ultimately the need to retain flexibility is key given the uncertainty as to emerging HARPS models.

The same concerns relate to any requirement as to "*a suitable transport manager*". This type of requirement is common for PSVs (and comparable modes such as Heavy Goods Vehicles) where operators tend to own, maintain and manage their own fleets of buses, coaches and lorries and employ driving and other staff. The requirement is not the same for PHVs (where operators can be single driver, single vehicle). The 'suitable management personnel' aspect that this requirement represents therefore needs to flex to accommodate the particular HARPS operation under consideration. The system needs to accommodate both those running many HARPS fleet vehicles to the individual who may own one vehicle permitting his vehicle to operate as a HARPS vehicle on a full or part time basis under his direct control (or the control of another HARPS operator).

Applying a conventional PSV framework means that some elements will not be appropriate for certain sub-categories of HARPS operation. However it also means that the perspective may be too narrow in terms of taking an old technology approach to a new technology.

A "transport manager" as conventionally understood in PSV terms may be insufficient for many types of complex HARPS operation. The differences between conventional vehicles and automated vehicles were explored in the 1st consultation paper and our response to it. Fundamentally they are conceptually different modes. In the framework of AVs and HARPS operation, aspects of technology, data and cyber-security competence for example are as likely to be operation-critical as those conventionally dealt with by the transport manager.

The assessment should start with a full appreciation of the core aspects of operation that may apply across a range of potential HARPS models and then core operational competences should be mapped from those into the relevant operator requirements. These competences can then be met either by operations or management staff or operational arrangements put into place such as key contracts for software and updates, data processing, cyber-resilience, communications networks, etc.

OPERATOR LICENSING – SCOPE AND CONTENT

Operator requirements

Question 8:

How should a transport manager demonstrate professional competence in running an automated service?

See above.

If one is required, conventionally a transport manager manages drivers' hours, rostering, qualifications and training, operations and similarly fleet operation, management, records, inspections and maintenance, etc and administers the paperwork for all the above.

Some of these can be recast such that transport managers retain oversight over a HARPS operation but given the potential breadth of technical and novel competences required to operate a HARPS service it is likely that the role may broaden out to a more general operations manager in particular managing key technical inputs into operation.

In terms of how competences can be demonstrated (from any transport manager or other key operational personnel), we would defer to those in the emerging industry. However, the

required training and development of qualifications is likely in the first instance to come from a professional qualifications and training framework that the industry itself will design and promote.

OPERATOR LICENSING – SCOPE AND CONTENT

Adequate arrangements for maintenance

Question 9:

Do you agree that HARPS operators should:

- 1 be under a legal obligation to ensure roadworthiness; and
- 2 demonstrate “adequate facilities or arrangements” for maintaining vehicles and operating systems “in a fit and serviceable condition”?

In principle, we agree with this proposition for those HARPS operators who own or lease their own vehicle fleet and/or maintain them. Whilst these requirements primarily relate to PSVs, it is arguable that similar arrangements could also apply to operators smaller vehicles. Given the complexities of AVs and operating system maintenance, we can see that it would be reasonable to expect even these small scale operators to demonstrate that they have arrangements in place to maintain their vehicles and operating systems.

We would query whether these obligations should necessarily lie with all HARPS operators if, for example, a HARPS operator has contracted for vehicles and services with other HARPS operators to be made available essentially on a booking platform.

If HARPS operators have contracted on such a basis either with HARPS operators of other fleets or individual HARPS operators, then it would arguably not be necessary to impose the same obligations to each tier of operation.

Primarily, these safety obligations should fall on the HARPS operator that actually keeps and maintains the vehicles.

Finally, again, a risk of importing PSV requirements is that they import a too narrow interpretation of maintenance requirements for AVs. Some of the more unique features of AVs were covered extensively in the first consultation. For example, and of particular importance, maintenance needs to consider not just the vehicle roadworthiness in a conventional sense but the system and that includes its software.

The Automated and Electric Vehicle Act 2018 rightly highlighted potential liability and insurance issues if safety-critical software was not updated.

We would recommend that adequate arrangements for safe maintenance of HARPS need to take into account the specific safety-critical maintenance requirements of AVs and not just the vehicle aspects but the software and services aspects. For example, given the public passenger context, if HARPS are not configured to automatically download and install safety-critical updates then we would recommend that this was part of any legal obligation of an operator to ensure their vehicle was “roadworthy” and part of associated daily checks.

