

# FOCIS

The Forum of Complex Injury Solicitors

**The Forum of Complex Injury Solicitors  
(FOCIS)**

**Response to**

**Law Commission Consultation 3: A  
regulatory framework for automated  
vehicles**

**March 2021**

## About Us

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims, including group actions. The objectives of FOCIS are to:-

1. Promote high standards of representation of Claimant personal injury and medical negligence clients;
2. Share knowledge and information among members of the Forum;
3. Further better understanding in the wider community of issues which arise for those who suffer serious injury;
4. Use members' expertise to promote improvements to the legal process and to inform debate;
5. Develop fellowship among members.

See further [www.focis.org.uk](http://www.focis.org.uk)

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 22 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Seven of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hugh James
Atherton Godfrey	JMW
Ashtons Legal	Irwin Mitchell
Balfour + Manson	Leigh Day
Bolt Burdon Kemp	Moore Barlow LLP
Dean Wilson	Osbornes
Digby Brown	Potter Rees Dolan
Fieldfisher	Serious Law LLP
Fletchers	Slater & Gordon
Freeths	Stewarts
Hodge Jones & Allen	Thompsons NI
Hudgell Solicitors	

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims. In line with the remit of our organisation, we restrict our responses relating

to our members' experience, practices and procedures relating to complex injury claims only. We will defer to others to respond on the impact relating to other classes of case.

## **Introduction**

FOCIS<sup>1</sup> welcomes the opportunity to respond to the Law Commissions' consultation 3 on the regulatory framework in relation to automated vehicles. We respond to this consultation from the perspective of ensuring access to justice for our seriously injured clients, and with reference to consultations 1 and 2 of this review.

We remain concerned regarding the limited scope of the strict liability regime detailed in the Automated and Electric Vehicles Act 2018, which would not extend to accidents which occur beyond roads or public places in Great Britain. We are aware that the government has recently confirmed it has no intention of following the EU jurisprudence on this issue, detailed in Vnuk, but it is our view that in order to protect victims of accidents, the AEVA should extend beyond UK roads. It remains our view that the strict liability regime in the AEVA will not go far enough in protecting injured victims. As we have already seen with the RTA 1988, there remains scope for accidents away from 'roads and public places'. If, for example, a pedestrian is injured by an AV on private land, such as by an automated tractor, the victims should still be able to rely on the strict liability regime within the AEVA. The absence of coverage in this respect will only serve to hinder access to compensation and leave the victim facing a potentially lengthy dispute over negligence and/or product liability issues. We call on the government to expand the application of the strict liability regime within the AEVA and update the RTA 1988. In doing so, UK legislation would simply reflect the sensible laws in a number of EU countries.

We note and comment upon the further thought given to the premise of the 'user in charge' (UIC). Where an innocent victim is injured in an accident with a vehicle driving in semi-autonomous mode (or SAE 3 with a UIC), we remain concerned that some may have to pursue costly and complex claims against technology manufacturers, in order to access compensation.

We still consider that public confidence will be integral to success of automated vehicles on our roads, and reiterate our call for a sustained public education campaign as the technology moves closer to reality on our roads. Such education must be clear on the requirements and expectations of a UIC and the applicability of true strict liability under the AEVA.

Some of the responses below are provided with reference to our earlier comments, as appropriate.

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<sup>1</sup> With thanks to Lucie Clinch, Knowledge Development Lawyer at Stewarts for assistance with this response

## Response

### **Chapter 4: SELF-DRIVING AND HUMAN INTERVENTION**

#### **Consultation Question 1 (Para 4.114)**

**We provisionally propose that:**

- 1) a vehicle should not be classified as self-driving if, with the ADS engaged, the user-in-charge needs to monitor the driving environment, the vehicle or the way it drives;**
- 2) it is nevertheless compatible with self-driving to require the user-in-charge to respond to a clear and timely transition demand which:
  - a) cuts out any non-driving related screen use;**
  - b) provides clear visual, audio and haptic signals; and**
  - c) gives sufficient time to gain situational awareness;****
- 3) to be classified as self-driving, the vehicle must be safe enough even if the human user does not intervene in response to any event except a clear and timely transition demand.**

**Do you agree?**

Yes.

In relation to Path 1 vehicles, we agree that a human is required in the vehicle and this will be a user in charge. We agree that the intended absence of driver liability in using an AV will require stringent regulation of AV driving behaviour at national level<sup>2</sup>. We note further work is required from Working Party 1 on the resolution as to what an ADS must do before 'drivers' can engage in non-driving activities<sup>3</sup> and we agree that there is and, will continue to be, scope for confusion amongst drivers as to what the various automation features can and cannot do, and what they as users in charge are required to do.

The Autonomous and Electric Vehicles Act 2018 (AEVA) confirms that the test relating to whether the vehicle is 'driving itself' is one where it 'does not need to be monitored by an individual'<sup>4</sup>, suggesting that secondary activities should be possible for the user in charge. It is clear from the paper that there remains difficulties in understanding the different types of 'autonomous vehicles' and which ones, using the SAE scale, would be covered by the AEVA. We suggest that all automated vehicles confirm their 'type' on start up together with a message as to the expectations of the UIC. As stated in our response to the initial consultation, the AEV Act 2018 does not, on the face of it, apply to vehicles which are not driving themselves (i.e. those with semi-autonomous features, ADS driving, or driver monitoring) and by extension the vehicles clearly will now require a driver if the vehicle is incapable of doing a safe stop.

We note the Commission proposal is with a focus on SAE level 3, which does not require users to monitor the driving environment, but does require users to be receptive to a transition demand and we agree with the above proposal in this respect. We agree that the law should give clear messages about what is and is not, "self-driving" and that humans in these vehicles

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<sup>2</sup> Para 3.72

<sup>3</sup> Para 4.49 of the Paper

<sup>4</sup> S8(1) AEVA 2018

should be clear on what is expected of them.

