

Submission in response to the Law Commission’s Third Consultation Paper on Automated Vehicles (‘A Regulatory Framework for Automated Vehicles’)

1. This submission consists of two responses from barristers at Temple Garden Chambers: the first is authored by Scarlett Milligan, which focuses on questions of safety standards expected of CAVs and the obligations of a User in Charge, and the second – beginning at page 8 – is authored by Paul Erdunast and focuses on the issues surrounding data retention and the corresponding data protection responsibilities of ADSEs.
2. The responses below do not represent the views of any other barrister at Temple Garden Chambers.

Submission by Scarlett Milligan

3. This response covers a number of the consultation’s questions, insofar as they relate to the role and responsibilities of a User in Charge and the safety standards to be expected of self-driving vehicles in the UK. In particular, this submission engages with the issues raised in questions 1, 4, 13, 28, 29, 34, and 54.
4. Historically, I have held a number of concerns about the use of ‘Level 3’ CAVs on public roads, and the legal framework surrounding their use. It seemed to me that Level 3 CAVs presented a conundrum which could be resolved in one of the following two ways, both of which had undesirable consequences:
 - a. Users in Charge would not be legally responsible for any accidents where the ADS was appropriately engaged, nor would they be required to voluntarily ‘intervene’ or ‘override’ any decisions of the ADS in the absence of a transition request. The natural consequence of this seemed to be that drivers might ‘switch off’ whilst the ADS was engaged, even if they remained obliged to be receptive (or ‘alert to’) a transition request. This could prove highly problematic, if not catastrophic, in situations where a Level 3 CAV required the User in Charge to take back control in emergency situations, or at short notice. Given the emerging nature of this technology, it was foreseeable that such transition requests could occur frequently, and could cause a number of accidents; or
 - b. Users in Charge would be legally responsible in circumstances where they could have intervened to avoid an accident, or where they negligently handled a transition request (for instance, because they had ‘switched off’ whilst the ADS was engaged). Whilst such an approach would ensure that Users in Charge remained vested in the driving and in helping to keep accidents to a minimum, it comes with an array of factual and legal difficulties in the context of civil or criminal proceedings, including but not limited to: how and when events should have been anticipated; how

quickly a reasonable User in Charge might have reacted; and whether it was or was not reasonable to override an ADS. These difficulties would be confusing for Users in Charge, not least due to the marketing material that is likely to accompany CAVs, and may in fact serve to create or amplify dangerous situations on the road.

5. Naturally, when the topic of CAVs first started to emerge on the legal agenda, we were assisted greatly – and, with hindsight, perhaps constrained – by the language of the SAE Levels. There was a relatively limited understanding of how those levels would translate into the vehicles of the future, and what the true extent of their abilities would be. As the technology has developed, our understanding of CAVs and our ability to engage in discussions about their legal framework, has improved substantially.
6. I have been greatly assisted in my own thinking by the Law Commission’s firm intention, as expressed in its latest consultation paper, to be “*informed by the technical specifications in the SAE Taxonomy but... not dictated by them*”. By moving away from the question of ‘What Levels of CAV should we allow on our roads?’ to the question of ‘What level of safety should our regulators insist upon?’, our legal and regulatory system is able to insist that an ADS performs to a high standard before it is permitted on UK roads. This gives us the tools to effectively remove – or at least minimise – a number of concerns held by myself and other commentators about the dangers posed by some of the more ‘primitive’ Level 3 CAVs, which were generally viewed as being a somewhat uncertain technology.
7. One of the biggest concerns surrounding the approval of Level 3 CAVs for use on public roads was the risk that they would regularly issue transition requests in the midst of unsafe environments or emergency manoeuvres, or otherwise with insufficient time for a User in Charge to regain their situational awareness. By adopting a regulatory system in which the UK sets its own safety standards before approving a CAV for use on our roads, we would, as a society, be giving ourselves the tools to eradicate or minimise these risks. With a sufficiently high safety standard, the nature of the CAVs being approved by our regulators could be seen as ‘Level 3+’: they cannot quite conduct all driving tasks within designated operational domains, but their safety systems and control mechanisms are such that the high-risk transition demands I mentioned above will be minimal and infrequent.
8. That is not to say, of course, that there will be no unexpected or unsafe transitions on our roads. Poor transitions will occur, whether due to the fault of the CAV/ADS (in which case the regulator may have cause to revisit the CAV’s safety case and certification), or of the User in Charge. But this problem is not confined to Level 3 vehicles: Level 4 vehicles are not immune to the risks associated with a short transition notice period (caused by, for example, snow or other bad weather causing the CAV to leave its operational design domain). Nor are they immune to a User in Charge struggling to regain concentration or