OPERATOR LICENSING – SCOPE AND CONTENT

Adequate arrangements for maintenance

Question 10:

Do you agree that legislation should be amended to clarify that HARPS operators are “users” for the purposes of insurance and roadworthiness offences?

In principle yes but see response to Question 9 above as to HARPS operations which may utilise multiple tiers of HARPS operators and which one or ones should be the relevant users in those situations. Should there be failures as to insurance or roadworthiness offences, it is arguable that different offences should apply to those who actually keep the vehicles and those who may put them to use on a HARPS platform on a contractual basis.

OPERATOR LICENSING – SCOPE AND CONTENT

Compliance with the law

Question 11:

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?

Yes we agree that these are, as a minimum, legal obligations that HARPS operators should have in common with other modes of public passenger transport.

Given the unique operational characteristics of AVs, the scope and requirements of “supervision” and “reasonable steps to safeguard” will be novel and will in particular benefit from some clear guidance from the outset (as the Law Commissions note).

Given the fleet and system nature of AVs and AV systems, from a safety management perspective we would also expect the duty to report accidents to be expanded (see response to Question 12 below).

OPERATOR LICENSING – SCOPE AND CONTENT

Compliance with the law

Question 12:

Do you agree that HARPS operators should be subject to additional duties to report untoward events, together with background information about miles travelled (to put these events in context)?

We refer the Law Commissions back to our response to the 1st consultation in respect of our views on AV safety, safety assurance, monitoring and enforcement.

Fundamentally, alongside any safety assurance agency in respect of AVs, we would recommend that there should be a system of independent road accident investigation (a Highways Accident Investigation Branch) tasked with safety investigations and recommendations. Such bodies would have accident investigation as well as accident prevention roles.

Such systems apply to and are well established in other mass transit passenger systems such as in rail, aviation and marine and the case for such an organisation is only likely to increase with the highly technical expertise needed to understand and investigate AV accidents.

Such systems do go hand in hand with statutory obligations on operators and other stakeholders in these industries to report incidents including 'near miss' safety incidents to allow for recommendations to prevent accidents.

Such obligations in fact are intrinsic to a mature safety management culture and go beyond transport and transport accidents and may well apply to operators in any event under existing health and safety legislation such as the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013.

The requirement to report untoward events would be bolstered if this also enables the relevant authority to report on an anonymised or aggregated basis untoward events to:

- enable analysis on the events to identify trends or patterns, recognising that whilst for each individual operator an event may be one-off when looked at across industry it may represent an issue or identify a pattern suggesting untoward behaviours targeting HARPs; and
- enable industry to address any concerns, e.g. improving security, versioning updates to address system issue, etc.

OPERATOR LICENSING – SCOPE AND CONTENT

Compliance with the law

Question 13:

Do you agree that the legislation should set out broad duties, with a power to issue statutory guidance to supplement these obligations?

Yes, it appears to us that this would be a sensible legislative approach that sets out some key primary principles of safe and legal HARPS operation but allows for the technical detail supporting these to be developed in an adaptable and responsive way. As the Law Commissions note, this is similar to the regulatory structure for PSV regulation.

As set out above however, the broad duties imposed in legislation should either genuinely be applicable to all HARPS types, AVs and operational models or should be sub-categorised to ensure that the system is able to regulate appropriately for different service types.

OPERATOR LICENSING – SCOPE AND CONTENT

Price information

Question 14:

We invite views on whether the HARPS operator licensing agency should have powers to ensure that operators provide price information about their services. In particular, should the agency have powers to:

- 1 issue guidance about how to provide clear and comparable price information, and/or
- 2 withdraw the licence of an operator who failed to give price information?

In principle we agree with these proposals save that:

- any withdrawal of licence power should be the last step in an escalating regulatory enforcement process involving improvement and enforcement notices, with the agency making clear at each stage the specific remedial steps required; and
- plainly pricing information of this nature is only directly applicable to services that do in fact charge separate fares in a conventional sense

In the case of the latter, the Law Commissions will be very aware of developments as regards integrated ticketing, travel cost and Mobility-as-a-Service models as well as more established vehicle use models such as car hire, car clubs, peer to peer sharing and so on. Here pricing information is bound up with other arrangements and is not a straightforward single payment for comparison purposes.