We agree that the vehicle must be safe enough even if the human user does not intervene in response to any event except a clear and timely transition demand. However, we continue to stress the importance of user training in this regard, particularly on the basis that the user in charge would not be expected to intervene in other scenarios.

Our proposals at question 52 regarding wording of the AEVA would reflect what is already part of road traffic legislation in other EU countries in relation to strict liability.

## **Consultation Question 2**

**We welcome views on whether self-driving features should be designed to ensure that they can be used by people with hearing loss.**

Yes they should be safe for use by people with hearing loss.

As stated in the paper, around 11 million people in the UK suffer with hearing loss and are able to hold a driving licence. We consider that self-driving features should ensure the vehicles can be used by people with hearing loss, via vibration or haptic signals to alert the driver to a transition demand. Autonomous vehicles should make the roads more accessible to many, particularly those with disabilities, and those who are hard of hearing should not be excluded from the regime due to a lack of design features.

## **CHAPTER 5: HOW SAFE IS SAFE ENOUGH**

### **Consultation Question 3 (Paragraph 5.118)**

**We provisionally propose that the decision whether a vehicle is sufficiently safe to “safely drive itself” should be made by the Secretary of State, as informed by advice from a specialist regulator.**

**Do you agree?**

Yes.

### **Consultation Question 4 (Paragraph 5.119)**

**We welcome observations on which of the following standards is most appropriate when assessing the safety of automated vehicles:**

- (a) **as safe as a competent and careful human driver;**
- (b) **as safe as a human driver who does not cause a fault accident;**
- (c) **overall, safer than the average human driver.**

The arrival of autonomous vehicles on our roads comes hand in hand with a promise to make roads safer. It is therefore reasonable to assume that the general public will expect a high standard from automated vehicles, when considering safety. It is a challenge for developers to program and for AVs to be rigorously tested with all contextual aspects of the road and potential incidents.

The removal of ‘blame’ on a human, in the context of an accident involving an AV will render some expectation that the vehicles are as safe as possible before they reach the roads. We

note the comments that waiting for an almost perfect vehicle is more likely to delay the benefits of AVs on the roads. It is our view that a combination of the above factors will initially need to be considered, given this is not a human driver, and one human driver may take different actions to the next. It would be reasonable to expect the vehicle to be safer than the average human driver (c).

The difficulty of capturing legal standards, such as a reasonable competent driver, in mathematical models cannot guarantee safety (as stated at para 2.50 of the Paper) as mathematics cannot catch all the aspects which might lead road users, lawyers and courts to blame a driver for what has happened.

In any event, as stated in our previous response, the public may not be wholly convinced or reassured by a comparison between automated driving systems and human drivers. We have already seen considerable press coverage around accidents involving self-driving vehicles and smart motorways. The public are likely to be suspicious and more critical of accidents involving self-driving vehicles than they are about human caused accidents. The automated driving systems should be compared against each other. Over time the expectation is that automated driving systems should prove much safer than human drivers, so caution should be applied to setting the current high level of accidents involving human drivers as the benchmark. Data will be required to confirm a decline in injury rates on our roads, and this will take time.

#### **Consultation Question 5 (Paragraph 5.120):**

**We welcome observations on how automated vehicles can be made as safe as reasonably practicable.**

We defer to the manufacturers on this point. We would suggest that an automated vehicle should be capable of detecting vulnerable road (and pavement) users, and is put through stringent tests in relation to a number of collision scenarios. The testing scenarios will need to be updated to reflect changing requirements of the law, particularly in light of the recently proposed changes to the Highway Code in relation to pedestrian priority on pavements, giving way to pedestrians crossing the road as well as the updated guidance on safe passing distances and speeds when overtaking cyclists or horse riders<sup>5</sup>. It is important that the vehicle is able to make decisions similar to those of a human, via appropriate algorithms, whilst accepting that not all humans would take the same action in any given scenario. In relation to how this is achieved, and appropriate modelling, we defer to manufacturers, software developers and programmers.

#### **Consultation Question 6 (Paragraph 5.121):**

**We welcome practical suggestions for how AV regulators can fulfil their public sector equality duty.**

Regulators must consult with a variety of road users and drivers as to what reactions might be taken in differing scenarios. It is important that any bias, in relation to sex, race and disability are removed from these discussions. As above hearing loss is a prime example of a disability which the AV regulator will need to consider.

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<sup>5</sup> See response to DfT Consultation on review of the Highway Code October 2020

## **CHAPTER 7<sup>6</sup>: ASSESSING SAFETY PRE-DEPLOYMENT**

### **Consultation Question 7 (Paragraph 7.99):**

**We provisionally propose that:**

- (1) safety assessment should use a variety of techniques;**
- (2) manufacturers/developers should submit a safety case to regulators showing why they believe that the automated driving system is safe;**
- (3) regulators should:**
  - a) provide guidelines for what is in the safety case;**
  - b) audit the safety case;**
  - c) prepare guidance for manufacturers and developers on preferred standards; and**
  - d) carry out at least some independent tests.**

**Do you agree?**

We do not express a view on this question, save to suggest that the above criteria is published prior to the approval of the safety of a new AV for the market.

### **Consultation Question 8 (Paragraph 7.100):**

**We seek views on whether an approval authority that intends to use a scenario database as part of the testing procedure should consult road user groups on the range of scenarios to be included.**

Yes; consultation with road user groups is essential. Further, any testing scenarios should reflect changes in the law, for example, in situations where the Highway Code has been updated since the advent of the technology. Similarly, any updates to safe road use or 'best practice' should also be updated into any existing AV technology.