situational awareness. The existence of these risks, in and of themselves, is not a reason to ban Level 3 or Level 4 CAV technology: our society does not operate with zero tolerance for risk, and the use of a safety standard to minimise risk to a level that is ‘as low as reasonably practicable’ is a welcome move that is consistent with other safety-critical industries. It also has the benefit of being a standard that our courts and regulators have experience in understanding and applying.

9. The reduction of the risks associated with Level 3 CAVs is extremely important to the general future of CAV technology: high proportions of unsatisfactory transition demands, and of associated accidents on our roads, would undoubtedly damage the public’s confidence in CAV technology and the role it should play in our society’s future. It is important that the public do not lose faith in CAV technology before it has had an opportunity to properly demonstrate its longer-term potential to drastically reduce the number of injuries and fatalities on our roads.
10. It therefore follows that I strongly support the proposal, as set out in [Question 13](#), that a UK safety regulator should be making its own assessment of whether a CAV is capable of safely driving itself, secondary to a CAV obtaining type approval (i.e., as step two of a two-stage assessment). The UK base of the regulator is an important element of the safety assurance process: it ensures that our society’s technological knowledge, technological advancement, and risk appetite can all be reflected in our safety standard, as can the characteristics (or quirks!) of the UK’s roads, road infrastructure, and connectivity.
11. In terms of what the UK’s safety standard should look like, the three options posited by [Question 4](#) are, in my view, all problematic because of their ties to the actions and behaviours of humans. As is recognised within the consultation paper, CAVs and ADSs will perform some tasks better than humans (such as abiding by speed limits and road signs), but will suffer from weaknesses most humans do not (for example, mistaking a plastic bag as an impassable object in the road).
12. A UK regulator would, no doubt, assess the safety and suitability of a CAV by reference to a number of technical standards, capabilities, and to the CAV’s safety case. Those factors would, in turn, shed light on matters such as: the sort of driving tasks an ADS could or could not handle; how often transition demands would be issued, and in what scenarios; how a transition demand would take place (for example, the ‘offer and accept’ model); how much notice the system would give to a User in Charge before issuing a transition demand; and the possibility of a wholesale system failure occurring. It is highly desirable (and likely) that these considerations be codified, whether in guidance or in a code of practice; given the likelihood of rapid technological advancement in the early days of CAV technology, codification of these matters in secondary legislation seems likely to hinder regular updates. In my view, such a document could be referred to in its own right, and the picture need not be complicated by an

unnecessary reference to human standards of driving; for example, legislation could refer to a CAV which has been “*approved as being capable of safely driving itself by reference to [the relevant guidance / code of practice]*”.

13. This approach also sits well with two other concepts put forward in the consultation paper:

- a. First, that the risk posed by a CAV should be as low as reasonably practicable. Allowing the standard to adapt to technological advancements, and expecting a CAV’s safety case to reflect this, would serve to minimise risks. By contrast, setting the boundaries of safety by reference to the behaviour of a human may inadvertently set the bar too low; there may be particular risks that a CAV could eliminate that a human - whether “reasonable”, “competent”, or “careful” - could not; and
- b. Second, that society should shift its focus from who is ‘to blame’ for falling below prescribed standards of behaviour, toward a system of dialogue between the UK regulator, ADSEs, Users in Charge, and the CAV industry, all aimed at learning from – and ultimately minimising or eradicating – risk.