Consequently, the pricing information requirement for HARPS operator licensing may not be suitable for all forms of HARPS operation and arguably may not be a basic mandatory requirement.

OPERATOR LICENSING – SCOPE AND CONTENT

Who should administer the system?

Question 15:

Who should administer the system of HARPS operator licensing?

In our response to the Law Commissions' 1st consultation, we supported the recommendation that there should be a separate safety assurance scheme and agency for AVs.

We did not go as far as to suggest that the relevant agency should, additionally, assume the current roles and powers of the likes of DVSA, the Advertising Standards Agency or Trading Standards. That position should be read to include the Traffic Commissioners. However we did expect that necessarily the AV safety agency would have to work closely with such other agencies in the undertaking of their roles on AV aspects.

Currently the Traffic Commissioners are responsible for the operator licensing system for PSVs and HGVs, whilst local authorities are responsible for taxi and PHV licensing.

Given the single national licensing system proposed and the technical detail of the potential issues to be examined on granting of a HARPS licence, the forum and role of the Traffic Commissioners would seem the more appropriate of the existing routes for operator licensing. The status and role of the Traffic Commissioners as an independent regulatory tribunal with a tribunal right of appeal (as opposed to Magistrates Court appeal for local authority PHV decisions for example) is also arguably better suited to HARPS licensing as envisaged

As stated above, if Traffic Commissioners are to expand their role to HARPS licensing, they will undoubtedly require the close co-operation and assistance of the national safety agency for AVs.

Finally, given the differing range of HARPS operations that may be brought forward for licensing (including operational models which are more akin to PHV models rather than PSV models), there should be flexibility with any expanded Traffic Commissioners' role to allow for a 'lighter touch' approach depending on scale of operation or risk.

OPERATOR LICENSING – SCOPE AND CONTENT

Freight transport

Question 16:

We welcome observations on how far our provisional proposals may be relevant to transport of freight.

There is some degree of comparative relevance of the Law Commissions' proposals for HARPS to freight.

When considering the regime for what might be termed "Highly Automated Road Freight Services", there is likely to be a similar case for a national licensing regime and authority.

However, as with passenger transport, there is an existing regulatory distinction between HGVs and LCVs that is not entirely arbitrary and which needs to be reflected in terms of flexibility in any national scheme.

Any national scheme would have to be able to accommodate sub-categories of road freight service that could range from large platooning fleets of high speed articulated lorries to single small last mile delivery low speed pods.

In our project RoboPilot, we examine the potential regulatory implications of automation for LCVs which are, conventionally, relatively lightly regulated. Once our report is available we will be pleased to share it with the Law Commissions.

However, as is explored in this response, it appears to us inevitable that, whilst licensing needs to retain flexibility to license smaller scale operations, automated operation is likely to involve a higher starting level for regulation than currently exists for the regulation of human-driven PHVs or LCVs at the lower end of passenger and freight transport scale of operations.

PRIVATELY-OWNED PASSENGER-ONLY VEHICLES

Setting a boundary between HARPS and private leasing

Question 17:

Do you agree that those making “passenger-only” vehicles available to the public should be licensed as HARPS operators unless the arrangement provides a vehicle for exclusive use for an initial period of at least six months?

We acknowledge in principle that there is a distinction to be made between short term vehicle ‘renting’ and long term vehicle ‘leasing’. Noting that the Law Commissions have consulted already with BVRLA as part of this proposed wording, our comments would primarily relate to the extent to which the system could be exploited and difficulties with enforcement.

It is unclear what “exclusive use” entails but we assume that this intended to cover not only use by the lessee but by their family and potentially friends? In any event, it would need to be clearly defined. If use is to be defined as some concept of “personal private use” then please see our comments above about the potential issues of blurring between “non commercial” and “commercial” use of passenger carrying vehicles.

Any regulatory boundary needs to be tested against likely attempts to circumvent HARPS regulatory requirements through contracting models which – on their face – appear to invoke long-term private use leasing but may be utilised in practice like HARPS. In any event, the application of a hard time boundary will inevitably lead to some contracts specifying initial exclusive use periods of 6 months and 1 day.

Furthermore, such contractual requirements may be fairly meaningless unless there are monitoring and enforcement arrangements in respect of them (by the lessor and other parties such as the police or traffic authorities). As the Law Commissions note, HARPS requirements go in particular to safety and for these circumstances (as well as others) there should be suitable provisions in place to enforce against unlicensed HARPS operators and vehicles.