## **CHAPTER 8: INITIAL APPROVALS AND CATEGORISATION – PROPOSALS**

### **Consultation Question 9 (Paragraph 8.17)**

**We provisionally propose that:**

- 1) unauthorised automated driving systems should be prohibited; and**
- 2) this should be subject to an exemption procedure by which the Secretary of State may authorise unauthorised systems to be used in tests and trials.**

**Do you agree?**

Yes subject to those tests and trials being designed and constrained to ensure the safety of other road users and the public.

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<sup>6</sup> There is no questions within Chapter 6

## **Consultation Question 10 (Paragraph 8.25)**

**We provisionally propose that:**

- 1) the Government should establish a domestic scheme to approve automated driving systems (ADSs) for use on roads in Great Britain (a “national ADS approval scheme”);**
- 2) manufacturers should have a free choice to apply for approval under either the UNECE system of international type approvals or through the national scheme;**
- 3) developers should be able to submit an ADS for national approval, even if they are not responsible for manufacturing the whole vehicle.**

**Do you agree?**

We consider that every automated vehicle should be authorised at either international or national level<sup>7</sup>. Such a system has potential to minimise disputes between manufacturer and developer and/ or importer and they can effectively agree to assume ongoing responsibility for the AV system. As stated in our response to Q9 of the first consultation, such a scheme would be needed to encourage public confidence. However, it should be clear that approval can be sought without the need to submit a whole vehicle for approval. We agree that most manufacturers selling vehicles across borders will still likely seek international approval, and should continue to do so. However, this is subject to the caveat that no material difference in standard between the UNECE and national scheme arises. It is possible there may be UK requirements, for instance reflecting aspects of the Highway Code (e.g. safe passing space and speed for cyclists and horses), that will not be reflected in the UNECE standards.

## **Consultation Question 11:**

**We provisionally propose that:**

- 1) an ADS approval scheme should be established through regulation under the Road Traffic Act 1988, without further legislative reform;**
- 2) an ADS should be defined as a combination of software, hardware and sensors, which can be installed in a “type” of vehicle;**
- 3) when an ADS is approved, the approval should be accompanied by specifications for:
  - a) the type of vehicle in which it can be installed; and**
  - b) how the ADS is installed within the vehicle;****
- 4) where an ADS is installed in a pre-registered vehicle, an example vehicle should be submitted to the regulator for approval of the installation.**

**Do you agree?**

We broadly agree although we reiterate our submissions from AV consultation 1 that the RTA 1988 requires a complete overhaul. Clarity over approvals will impact on user confidence.

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<sup>7</sup> Para 4.105 of the Law Commission Consultation Paper Summary



**Consultation Question 12 (Paragraph 8.44):**

**We invite observations on the appeal process in regulation 19 of the Road Vehicles (Approval) Regulations 2020, including:**

- i. how it works in practice; and**
- ii. how well it is suited to the proposed national ADS approval scheme.**

We do not express a view on this question.

**Consultation Question 13 (Paragraph 8.71)**

**We provisionally propose that:**

- 1) once an ADS has received type approval at either international or domestic level, an Automated Driving System Entity (ADSE) would need to submit the vehicle to the UK safety regulator for categorisation as able to safely drive itself;**
- 2) the safety regulator should make a recommendation to the Secretary of State for how the vehicle should be classified;**
- 3) it should be open to the safety regulator to recommend that an ADS-enabled vehicle is classified in one of three ways: as not self-driving but driver assistance; as self-driving only with a user-in-charge; or as self-driving without a user-in-charge;**
- 4) the safety regulator should only recommend classification as self-driving (either with or without a user-in-charge) if it is satisfied that:**
  - 1. an ADSE is registered as taking responsibility for the system;**
  - 2. the ADSE was closely involved in assessing safety and creating the safety case; and**
  - 3. the ADSE has sufficient funds accessible to the regulator to respond to improvement notices, to pay fines and to organise a recall.**

**Do you agree?**

Yes. All of the above suggestions should ensure maximum safety of the ADS via the categorisation and approval process. We would add that for self-driving vehicles that were subject to international rather than national approval the safety regulator should, when classifying the vehicle for UK road use, consider whether it meets all aspects of the Highway Code.

**Consultation Question 14**

**We provisionally propose that a new legislative framework should provide regulation- making powers to specify:**

- (a) who should assess whether a vehicle is capable of self-driving;**
- (b) the procedure for doing so; and**
- (c) criteria for doing so.**

**Do you agree?**

We agree that regulation making powers should be legislated separately and agree with the Paper that regulations would bring some parliamentary oversight and formality to the process, while allowing flexibility to learn from experience<sup>8</sup>. As mentioned in the paper, the AEVA provides simple categorisation of self-driving in section 1 but does not include any guidance on the relevant regulatory requirements to be met before the AEVA is involved in relation to an accident. It is important that the assessment should be made by the Secretary of State and that the procedure and criteria in doing so, is clear.

As stated above, the RTA 1988 is not an appropriate place for expansion of the legislative and regulatory framework for AVs, and the AEVA is not going to be expanded to deal with the new ADS approval scheme, therefore it would be more appropriate to overhaul the relevant road traffic legislation now. As stated in our introduction, doing so would simply reflect the current law already in place in many EU countries.

#### **Consultation Question 15 (Paragraph 8.78)**

**We seek views on whether the new legislation should include provisions for appeals against a categorisation decision. If so, should these be similar to those in regulation 19 of the Road Vehicles (Approval) Regulations 2020?**

We do not express a view on this question.