14. If I were forced to pick one of the three options put forward by Question 4, I would tend toward “*as safe as a human driver who does not cause a fault accident*”, as the other two options are inherently accepting of accidents caused by human error, and it is my view that the long-term goal for CAVs should be the elimination of accidents insofar as is possible. The tension between this long-term goal and the intermediate safety expectations of CAVs demonstrates another way in which referencing human behaviour may cause confusion: the general public may be confused by a regulator stating that CAVs should all be “*as safe as a human driver who does not cause a fault accident*”, whilst accepting the occurrence of CAV-fault accidents in the short to medium term, or, conversely, by a regulator stating that CAVs should be “*overall, safer than the average human driver*” whilst declining to certify a CAV as safe in light of a risk that may be presented by many humans (but is generally not present in other CAVs).

15. Irrespective of the standard adopted by the UK, there remains a risk that a CAV could be certified by our regulator as being safe to drive itself and yet subsequently become unsafe, for example, because of a cyberattack or maladaptive AI-based learning. It seems to me that a regulator can only assess a CAV’s ability to safely drive itself at a fixed point in time: it would be unreasonable to expect a regulator to have a continuing and ongoing obligation to regularly re-assess a CAV’s safety (other than by reference to fixed periods of time, for example a yearly re-certification process). This, in and of itself, is another reason why the safety standard adopted by the UK must indeed be a high one: there must be a high degree of confidence that a CAV is unlikely to become unsafe. In addition, I would suggest that a list of pre-defined events

should be identified as triggers for the regulator to revisit a CAV's certification and safety case (such as: accidents causing injuries or fatalities; cyberattacks which occur on a large scale or otherwise cause serious interference or disruption; international events or accidents which call a CAV's safety into question; and the inability of an ADSE to continue to meet its financial obligations in relation to CAV fines and/or compensation).

16. As for the proposals in Question 13 concerning the requirements on an ADSE prior to a CAV's certification as being safe to drive itself, I strongly agree that such control mechanisms are needed so as to prevent the risk of 'shell' ADSEs being unable to pay fines or compensate individuals. The determination of whether an ADSE has sufficient funds which are "accessible" may need further consideration: Will the funds need to be in England and Wales for enforcement purposes? Will the ADSE need to be a company registered in England and Wales? What measures will be taken to ensure that funds are not only present at the time of certification, but also in the years to come when problems may materialise?
17. On the basis that a UK regulator would insist upon a high safety standard which would eliminate or drastically reduce the risks associated with Level 3 CAVs (as I have discussed above), I am of the following views.

Question 1

18. It is appropriate for Users in Charge to not have any obligation to monitor their environment whilst an ADS is appropriately engaged. A sufficiently safe Level 3 vehicle should – in the majority of instances – issue transition requests which give a User in Charge sufficient time to regain situational awareness and assume the driving task in a safe environment. That being the case, any monitoring obligation – or obligation to override an ADS absent a transition demand – could, as set out in more detail at the start of this submission, detract from the benefits of a CAV, confuse Users in Charge, and perhaps increase the likelihood of an accident.
19. It would therefore follow that a Level 3 CAV certified by a UK regulator as self-driving would indeed fall within the remit of the AEVA 2018 (which has been the matter of some debate and, as I understand it, was not the original intention of Parliament¹).

Question 28

20. The proposed definition of a User in Charge as "*an individual in position to operate the controls of a vehicle while an ADS is engaged and who is either in the vehicle or in direct sight of the vehicle*" has, in my view, a flaw: it captures any

¹ See, for example, the letter of Baroness Sugg following the bill's second reading on 20 February 2018: http://data.parliament.uk/DepositedPapers/files/DEP2018-0264/Baroness_Sugg_-_Baroness_Randerson_AEV_Bill_2nd_reading.pdf

number of individuals who may be in a “position” to operate the CAV, rather than the intended User in Charge. For example, a family could all be licensed to operate their CAV, and all be taking a journey in the CAV at the same time. Assuming that modern technology will not restrict a User in Charge to a typical ‘driver’s seat’, will all of the adults be deemed Users in Charge? What if they had agreed that one person would be the User in Charge, thus allowing the others to consume alcohol? The answer to this may be a technical one: individuals may need to ‘opt in’ to their legal responsibilities as a User in Charge prior to using a CAV, thereby identifying – and recording – the intended User(s) in Charge.