PRIVATELY-OWNED PASSENGER-ONLY VEHICLES

Allocating responsibility for a privately-owned passenger-only vehicle: placing responsibilities on keepers

Question 18:

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?

In principle yes.

However, it is possible that private owners may in practice contract with either the ADSE or third parties to deal with some of the more technical aspects of the above on an ongoing basis.

This reflects how people today may, for example, contract with dealers, repairers, insurers and brokers and roadside repair and recovery bodies. Indeed some applications (such as e-Call) are automating some of these functions.

Whilst primary responsibility should lie with the owner, actual implementation of these functions may well therefore be contracted out and is very likely to, for example, in the case of removing stopped vehicles since, by definition, the owner may not be in the vehicle at all at the time. This is anticipated in the Law Commissions' Question 21.

Obligations on the keeper need to reflect that the keeper may have taken such reasonable steps to ensure these functions and activities are undertaken through third party arrangements and would be entitled to rely on a degree of assurance from.

PRIVATELY-OWNED PASSENGER-ONLY VEHICLES

Allocating responsibility for a privately-owned passenger-only vehicle: placing responsibilities on keepers

Question 19:

Do you agree that there should be a statutory presumption that the registered keeper is the person who keeps the vehicle?

We agree that until ownership and operational models appear, there is the potential for uncertainty as to where (safety-critical) responsibilities may lie. In the circumstances, we agree that there should be a statutory presumption in the first instance and that the registered keeper is a logical (and easy to identify and understand) subject of those obligations.

PRIVATELY-OWNED PASSENGER-ONLY VEHICLES

Allocating responsibility for a privately-owned passenger-only vehicle: placing responsibilities on keepers

Question 20:

We seek views on whether:

- 1 a lessor should be responsible for the obligations listed in Question 18 unless they inform the lessee that the duties have been transferred.
- 2 a lessor who is registered as the keeper of a passenger-only vehicle should only be able to transfer the obligations to a lessee who is not a HARPS operator if the duties are clearly explained to the lessee and the lessee signs a statement accepting responsibility?

Yes. On the basis of the proposed model above, we agree that these are sensible propositions applying the proposed principles.

PRIVATELY-OWNED PASSENGER-ONLY VEHICLES

Will consumers require technical help?

Question 21:

Do you agree that for passenger-only vehicles which are not operated as HARPS, the legislation should include a regulation-making power to require registered keepers to have in place a contract for supervision and maintenance services with a licensed provider?

As the Law Commissions' note, there is currently a great deal of uncertainty as to what level of technical or support assistance consumers might require to safely operate and maintain their own passenger-only vehicle on a day to day basis. Instinctively it is considered that AVs will be more technically complicated in nature than conventional vehicles.

However, equally there are developers seeking to automate processes (e.g. for self-diagnostic and self-maintenance functions) or to make human-machine interfaces as straight forward as possible such that specialist intervention may be limited to more significant or periodic maintenance.

Alternatively, services may develop which allow for the possibility of spot hiring services as required as opposed to having before-the-event contracts in place.

Whilst there is plainly a need to understand how in practice consumers might meet relevant obligations in respect of their passenger-only vehicles (in particular when they themselves are not in the vehicle), we query whether there is a yet a demonstrable need for a regulation-making power explicitly for this aspect. This does not however discount the possibility that such regulations might fall under other powers e.g. any ancillary regulation-making powers in respect of AV safety, if the relevant features are, on the basis of an observed safety risk or need, considered necessary.

PRIVATELY-OWNED PASSENGER-ONLY VEHICLES

Peer-to-peer lending

Question 22:

We welcome views on whether peer-to-peer lending and group arrangements relating to passenger-only vehicles might create any loopholes in our proposed system of regulation.

Please see our comments above and in particular in response to Question 4 as to the “Hire and Reward” test.

PRIVATELY-OWNED PASSENGER-ONLY VEHICLES

Protecting consumers from high ongoing costs

Question 23:

We seek views on whether the safety assurance agency proposed in Consultation Paper 1 should be under a duty to ensure that consumers are given the information they need to take informed decisions about the ongoing costs of owning automated vehicles.

In principle, we support greater transparency and product education for all users (not just direct consumers of AVs). AVs are a new technology and, as with all such things, prone to jargon and highly technical distinctions in operation and use.