#### **Consultation Question 16 (Paragraph 8.83)**

**We seek views on whether the regulator that classifies vehicles as self-driving should have power to allow their deployment in limited numbers, so as to gather further data on their safety in real world conditions.**

Whilst we agree it may be sensible to permit limited deployment for data gathering purposes, but would remain concerned that the vehicle is not ready for 'real world' testing and therefore any classification and release of these vehicles would need to have stringent measures in place so as to avoid harm to other road users, assuming such vehicles will share the roads with conventional ones. We note that there is already a Code in Practice<sup>9</sup> in place for testing of vehicles in real world conditions. If 'self-driving' in this context is to be via vehicle requiring a user in charge, the users in charge will need training on managing the vehicles before they are released into real world conditions and other road users should be made aware of areas and zones where these vehicles are active.

### **CHAPTER 10: ASSURING SAFETY IN USE**

#### **Consultation Question 17 (Paragraph 10.82)**

**We provisionally propose that legislation should establish a scheme to assure the safety of automated driving systems following deployment, giving scheme regulators enhanced responsibilities and powers. Do you agree?**

Yes. A safety scheme would also serve to increase consumer confidence where regulators of the scheme are responsible for safety and compliance with the law.

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<sup>8</sup> Para 3.33 summary Paper

<sup>9</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/446316/pathway-driverless-cars.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/446316/pathway-driverless-cars.pdf)

### **Consultation Question 18 (Paragraph 10.83)**

**We provisionally propose that the enhanced scheme should give regulators the following responsibilities and powers:**

- 1) Scheme regulators should be responsible for comparing the safety of automated and conventional vehicles using a range of measures;**
- 2) To do this the regulator should have power to collect information on:
  - a) leading measures (instances of bad driving which could have led to harm) and**
  - b) lagging measures (outcomes which led to actual harm);****
- 3) Regulators should have power to require an ADSE:
  - a) to update software where an update is needed to ensure safety and continued compliance with the law;**
  - b) to keep maps up-to-date, where an AV relies on maps to ensure safety and compliance with the law;**
  - c) to communicate information about an ADS to users in a clear and effective way, including where necessary through training.****

**Do you agree?**

Yes. As the AEVA is clear that safety critical updates must be made to the vehicle, with responsibility for this ultimately falling to the UIC or registered owner. We agree that more responsibility should be upon the ADSE to update the software, maps and information as required to ensure safety of these vehicles. Training of users will be imperative particularly if there are steps that must be taken by the UIC, before a journey begins. As we stated in our earlier response, ideally, it should not be possible to start the vehicle without software updates being carried out. Similarly, if maps are crucial to the safety of the vehicle, it should not start if the maps are not updated. We agree in principle that the regulator should have the power to require the ADSE to complete the above steps, rather than the consumer.

### **Consultation Question 19 (Paragraph 10.84)**

**We welcome views on the following issues:**

- 1) Should scheme regulators be empowered to approve software updates that apply only within the UK, without requiring the manufacturer to return to the original type approval authority?**
- 2) Should the scheme also deal with cybersecurity?**
- 3) Are other powers needed? (note that data is discussed in Chapter 17)**

1) Yes, as for UNECE approved vehicles this may be necessary to facilitate UK only software updates to comply with the Highway Code.

2 & 3) We do not express a view on these questions.

### **Consultation Question 20 (Paragraph 10.100)**

**Should the authority administering the scheme to assure safety while automated vehicles are in use be kept separate from type approval authorities (as is already the case)? Alternatively, should both functions be combined in a single body?**

We do not express a view on this question, save to say that the system might be clearer with a combined body dealing with the safety and approval process. We note that the Commission considers that risk of issues slipping between two bodies could be overcome by close working relationships.

### **Consultation Question 21 (Paragraph 10.101)**

**What formal mechanisms could be used to ensure that the regulator administering the scheme is open to external views (such as duties to consult or an advisory committee)?**

We do not express a view on this questions save to say that wider views of road users, drivers and vulnerable road users will be important in ensuring safety for all.

## **CHAPTER 11: INVESTIGATING TRAFFIC INFRACTIONS AND COLLISIONS**

### **Consultation Question 22 (Paragraph 11.24)**

**We provisionally propose that a statutory scheme to assure AVs in-use should:**

- 1) investigate safety-related traffic infractions (such as exceeding the speed limit; running red lights; or careless or dangerous driving);**
- 2) investigate other traffic infractions, including those subject to penalty charge notices;**
- 3) if fault lies with the ADSE, apply a flexible range of regulatory sanctions.**

**Do you agree?**

Any regulatory authority in respect of offences should have appropriate expertise to consider and seek to encourage rectification of any faults. We agree with the paper that it is unlikely that a financial penalty would have the same effect on an ADSE than a human driver, carrying the risk that it may be cheaper to pay fines than rectify the problem. It is acknowledged, for example, that some automated vehicles may not recognise a manual (not data enabled) temporary speed limit sign and could commit infringements in this regard. However, we would consider it important that automated vehicles can read such signals, before they are on the roads, to ensure safety to other road users.

We agree the proposed graduated regime in which the penalties increase over time for regular infringements. If the fault truly lies with the ADSE, there should be a range of sanctions available to ensure any issue is rectified promptly and appropriately.

The authority should be able to investigate AVs wider compliance with the standards set by the Highway Code even if they do not amount to a traffic offence.

### **Consultation Question 23 (Paragraph 11.53)**

**We provisionally propose that the regulator which assures the safety of AVs in-use should have powers to impose the following sanctions on ADSEs:**

- 1) informal and formal warnings;**
- 2) fines;**
- 3) redress orders;**

- 4) compliance orders;**
- 5) suspension of authorisation;**
- 6) withdrawal of authorisation; and**
- 7) recommendation of attendance at a restorative conference.**

**Do you agree?**

Yes, but we would add that in addition to fines the regulator ought to also have the power to order for the ADSE to pay reasonable legal costs both of the regulator and of adversely affected parties (notably accident victims).

