

**Response to Law Commissions' third consultation on Automated Vehicles
(Law Commission Consultation Paper 252; Scottish Law Commission Discussion
Paper 171)**

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What is your name?

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What is the name of your organisation?

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Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

CHAPTER 4: SELF-DRIVING AND HUMAN INTERVENTION

Consultation Question 1 (Paragraph 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?

[Respondents chose from the following options: yes; no; other.]

No

Point one is the only acceptable definition of a self-driving car. The law should be clear that in order to be self-driving, the vehicle must be able to operate without human interaction. Other than that, the vehicle is under the control and responsibility of the person behind the

wheel and features are merely assistive. I feel that point 2 could be incorporated into legislation, but clearly distinguished between it and a self-driving vehicle.

Consultation Question 2 (Paragraph 4.115)

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

Yes. I would refer back to my views above. If it is self-driving, that means anyone, regardless of impairment or disability should be able to use it. Requiring driver/person-behind-the-wheel interaction prevents the vehicle from truly being self-driving.

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?

[Respondents chose from the following options: yes; no; other.]

Yes

There must be a regulatory body which grants the right to consider a vehicle self-driving and this must not be left to OEMs to designate without approval. The Secretary of State would likely be the most appropriate body to undertake this role.

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.

[Respondents chose from the following options: as safe as a competent and careful human driver; as safe as a human driver who does not cause a fault accident; overall, safer than the average human driver; none of the above.]

As safe as a competent and careful human driver

Self-driving cars will not be infallible and thus a realistic expectation will be that they operate to the same standard as a careful human driving. Expecting safety beyond this might be a product of deployment over subsequent years and the development of software based on the data collected, but at the outset this seems a reasonable middle-ground for assessment of safety.

Consultation Question 5 (Paragraph 5.120)

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

Safety must involve physical safety, including similar requirements for the maintenance of a conventional vehicle. Safety must also include compulsory insurance, a state-underwritten system of insurance for accidents caused by mass-hacked vehicles, safety critical software being updated over-the-air but which also protects the driver's privacy, and the vehicle should be accessible for all members of the community - especially those with disabilities.

Consultation Question 6 (Paragraph 5.121)

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

This is a very large topic and one that requires very careful consideration - especially including responses from bodies representing disability and equalities groups. This is fundamental and should be seen as an opportunity to further the UK as leading the way in CAV deployment and effective regulatory standards.

Given the opportunity to look at the issue of public and private use of CAVs, and the regulations that currently exist, their compatibility with CAV deployment, and the needs to amend these in light of 'driver-less' vehicles, the following factors should be considered as a starting point for further discussion.

The Equality Act (EA) 2010 covers many aspects of equality and anti-discrimination, and whilst Part 3 applies to transport and travel services (this includes much of the land transport and the infrastructure and transport services); and Part 12 and Sch 2 regulate accessibility for persons with disabilities when using public service vehicles – for example buses, travelling by rail, and accessing transport by taxis and private hire vehicles, there are limitations and this Act does not provide the protections needed with the influx of CAVs. That being said, the EA 2010 provides for protection against discrimination of persons with a disability, but in respect of transport providers, the definition and scope of the EA 2010 is broader and covers persons with reduced mobility – hence those who would not be considered 'disabled' as defined in the EA 2010.

The main issues to consider in respect of the EA 2010 are as follows:

A Service Provider and Transport Service Provider: This includes legal persons – individuals, businesses (private and voluntary organisations) and public bodies.

It is unlawful for service providers to: Discriminate on the terms on which a service is provided to the person with a disability; Terminate the provision of the service; Subject the person with a disability to any other detriment; Harass or victimise the person requiring the service by, for example, not providing the service, through the terms on which the service is provided, or subjecting the person to any other detriment; and Fail to make reasonable adjustments to ensure persons with disabilities have the access as is enjoyed by the public (an anticipatory duty) – subject, as they are, to a reasonableness test.