Alongside industry efforts, we consider that part of the safety role of the safety assurance agency will be to promote public awareness and education of the unique and novel characteristics of AVs and owning them. This should include – rightly – checklists for buyers for example.

As to a specific duty to ensure that consumers are given the information they need to take informed decisions about the ongoing costs of owning automated vehicles, this information is most likely to be in the hands of OEMs, dealers, lessors and other consumer-facing entities marketing AVs. In such circumstances, at most, the safety assurance agency should arguably have a statutory obligation to ensure that those marketing AVs provide information (and have a corresponding statutory duty enforceable by the safety assurance agency).

ACCESSIBILITY

What we want to achieve

Question 24:

We seek views on how regulation can best promote the accessibility of Highly Automated Road Passenger Services (HARPS)? In particular, we seek views on the key benefits and concerns that regulation should address.

We consider that this is a difficult area to prospectively regulate for at this time, save to provide at a high level that equality legislation applicable to public transport should prima facie be applicable to HARPS also. Put another way, there is no obvious reason why – at this time – HARPS should be actively exempted as a category from such legislation (in contravention of the Inclusive Transport Strategy).

The Law Commissions will be aware from projects such as Flourish that accessibility and inclusive mobility are already seen as a key potential societal benefit of AVs. In addition, the first trials now being undertaken into commercial passenger operation are expected to provide further insight into accessibility issues (including issues of no driver – see response to Question 26).

One possible regulatory tool to consider, where appropriate to scale of operation, is for the licensing process to include consideration of accessibility statements or disabled persons protection policies to ensure that accessibility needs in operation have been considered. Such requirements do exist in rail and aviation for example.

ACCESSIBILITY

Core obligations under equality legislation

Question 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?

As indicated above, in principle there is no obvious reason why – at this time – HARPS should be actively exempted as a category from such legislation (in contravention of the Inclusive Transport Strategy).

However, HARPS operations may vary greatly in scope, scale, purpose, accessibility and operation. A power to grant exemptions from regulations for exceptional circumstances should be retained (such as the existing powers in respect of the Public Service Vehicles Accessibility Regulations 2000)

ACCESSIBILITY

Specific accessibility outcomes

Question 26:

We seek views on how regulation could address the challenges posed by the absence of a driver, and the crucial role drivers play in order to deliver safe and accessible journeys. For example, should provision be made for:

- 1 Ensuring passengers can board and alight vehicles?
- 2 Requiring reassurance when there is disruption and accessible information?
- 3 Expansion of support at designated points of departure and arrival?

It is not clear that regulation would assist at stage. AV developers and potential HARPS operators will necessarily need to address the issue and of what reasonable adjustments are to be made to deal with the absence of a driver. Adjustments are going to depend on the nature of the operations being proposed. New technology may be accompanied by new ways of directly

We do however agree that accessibility provision (whatever they may be) should be fully described and transparent to users so that journey planning is seamless.

At this stage, we would consider that guidance or codes of practice as to assessing accessibility requirements and potential adjustments and mitigations within the reasonable range are likely to be more useful at this stage for informing discussions and shaping emerging good practice in the industry.

ACCESSIBILITY

Developing national minimum accessibility standards for HARPS

Question 27:

We seek views on whether national minimum standards of accessibility for HARPS should be developed and what such standards should cover.

As above, given the variety of services, vehicles and operations potentially covered by the HARPS category, it is unclear whether a single set of national minimum standards of accessibility would be possible or helpful.

However, we consider that guidance or codes of practice as to assessing accessibility requirements and potential adjustments and mitigations within the reasonable range are likely to be more useful at this stage for informing discussions and shaping emerging good practice in the industry.

In due course, such practice could be converted into minimum standards if appropriate to do so.

ACCESSIBILITY

Enforcement mechanisms and feedback loops

Question 28:

We seek views on whether operators of HARPS should have data reporting requirements regarding usage by older and disabled people, and what type of data may be required.

Any data reporting requirements regarding usage by older and disabled people will likely require the provision of personal data, and so requirements should be seen in the context of statutory obligations under the Data Protection Act 2018.

To the extent data is required, careful consideration should be given to who that data is shared with and for what purposes it is used. The requirement for the data does therefore need to have a specific purposes and necessity in mind before requiring operators to collect and process it.