We consider that the implementation of restorative conferences with accident victims and/or victims' families will encourage user confidence and trust in automated vehicles. Similarly, it is important that the ADSE is able to speak with victims of accidents to explain why they consider an accident has happened, and be given an opportunity to apologise. Whilst this idea is taken from the idea of restorative justice in relation to a crime context, it could also have a valuable place in civil matters whereby injury has occurred.

#### **Consultation Question 24 (Paragraph 11.54)**

**We provisionally propose that the legislation should provide the regulator with discretion over:**

- 1) the amount of any monetary penalty; and**
- 2) the steps which should be taken to prevent re-occurrence of a breach.**

**Do you agree?**

We agree that the principle of discretion seems reasonable, but would suggest that any regime should be transparent in relation to levels of fines, warnings and compliance, including the ultimate discretion/sanction to remove approval of the vehicle. To be effective the scale of fines should be related to the commercial value to the ADSE of the turnover for their AV business, perhaps in a similar fashion to fines imposed by the ICO for data breaches. This scale should also be related to repetition and risk of harm, i.e. if a number of breaches have occurred in a short space of time, there should be the option to move to more serious sanctions, rather than moving from the bottom of the scale of sanctions, i.e. issuing a small fine for a series of breaches is unlikely to prevent further issues.

#### **Consultation Question 25 (Paragraph 11.69)**

**We provisionally propose that a specialist incident investigation unit should be established:**

- a) to analyse data on collisions involving automated vehicles;**
- b) to investigate the most serious, complex or high-profile collisions; and**
- c) to make recommendations to improve safety without allocating blame.**

**Do you agree?**

Yes. We agree with the thrust of the paper<sup>10</sup> that a specialist investigation unit carries several advantages and refer to our answer Q14 in the 2019 response to Consultation 1. It remains imperative that a new investigation unit be funded appropriately and are able to conduct investigations to a high standard in a timely fashion. We reiterate our suggestion for any report to be issued within 28 days of a serious accident and such reports should be admissible as evidence in civil proceedings. We agree that the central role of the investigation should be to make relevant safety recommendations. It is correct that the branch should be required to investigate the most serious, complex or high profile collisions to ensure the resources and expertise, are properly used. This should not detract from the ability of police forces to investigate conventional accidents in the usual way.

### **Consultation Question 26 (Paragraph 11.82)**

**We provisionally propose that the UK Government should establish a forum for collaboration on the application of road rules to self-driving vehicles.**

**Do you agree?**

Yes.

### **Consultation Question 27 (Paragraph 11.83)**

**We welcome views on:**

- 1) the issues the forum should consider;**
- 2) the composition of the forum; and**
- 3) its processes for public engagement.**

It is important that user groups are formed to assist with public confidence in the safety of these vehicles, how road rules might be interpreted by AVs and those scenarios where the public might consider mounting the pavement to be appropriate, i.e. in the instance of a passing emergency vehicle, and as discussed within the paper. We consider that the chairing of any such forum is by an independent expert either from the regulator, or manufacturers, developers or insurers.

## **CHAPTER 12: THE USER-IN-CHARGE**

### **Consultation Question 28 (Paragraph 12.24)**

**We provisionally propose that that the user-in-charge:**

- 1) should be defined 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; and**
- 2) is not a driver while the ADS is engaged, and would not be liable for any criminal offence or civil penalty (such as a parking ticket) which arises out of dynamic driving.**

**Do you agree?**

We note that the provisional view of enabling a driver to take over from a stopped position has been adapted to move in line with the ALKS Regulation requiring a human to take over driving

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<sup>10</sup> Paras 11.46-11.68

within at least 10 seconds of a transition demand, avoiding the undesirable occurrence of a stop in lane. We agree that the user in charge should be in the vehicle, or in direct sight of it, and we agree that remote control centres/supervision should be dealt with separately to the 'user in charge'<sup>11</sup> requirements.

We note the proposal that the user in charge is not a driver while the ADS is engaged and cannot be liable for criminal or civil penalties. We refer to our response at Q1(2) of Consultation 1 and reiterate our suggestion that clear laws and guidance will be needed as to circumstances in which the 'user in charge' is required to take control. Whilst we appreciate the proposal that this be in response to a transition demand from the vehicle, it will still be important to update the terminology in both the civil and criminal legislation, particularly if the user in charge is not going to be deemed a 'driver' when the ADS is engaged. It should be clear that once the transition demand has been responded to (or not), the user in charge then immediately becomes a 'driver' again, and therefore subject to the relevant standard of a human driver.

Whilst the AEVA does place liability upon an insurer in civil law for any damage caused by the vehicle in automated mode, this does not include semi-autonomous modes. The exclusion of the driver from any penalty, which might include failing to stop at the scene of an accident<sup>12</sup>, would only be workable if the AEVA is revised to include semi-autonomous features. It remains possible that an AV could be the "cause" of an accident, perhaps by making a surprising manoeuvre, or a sudden stop, and that the UIC in these scenarios is not required to take action. Similarly, referencing the scenario whereby the vehicle has not registered a temporary speed sign, but the user in charge has, but failed to act/take back control of the vehicle, we agree with the current proposals that the user in charge should be absolved from liability, even under the AEVA.

We agree with other consultees to Consultation 1 that if legislation is passed to deal with the user in charge, the duties of the user in charge should be set out in a list, to ensure their responsibilities are clear.