21. The question of civil penalties, such as parking tickets, arising out of dynamic driving is an interesting one: if the User in Charge is not responsible for where their CAV parks, who is? What if a parking ticket arises because the charge to a bank account failed? It seems inappropriate for this responsibility to be attributed to the ADSE, particularly if mapping technology is not currently able to inform a CAV where it can park for free, and whether there are any available parking spots. In my view, holding Users in Charge accountable for such matters need not conflict with the concept that a User in Charge is not responsible for the driving task whilst an ADS is appropriately engaged: a User in Charge could have a separate civil responsibility of taking reasonable steps to ensure that the CAV is appropriately parked. As CAV technology, mapping and ownership models continue to adapt to our modern environments, this discrete liability may need revisiting. But, in the absence of technological assurances that CAVs would rarely, if ever, be unable to park themselves in such a way that civil penalties would not be incurred, this seems an inappropriate step at this time.

Question 29

22. I agree that a User in Charge should reacquire legal responsibility for the driving of a CAV at the end of a transition demand period, whether or not the User in Charge has, in fact, responded to the transition demand. This would, in turn, mean that a User in Charge has civil or criminal responsibility for how and where the CAV comes to a stop, for example, if a CAV’s minimum risk manoeuvre results in it stopping in such way as to block a junction. There will, no doubt, be concerns that a User in Charge would acquire this legal liability in circumstances where they were incapable of effectively responding to the transition demand, whether due to an improper or unsafe demand from the CAV, or due to their own incapacity. However, in my view our legal system and regulators are capable of identifying and extricating these situations so as to ensure that a User in Charge would not be unfairly penalised if, on further investigation, they were found not to be at fault. This is discussed in my answer to Question 34 below.

Question 34

23. As discussed above, it is entirely appropriate that a User in Charge should be capable of avoiding civil or criminal liability in connection with the driving of a CAV in circumstances where they could not reasonably have avoided an offence,

or events which amount to common law negligence. If the law were otherwise, this would amount to a ‘blanket liability’ on Users in Charge following the issuing of a transition demand, which would place individuals in a worse position than they are currently in. Furthermore, such a system would undermine an ADSE’s responsibility to ensure that its CAVs issue safe transition demands.

24. As will be well known to the Law Commission, the current legal test in civil proceedings is to ask whether the actions of a driver fell below the ‘reasonable’ standard. When considering how a User in Charge responded to a transition demand from an AI-driven system, it is illogical to ask whether the User in Charge was behaving ‘reasonably’; the question is, instead, one of whether they could and should have been able to navigate the situation and the transition demand. This depends not on their reasonableness, but on whether they competently navigated the situation, and thus the test of a “*competent and careful driver*” seems appropriate.
25. Some may be concerned that the standard of a “*competent and careful driver*” is a new one, and therefore unpredictable. However, in my view, the standard is likely to operate similarly – and produce similar outcomes – to the ‘reasonable driver’ standard deployed in civil proceedings.
26. An alternative test to consider is whether it was ‘reasonably practicable’ for a User in Charge to avoid the offence: this is a test that the criminal courts are used to applying in the context of health and safety legislation, and would put the emphasis on the realities of the situation that the User in Charge finds him or herself in, rather than on his or her competence.

Question 54

27. Finally, I would like to add that it is my view that a wholesale review of product liability law in England and Wales is not only necessary, but overdue; the Consumer Protection Act 1984, and the case law interpreting it, fails to reflect various facets of our modern lives. If society is to accept the Law Commission’s proposed ‘step change’ when it comes to the dialogue surrounding road traffic accidents, it needs to be confident that, when things do go wrong, compensation will follow. At the moment, neither individuals nor AEVA insurers can be confident of that.
28. It would not be in anyone’s interest for product liability and consumer protection laws to develop in a siloed manner. However, a wholesale review of these laws will take time, and so should not be delayed.