REGULATORY TOOLS TO CONTROL CONGESTION AND CRUISING

Traffic regulation orders

Question 29:

We seek views on whether the law on traffic regulation orders needs specific changes to respond to the challenges of HARPS.

We agree with the Law Commissions that AV operation generally will add to the existing case for TROs in digital standardised form and simple cost-effective legislative processes.

Traffic regulation zones are, in addition to geofencing by physical features, likely to form part of the parameters for AV operation and are therefore a tool by which local traffic authorities can modify, restrict or permit AV operation. The more flexible the relevant powers, the more dynamic and responsive the tool can be, assuming that connectivity ensures that all traffic management requirements are directed to AVs in real time without delay.

Finally, we would highlight the potential limitations of the law on traffic regulation orders to matters not on the "road". To the extent that AVs are to be permitted to access footpaths and other public spaces, it is possible that changes to use of TROs will not sufficient in themselves but that changes in primary legislation may be required.

We intend to publish a report shortly in respect of our CAPRI project which will touch on these issues and will be glad to share it with the Law Commissions once published.

REGULATORY TOOLS TO CONTROL CONGESTION AND CRUISING

Regulating use of the kerbside

Question 30:

We welcome views on possible barriers to adapting existing parking provisions and charges to deal with the introduction of HARPS.

In particular, should section 122 of the Road Traffic Regulation Act 1984 be amended to expressly allow traffic authorities to take account of a wider range of considerations when setting parking charges for HARPS vehicles?

At this point in time, it appears to us that there is insufficient data to understand fully how HARPS operations are likely to utilise kerbside in their operations. Consequently, we do not see any necessity at this stage to amend existing legislation (which the Law Commissions correctly note are already quite flexible).

Parking charges aside, the bigger structural and technological issues for AVs (and HARPS) at present may be the limitations they have or that are imposed on them in the context of an overall lack of parking spaces and how that impacts (in particular) commercial operations.

In circumstances (outside of London in particular) where much loading and unloading of passengers (as well as freight) is necessarily undertaken by stopping in the road or by parking partially on pavement, there is an issue as to whether AVs are able to or to be permitted to operate to the same degree of “tolerance” in respect of strict rules of the road. In such circumstances, authorities may actually have to consider proactively managing kerbside in favour of AVs to ensure that they can efficiently stop when necessary either through permanently designated or dynamically managed kerbside access. Failure to do so, may have equally detrimental effects on traffic flow. Again, we examine some of these themes in our forthcoming RoboPilot report.

REGULATORY TOOLS TO CONTROL CONGESTION AND CRUISING

Road pricing

Question 31:

We seek views on the appropriate balance between road pricing and parking charges to ensure the successful deployment of HARPS.

We acknowledge the risk of HARPS vehicles “cruising” as opposed to parking and the concerns around this as regards impact on traffic flow. At present, it is not known what the real impact will be. For some areas and cities, the scale of the issue may not present any particular problem locally. For other areas, HARPS operators may mitigate the issue in other ways (e.g. by providing dedicated privately-owned spaces to manage their own fleet operations throughout the day). As operators acquire and analyse more and more data and volume, fleet management is likely to become increasingly optimised reducing overall need for parking or cruising. It is important to acknowledge that for commercial passenger or freight carrying operations, time spent cruising or parked is economically unproductive and so not in the operator’s interest either.

Fundamentally, road pricing is part of a much larger conversation about use of and payment for roads and road infrastructure as well as associated policy aspects such as congestion

management and air quality management. As those tools develop, local authorities will be able to use those in conjunction with powers such as parking charge powers to manage the use of impacts of AVs and HARPS as they consider best suited to local conditions. In the circumstances, we would not have any preconceived view about what the appropriate balance is between these powers as regards any particular location.

REGULATORY TOOLS TO CONTROL CONGESTION AND CRUISING

Road pricing

Question 32:

Should transport authorities have new statutory powers to establish road pricing schemes specifically for HARPS?

If so, we welcome views on:

- 1 the procedure for establishing such schemes;
- 2 the permitted purposes of such schemes; and what limits should be placed on how the funds are used.

Per above, we do not consider that the obvious need for new statutory powers as suggested has arisen as yet (although it may do so). Nor that there is any established need at this stage to apply such powers specifically to HARPS as opposed to any other road vehicle.