### **Consultation Question 29 (Paragraph 12.37)**

**We provisionally propose that following the end of the transition demand period:**

- 1) the user-in-charge should re-acquire the legal obligations of a driver, whether or not they have taken control of the vehicle; and**
- 2) if, following a failure to respond to a transition demand, the vehicle stops in a manner which constitutes a criminal offence, the user-in-charge should be considered a driver and should therefore be liable for that offence.**

**Do you agree?**

Yes. Any failure to respond or to take control of the vehicle should place liability on the user in charge. We would suggest that if this is the case, and injury is caused to a third party, or indeed the user in charge, insurers and manufacturers are required to quickly share evidence of that failure with any victim. The insurer's strict liability under the AEV should be extended to cover accidents where a transition demand has been made but not been completed. That may leave separate disputes on liability between the insurer, UIC/driver and/or the ADSE, but 3<sup>rd</sup>

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<sup>11</sup> Para 12.17 of the Paper

<sup>12</sup> 12.21 of the paper

party victims ought not to face the cost, delay and uncertainty of such disputes.

### **Consultation Question 30 (Paragraph 12.45)**

**We seek views on whether a person with a provisional licence should be allowed to act as a user-in-charge, if accompanied by an approved driving instructor in a vehicle with dual controls.**

This appears sensible as how else in the future would aspirant drivers gain the necessary qualification as a driver including necessary experience as a UIC. Naturally a learner driver should not be allowed to act as a user-in-charge without accompaniment of an experienced AV instructor. As it may be decades before all current drivers themselves become experienced in AVs including as a UIC, we do not consider drivers who are not AV approved instructors should be allowed to supervise provisional license holders travelling as a UIC.

### **Consultation Question 31 (Paragraph 12.53)**

**We provisionally propose that legislation should create new offences of:**

- 1) using an automated vehicle as an unfit or unqualified user-in-charge; and**
- 2) causing or permitting the use of an automated vehicle by an unfit or unqualified user-in-charge.**

**Do you agree?**

Yes.

### **Consultation Question 32 (Paragraph 12.59)**

**We provisionally propose that persons carried without a user-in-charge should be guilty of a criminal offence. Do you agree?**

Yes.

### **Consultation Question 33 (Paragraph 12.60)**

**We seek views on whether the new proposed offence of being carried without a user- in-charge should only apply if the person:**

- 1) knew that the vehicle did not have a user-in-charge; and**
- 2) knew or ought to have known that a user-in-charge was required.**

We reiterate our previous views and answer to consultation 1, Q26, which remains unchanged. The technology ought to be able to eliminate or at least greatly reduce the risk of this scenario. We consider that knowledge is important and agree that the new offence should carry this caveat, particularly where the vehicle is not to be driven without a user in charge.

### **Consultation Question 34 (Paragraph 12.66)**

**We provisionally propose that a user-in-charge who takes over control of the vehicle:**



- 1) should be considered a driver; but**
- 2) should have a specific defence to a criminal offence if, given the actions of the ADS, a competent and careful driver could not have avoided the offence.**

**Do you agree? If not, we welcome views on alternative legal tests.**

Yes. With reference to the scenario where the ADS chooses to drive the wrong way along a one way street, with the user in charge taking control but failing to avoid a collision, it would be unreasonable to blame the user in charge for that collision, where the ADS put the vehicle on the street initially.

#### **Consultation Question 35 (Paragraph 12.94)**

**We provisionally propose that the user-in-charge should be liable for criminal offences which do not arise from the dynamic driving task, including those related to:**

- 1) insurance;**
- 2) maintaining the vehicle in a roadworthy condition (including installing safety critical software updates);**
- 3) parking;**
- 4) duties following accidents to provide information and report accidents to the police; and ensuring child passengers wear seatbelts.**

**Do you agree?**

Yes. However, as stated by the Law Commission in Consultation 1, new solutions will be required when automated vehicles are driving, and able to drive, without a user in charge, i.e. those vehicles with level 5 automation

#### **Consultation Question 36 (Paragraph 12.95)**

**We provisionally propose that the legislation should include a regulation-making power to clarify those roadworthiness failings which are (and those which are not) the responsibility of the user-in-charge.**

**Do you agree?**

Yes, as some duties may more properly fall to the ADSE to “push” software updates to AVs and prevent the vehicle from being used until those updates have been applied. It is important that there is as much clarity as possible in relation to the duties of the user in charge of the vehicle to save legal disputes arising once the vehicles are on the roads.

### **CHAPTER 13: REMOTE OPERATION: NO USER-IN-CHARGE VEHICLES**

#### **Consultation Question 37 (Paragraph 13.67)**

**We provisionally propose that:**

- 1) where an individual is exercising latitudinal and longitudinal control (steering and braking) over a vehicle remotely, that should not be regarded as a form of “self-driving”; and**

- 2) where lateral and longitudinal control are exercised by an ADS, all other forms of remote operation should be regulated as “self-driving”.**

**Do you agree?**

**We welcome views on whether the current definition of when a vehicle “drives itself” under the Automated and Electric Vehicles Act 2018 should be amended to deal with some forms of remote operation which may involve a degree of “monitoring”.**

Yes. As we stated in our response to Q11 of Consultation 2, the AEVA is not currently drafted for the scenario of remote operation. It is imperative that the level of ‘monitoring’ or supervision required from a remote supervisor away from the vehicle is defined along with their responsibilities in relation to technology failure and/or following an accident. If remote operation is to be covered by the AEVA, liability should continue to attach to the insurer where a HARPS vehicle is involved in an accident, particularly given it will be driving in fully autonomous mode with no driver.

We broadly agree with the proposals in **Qs38-41**.