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13 March 2021

Submission by Paul Erdunast

1. This response focuses on data protection responsibilities of ADSEs, in particular insofar as they interact with the evidence-gathering process in legal claims where one or more automated vehicles are involved.
2. In summary, I agree with the Law Commission that so long as adequate safeguards are in place, collecting location and timestamp data within the DSSAD should be compatible with GDPR.
3. Such safeguards include information security. The core of many people's privacy concerns regarding location, video feed and timestamp data centres around the three risks identified by the "Berlin Group" as highlighted by Alex Glassbrook, of Temple Garden Chambers, cited at paragraph 17.89 of the Law Commission's Consultation Report:
 - a. *Unauthorised secondary use*: for example, controllers might sell data to commercial organisations.
 - b. *Lack of control*: for example, data might be accessed by others using the vehicle.
 - c. *Lack of accountability*: with too many different people involved in data retention and processing.
4. Therefore I will answer Consultation Question 58 first. In short, I agree that it is essential that a future regulator robustly ensures that an ADSE has both the will and the systems to ensure that it abides by its GDPR responsibilities.

5. Consultation Question 58 proposes the following:

"We provisionally propose that:

(1) when an ADSE applies for categorisation of its vehicle types as self-driving, it should present the regulator with details on how data will be recorded, stored, accessed and protected;

(2) the regulator should only categorise a system as self-driving if it is satisfied that that the ADSE has systems to abide by its obligations under the GDPR.

Do you agree?"

6. I agree with the principles that appear to be behind paragraph 2, namely an emphasis on having adequate systems in place to ensure compliance with the GDPR, and in particular information security. I would propose the following phrasing in order to ensure that those principles are at the forefront and so that the public can have confidence that the regulator will apply a stringent test to ADSEs:

"(2) the regulator should only categorise a system as self-driving if it is satisfied that the systems put in place by the ADSE ensure that it will abide by its

obligations under the GDPR and, in particular, that it will protect the security of stored information at all times.”

7. I agree that the ePrivacy Directive was not made with automated vehicles in mind. It can be seen in particular in relation to the narrowness of the exceptions. Providing location data of an accident to insurers is fundamentally different from providing a backend hack into someone’s telephone messages. In my view, putting in place the measures that the Law Commission recommends in questions 55-58 would not likely risk the EU concluding that the UK has failed to respect data protection law. This is particularly the case given the EU’s own remarks quoted in the consultation paper regarding how the ePrivacy Directive has failed to keep up with changing times.

8. Consultation Question 55 provides as follows:

“We provisionally propose that:

(1) for a vehicle to be classified as self-driving, it needs to record the location as well as the time at which the ADS is activated and deactivated;

(2) the Government should work within the UNECE to ensure data storage systems for automated driving record these data; and

(3) any national system to approve an ADS should require these data to be collected, subject to safeguards.

Do you agree?”

9. I would like to address the safeguards mentioned in subparagraph (3) by reference to the collection of personal data, including special category data, mentioned in 17.50(1) and (2). When data is collected for the purposes of investigating a criminal matter or provided to insurers for the purposes of dealing with claims (17.50(1)), the investigation relates to an identifiable individual, and therefore the data would not be anonymised. However, there is no reason that I can see not to anonymise data in the context of learning lessons from investigation of high-profile collisions and generalised monitoring of the risks to vulnerable road users from AVs. It should not be onerous for an ADSE to have systems in place to anonymise the data that they hold immediately before sharing it with relevant bodies (but keeping their own version non-anonymised).

10. This would provide a solution in these instances to the problems around processing data, including sensitive data: as recital 26 to the GDPR makes clear, the data protection principles do not apply to anonymous information.