REGULATORY TOOLS TO CONTROL CONGESTION AND CRUISING

Quantity restrictions

Question 33:

Do you agree that the agency that licenses HARPS operators should have flexible powers to limit the number of vehicles any given operator can use within a given operational design domain for an initial period?

If so, how long should the period be?

Such limits should be part of a range of potential conditions that the licensing authority may be able to apply based on the statutory criteria and in response to specific licensing applications and operations being assessed.

It does not appear to us helpful to prescribe such conditions upfront. However, in our response to the 1st consultation we did acknowledge that in early phases of deployment of new technology, it may be prudent for deployment approvals to be phased for a period of enhanced monitoring and data gathering.

We would however state that conditions such as these can obviously be significant interferences in the market and must therefore be justified objectively and on a reasoned and transparent basis.

REGULATORY TOOLS TO CONTROL CONGESTION AND CRUISING

Quantity restrictions

Question 34:

Do you agree that there should be no powers to impose quantity restrictions on the total number of HARPS operating in a given area?

On the basis that there will be other regulatory tools available to authorities to control congestion and traffic, we would agree that those tools should be utilised first before any such new additional powers are contemplated.

At this point, there is no particular reason to legislate for those powers pre-emptively.

INTEGRATING HARPS WITH PUBLIC TRANSPORT

The current system of bus regulation: HARPS as mass transit

Question 35:

Do you agree that a HARPS vehicle should only be subject to bus regulation:

- 1 if it can transport more than eight passengers at a time and charges separate fares; and
- 2 does not fall within an exemption applying to group arrangements, school buses, rail replacement bus services, excursions or community groups?

We acknowledge that there may be compelling policy reasons to regulate similarly forms of HARPS that in form factor are similar to buses.

In principle however there may be no technical reason that a HARPS vehicle needs to be equated to a bus or subject to bus regulation. That approach would potentially limit innovation and fresh thinking as to the distinct roles that such vehicles could have in a mass transit system potentially alongside and complementing conventional buses.

In some cases, HARPS operators may choose to use HARPS vehicles essentially to replicate characteristics of a local bus services (fixed route, fixed stops, timetable, etc) in which case it would logically follow that they should register as buses and be subject to bus regulation.

However, large passenger size HARPS vehicles (or vehicles which are capable to adapting to such a purpose from time to time) could be deployed for other purposes given their different operational and costs characteristics or using innovative models or technology including for example providing PHV type services to passengers in vehicles able to carry more than 8 people.

The proposal in question would reinforce a distinction between use of vehicles able to carry 8 passengers or less and those able to carry more that exists in the current regulations but that need not automatically be applied to HARPS.

INTEGRATING HARPS WITH PUBLIC TRANSPORT

The current system of bus regulation: HARPS as mass transit

Question 36:

We welcome views on whether any particular issues would arise from applying bus regulation to any HARPS which transports more than eight passengers, charges separate fares and does not fall within a specific exemption.

See above. Fundamentally it presupposes that the function of such HARPS operations are to replicate existing bus operations but without a driver and therefore they are to be subject to the same regulations. This may indeed be the aim of such HARPS operators but it precludes using AV technology and systems to provide different kinds of services that may be more flexible in pricing and routing, more adaptable and responsive or provide services that may be more door to door than stop to stop.

INTEGRATING HARPS WITH PUBLIC TRANSPORT

The current system of bus regulation: HARPS as mass transit

Question 37:

We welcome views on whether a HARPS should only be treated as a local bus service if it:

- 1 runs a route with at least two fixed points; and/or
- 2 runs with some degree of regularity?

See general concerns above regarding restriction of innovation.

INTEGRATING HARPS WITH PUBLIC TRANSPORT

Encouraging use of mass transit: Mobility as a Service

Question 38:

We seek views on a new statutory scheme by which a transport authority that provides facilities for HARPS could place requirements on operators to participate in joint marketing, ticketing and information platforms

This would broadly replicate HARPS schemes that replicate conventional transport partnership models providing integrated and co-ordinated transport. Assuming that they reflected true partnerships where each stakeholder committed resources or other material contribution, then the benefits of participation ought to be self-reinforcing. However, we acknowledge that a statutory underpinning could encourage participant by instilling trust and enforceable obligations into the structure. The provisions would, however, have to be flexible and able to recognise what may be quite bespoke structures and commitments from various stakeholders otherwise – much like bus statutory partnerships – alternative voluntary partnerships may be preferred instead.