#### **Consultation Question 42 (Paragraph 13.116)**

**We welcome views on how accessibility standards for Highly Automated Road Passenger Services (HARPS) might be developed.**

**We provisionally propose that:**

- 1) an accessibility advisory panel should be formed to include:
  - a) the Equalities and Human Rights Commission; and**
  - b) representative groups for disabled and older persons;****
- 2) the Secretary of State should be obliged to consult with the accessibility advisory panel prior to setting any national minimum standards on HARPS;**
- 3) there should be a duty to periodically re-consult the accessibility advisory panel at set intervals to ensure requirements keep pace with developing evidence of technical feasibility and changing needs.**

**Do you agree?**

Yes. If HARPS are truly to enable more social mobility, it is important that groups are not excluded; consulting with relevant stakeholders will be crucial.

#### **CHAPTER 14: CRIMINAL OFFENCES BY ADSES AND THEIR SENIOR MANAGERS**

We provide a response only to Q44 in this section:

#### **Consultation Question 44 (Paragraph 14.107)**

**We provisionally propose that:**

- 1) it should be a criminal offence for an ADSE to omit safety-relevant information or include misleading information when putting a vehicle forward for classification as self-driving or responding to information requests from the regulator;**
- 2) the offence should apply to senior managers (where it was**

- attributable to the manager's consent, connivance or neglect);
- 3) the offence should not apply to more junior employees;
  - 4) the offence should carry a higher sentence if it is associated with a death or serious injury;
  - 5) the offence should be prosecuted in England and Wales by either the regulator or the Crown Prosecution Service and in Scotland by the Procurator Fiscal.

**Do you agree?**

Yes.

## **CHAPTER 15: NEW WRONGFUL INTERFERENCE OFFENCES**

### **Consultation Question 47 (Paragraph 15.10)**

**We provisionally propose that legislative amendment should clarify that the tampering offence in section 25 of the Road Traffic Act 1988 applies to anything that is physically part of a vehicle and any software installed within it.**

**Do you agree?**

Yes. However, as stated in our response to Consultation 2, Q35, the clarification may need to be broad enough to cover a range of AV technologies. We defer to the developers on this point, but would suggest the RTA 1988 will ultimately need to be overhauled completely to deal with any update as vast as this, as well as the other deficiencies which have long been present in attempting to reconcile outdated legislation with modern driving and modern technology.

### **Consultation Question 48 (Paragraph 15.11)**

**We welcome views on whether the tampering offence should apply to external infrastructure required for the operation of the AV.**

We agree that the offence should apply to items such as masts or networks upon which the AVs are reliant. Security around such elements of the AV network must be of the highest standard.

### **Consultation Question 49 (Paragraph 15.53)**

**We provisionally propose that there should be an aggravated offence of wrongfully interfering with an AV, the road, or traffic equipment contrary to section 22A of the Road Traffic Act 1988, where the interference results in an AV causing death or serious injury, in:**

- 1) England and Wales; and
- 2) Scotland.

**Do you agree?**

The majority of responses to Consultation 1 supported the idea of an aggravated offence of causing death or serious injury as per the above proposal and we agree that a new offence based on s22A of the Road Traffic Act is desirable and reasonable in the circumstances.

### **Consultation Question 50 (Paragraph 15.55)**

**We provisionally propose that the appropriate mental element for the aggravated offence is intent to interfere with a vehicle, the road or traffic equipment. Do you agree?**

Yes.

### **Consultation Question 51 (Paragraph 15.62)**

**We seek views on whether an approved work defence for repair or maintenance operations authorised by a vehicle manufacturer or Automated Driving System Entity is desirable.**

We do not express a view on this question.

## **CHAPTER 16: CIVIL LIABILITY**

### **Consultation Question 52 (Paragraph 16.24)**

**We provisionally propose that the way the Automated and Electric Vehicles Act 2018 deals with contributory negligence and causation is:**

- 1) adequate at this stage; and**
- 2) should be reviewed by the UK Government in the light of practical experience.**

**Do you agree?**

No. We do not agree that the AEVA deals with contributory negligence nor causation appropriately and these concerns should be addressed with any review or update to the Act over the coming months, in response to the Consultation series. The responses detailed in the paper <sup>13</sup> demonstrate that the current position is inadequate, given the split in responses on this issue from the earlier consultation.

We reiterate our comments in response to Consultation 1 on these points and stress that there remains a need for guidance given that claims will otherwise be prolonged; injured parties should not be put to the cost and challenge of proving causation. Leaving this issue to practical experience of AVs and to ask the courts to decide using inadequate legislation will leave many victims fighting lengthy and costly legal battles, whilst insurers seek guidance on applicability from the Court. We suggest that the AEVA is amended now to reduce the scope for any such difficulties. It remains likely that insurers will seek to avoid the strict liability intention of the AEVA by raising causation and contributory negligence issues.

We refer to our response to consultation 1 and the following themes:

We still consider that some redrafting is required of Section 2 of the AEV Act in order to ensure it provides true strict liability. The current reference to an accident 'caused by' including 'partly caused by', by interpretation in s8, leaves scope for insurers to argue against compensating victims on the grounds that the accident was unavoidable by the AV. It also, by default, requires the victim to prove causation, which would be difficult and costly in an AV context. Similar challenges have defeated numerous product liability claims under the notoriously difficult "strict liability" regime of the Consumer Protection Act 1987. We suggest "caused by"

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<sup>13</sup> Paras 16.15-16.23

within s2 of the Act, be replaced by “involving” or at the very least the burden of proof be reversed to require the insurer to prove the accident was wholly caused by the injured party, if applicable.