11. When considering privacy issues, it is helpful in a UK context to consider Article 8 ECHR, and in particular the exceptions set out in subparagraph (2):

“Article 8 of the Convention – Right to respect for private and family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

12. Article 8 additionally takes into account the value of the information that is being protected when it is balanced alongside the relevant public interest (in this instance, public safety, the prevention of disorder or crime, and for the protection of the rights and freedoms of others). It seems to me that the value of specific location and timestamp data over seconds or at most minutes, in relation to road traffic accidents is very unlikely to have a high level of privacy accorded to it in and of itself (contrast ‘backdoors’ into mobile phone messaging apps). Furthermore, as long as the data is anonymised before it is shared with public bodies for their investigations as suggested at paragraph 9, insurers dealing with cases and the criminal justice system both currently require disclosure of the location and time of the accident: therefore there seemingly need not be privacy concerns in this specific situation about disclosing such data. Accordingly, when one considers the weighty public interest in investigating crimes and settling or deciding civil cases fairly, in my view it is clear that the balance lies in favour of recording location and timestamp data, and disclosing it in appropriate circumstances.

13. This is why I have accorded so much concern to issues of information security, putting my answer to Consultation Question 58 at the top of my response. Privacy breaches by the data controller or hacks by third parties may reveal information that is much more central to someone’s private life than the authorised releases of information that the Law Commission proposes. If ADSEs can satisfy the public that they securely store recorded information, then in my view the privacy concerns would be much less significant than they are currently (or at least much less justifiable!).

14. I therefore agree with the remainder of Consultation Question 55.

15. Consultation Question 56 states:

“We provisionally propose that legislation should impose a duty on those controlling AV data to disclose data to insurers, where the data is necessary to decide claims fairly and accurately.

Do you agree?”

16. I agree with the Law Commission’s answer to this question as well as its reasoning. That said, I would subtly amend the phrasing of “*necessary to decide claims fairly and accurately*”.

17. The term “necessary” is used in a looser sense in a GDPR context than elsewhere on the statute book. The ICO glosses this word as follows [on its website](#):

“When is processing 'necessary'?”

Many of the lawful bases for processing depend on the processing being “necessary”. This does not mean that processing has to be absolutely essential. However, it must be more than just useful, and more than just standard practice. It must be a targeted and proportionate way of achieving a specific purpose. The lawful basis will not apply if you can reasonably achieve the purpose by some other less intrusive means, or by processing less data.”

18. Furthermore, in the interests of internal consistency, there would seem good reason to replace “decide claims fairly and accurately” with the phrase used in the GDPR in relation to processing of sensitive data at Article 9(2)(f): “*processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity*”;

19. It would therefore be sensible to avoid confusion or litigation by doing one of two things:

- a. Change “*processing is necessary to decide claims fairly and accurately*” to “*processing is a targeted and proportionate way to establish, exercise or defend legal claims*”; or
- b. Change “*processing is necessary to decide claims fairly and accurately*” to “*processing is necessary to establish, exercise or defend legal claims*”, and define “necessary [for a purpose]” in the legislation as “a targeted and proportionate way [to achieve a purpose]”.

20. Which of these options is chosen may depend on factors that are specific to the relevant provisions, such as ease of reading in context of other provisions. My instinct, however, would be that the first option is preferable.

21. Consultation Question 57 reads as follows:

“We provisionally propose that:

(1) initially, DSSAD data from self-driving vehicles should be stored for three years; and

(2) the issue should be reviewed in the light of experience.

Do you agree?”

22. I agree with the Law Commission that the Government should err on the side of caution, and on the side of doing justice in individual claims at the risk of collecting larger amounts of data (17.78). There must be a balance. It would seem inconsistent for data to be destroyed before the limitation period, legislated for in the Automated and Electric Vehicles Act 2018, designed

precisely for such vehicles, expires. Why should a person who waits closer to the limitation period to expire, as they are entitled to do and may choose to do for any number of justifiable reasons, be seriously disadvantaged as opposed to another whose claim is issued quicker?

23. There is a further point, however. If a non-AV driver is hit by an AV and makes a claim just before the limitation period, the insurer would have little to no time to request the relevant data before it is destroyed. Such data would be helpful not only to the insurer in defending the claim and the Claimant for proving the claim, but additionally to the insurer in making a potential product liability claim against the ADSE under s5 Automated and Electric Vehicles Act 2018, which they have two years to do from the settlement of the insurer's liability: s10A Limitation Act. Accordingly, a three-year time period until destruction risks serious problems down the line. Erring on the side of caution, in my view a four-year time period for retention would appear sensible.

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