Section 3(2): There should be further guidance as to when it is ‘not appropriate’ to allow a car to ‘drive itself’ to ensure the ‘user in charge’ understand their responsibilities and so injured victims are afforded sufficient protection. It appears that this will be an area for supplementary litigation whilst parties attempt to determine the applicability of s3 in relation to contributory negligence generally. Level 4 and 5 vehicles must be capable of performing a safe stop without the intervention of the user in charge. That applies even if at that moment in time it had become inappropriate for the vehicle to continue to drive itself. We accept that the requirement of a ‘user in charge’ may alleviate some of these issues in relation to the various levels of automation, particularly regarding level 3, but the position is still unclear in relation to causation and contributory negligence.

In particular ‘drivers’ and UICs of AVs would be at risk of delayed compensation if they cannot show the vehicle itself was at fault, despite the proposals from the Commission that the UIC will not be liable if the ADS was engaged and evidence of the engagement or disengagement of the system should be provided to insurers.

This provision of the Act purports to only relate to scenarios when it was inappropriate to allow the AV to begin driving itself. It is important that cannot be construed as applying in the scenarios that develop mid journey, including prior to the completion of a transition demand. We again point out that the manufacturers, regulators and any safety agency really ought to be able to ensure that level 4 and 5 vehicles simply could not begin driving themselves when it was not safe to do so (e.g. level 4 automation could only be engaged in designated areas).

If the AEVA is not going to be amended, it would be helpful for victims and insurers to be provided with clear guidance on whether *any* accident involving an AV should be dealt with by the AV insurer, which seems to be suggested by the AEV Act itself (with our without a user in charge) and would be a true system of strict liability.

### **Consultation Question 53 (Paragraph 16.32)**

**We provisionally propose that measures should be put in place to compensate the victims of accidents caused by uninsured AVs.**

#### **Do you agree?**

Yes. The overall intention of the liability regime within the AEVA is to ensure injured victims are able to access compensation promptly, but the AEVA only applies to insured AVs. Injured victims should be able to access compensation promptly, whether the vehicle is insured or not, and we agree that the MIB should be in a position to deal with such claims.

We are encouraged that the Law Commission acknowledge that the position regards uninsured driver coverage must be resolved before AVs are allowed on our roads<sup>14</sup>.

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<sup>14</sup> Para 16.31 of the Paper

## Consultation Question 54 (Paragraph 16.47)

**We provisionally propose that:**

- 1) product liability law should be reviewed to take account of the challenges of emerging technologies;**
- 2) any review should cover product liability as a whole, rather than be confined to automated vehicles; it should not, therefore, form part of this project on automated vehicles.**

### **Do you agree?**

Yes, in principle. We note the concerns and position of the Law Commission in relation to product liability law generally, particularly with reference to provision of software. Our concern remains that the existing law may allow insurers to suggest that the blame for an incident or injury lies with the manufacturer, or whoever performed the last service in failing to calibrate sensors or update software. The victim may be required to bring a highly technical Consumer Protection Act claim for product defect in tandem with negligence claims against both the driver and the servicer; so incurring delay, costs and risk of pursuing three or more defendants.

The motor insurance industry, together with the requisite manufacturers should make appropriate arrangements as to how liability/recovery issues may be dealt with between them, save the manufacturer confirming it might take responsibility for all accidents involving its software (in the manner Volvo has done).

We are aware that the government has instituted a review of product safety<sup>15</sup> within the UK, but there remains significant uncertainty as to how the Product Liability Directive and indeed the current Consumer Protection Act 1987 is to apply in the future, particularly in relation to AVs. There appears to be ongoing tension between the application of the law and consumer expectations generally in product liability claims.

It is important that in any product liability review in relation to AVs, that consumer expectations are considered and that those consumers are educated as to what they can reasonably expect in terms of safety, for example, when riding in an AV. This correlates with our suggestion above, that the UIC should, at the very least, be informed on starting the vehicle as to what is expected from them during the journey, and what their responsibilities are.

If accident victims are left in a scenario where a product liability claim is to be pursued, there will be confusion and dispute as to which entity should be sued, i.e. manufacturer or software provider, without clearer legislation. Inevitably, contributory negligence arguments would be raised where possible, pending clearer guidance as to the requirements of the UIC as a 'driver'. Similarly, if software updates are not appropriately enabled or something was to go wrong with the software, there might be development risk defence if the alleged defect was unknown in the industry at the time.

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<sup>15</sup> Call for Evidence: UK Product Safety Review  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/967823/uk-product-safety-review-call-for-evidence.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/967823/uk-product-safety-review-call-for-evidence.pdf)

In addition, ideally, we suggest that any assurance from manufacturers/developers akin to that publicised by Volvo, would be written into any warranty or guarantee and be enforceable against them.

## **CHAPTER 17: ACCESS TO DATA**

### **Consultation Question 55 (Paragraph 17.65)**

**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?**

Yes. Data such as speed, location and time stamp, as well as tracking whether the vehicle was in ADS mode at the time of any accident is crucial and should be one of the benefits of such technology. Accident data will also be important in assessing relative safety of AVs when compared to conventional vehicles, so we do not see any valid reason as to why this data should not be permitted to be gathered, subject to any relevant privacy laws (see paper).

### **Consultation Question 56 (Paragraph 17.71)**

**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?**

Yes. Such data should also be provided to accident victims and their solicitors to ensure all parties are on an equal footing. Requests for such data should be dealt with promptly, or we would propose that such data provided to insurers in relation to a claim, is also automatically provided to injured victims or their families, to enable any liability issues to be promptly resolved.

### **Consultation Question 57 (Paragraph 17.81)**

**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?**

No. Three years would often be insufficient for cases involving incapacity or product defects. We suggest an extended period for cases where the accident report involves serious injury or

death. Ideally any storage should be in line with any long stop limitation period, for example, 10 years.

In any event, we agree that this will need to be kept under review.

**Consultation Question 58 (Paragraph 17.95)**

**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?**

Yes.