The service provider also acts unlawfully where they do not provide the quality of service to the person with a disability that they usually provide to the public (or a section of it which includes the person) or in not providing the person with a service in the manner in which, or on the terms which it usually provides to the public.

A service user may not be discriminated against (having required a service or having been provided with the service) when seeking to obtain a service and/or during the provision of that service. This includes the denial of that service. This imposes a duty to make reasonable adjustments in the event that a person with a disability is placed at a 'substantial disadvantage' in comparison to a person who is not disabled, due to the provider establishing a provision, criterion or practice (a PCP); some physical feature; or their failure to provide an auxiliary aid, there exists a duty for the service provider to make reasonable adjustments.

The duty means that the service provider must take such steps as are reasonable to avoid the disadvantage, or it should adopt reasonable alternative methods to providing the service.

In respect to physical features that puts or would put a person with a disability at a disadvantage, the duty to make reasonable adjustments applies to features in or on premises occupied by the provider, and physical features brought onto premises other than those occupied by the provider (by or on their behalf) while providing the service. These duties do, however, vary depending on the type of vehicle being used to provide the service.

The government gave instruction (Clery, Kiss, Taylor, and Gill 2017) to service providers that they should not view disabled passengers as a homogenous group, rather they should recognise and provide services which recognise the marked differences between groups with various disabilities and needs. This extended to the requirement for service providers to anticipate the wants of persons with different needs depending on the disability and to positively make reasonable adjustments to ensure parity of service provision for persons in such groups and the general public. Indeed, a failure to anticipate the needs of persons with disabilities may result in the failure to have made an adjustment which was otherwise reasonable for it to have made.

At Part 12 of the EA 2010 are the requirements listed for reasonable adjustments to the physical features of private hire vehicles, taxis and public service vehicles to ensure their accessibility for persons with disabilities. Such people will likely experience CAV use in this context (along with other forms of 'public' transport ahead of privately-owned and used CAVs) hence these should be a priority for legislative action.

Taxis and Private Hire Vehicles: The duties applicable to taxis and PHVs include the requirement to make reasonable adjustments in the provision of their service; to accept passengers with assistance dogs; in some circumstances the vehicle must be wheelchair accessible (often applicable to taxis in larger cities); and where the vehicle is identified as wheelchair accessible, the provider must accept passengers, must also be able to provide them with appropriate assistance, and must not apply an additional charge for this service.

Designated Vehicles: Local authorities, through their licensing authorities, are permitted to produce a designated list of wheelchair accessible taxis and PHVs.

Without such a list, the requirements established in EA 2010 s. 165 will not apply and drivers will be able to refuse to carry wheelchair users; they can operate without having to provide such users with assistance; and they may charge an additional fee for the carriage of these users. The nature of the list allows passengers to make informed decisions about the vehicle to be used for their travel. Section 165(4) of the EA 2010 is quite important for the future of CAVs and persons with disabilities' ability to use these. It requires the drivers of a designated vehicle hired for or by a person who uses a wheelchair to, at no additional charge, allow the user to travel in their wheelchair, or to travel in a passenger seat with the wheelchair being carried in the vehicle; to ensure the wheelchair user is carried in safety and reasonable comfort; and to give the user mobility assistance (helping the user on and off the vehicle, stowing their luggage and wheelchair and so on) as and when reasonably required. An offence is committed for breach of these requirements. With the use of CAVs in the

public sector and through private-PHVs (yet regulated by the state) impacting on the means of persons with disabilities to use accessible transport, and given the future lack of 'driver' support for people who use wheelchairs, thought must be given to which vehicles will be used in this mode of transport and its accessibility for a range of users – both able bodied and with a variety of disabilities. Similar issues extend to passengers who require transport with their assistance dogs.

Public Service Vehicles (buses and coaches): The relevant framework for the accessibility standards are contained within Chapters 2 and 2A of the EA 2010.

These chapters are supplemented by Regulation 181/2011/EC concerning the rights of passengers in bus and coach transport which provide additional rights for passengers who have disabilities or are persons with reduced mobility. The operators of public service vehicles are subject to a range of mandatory duties which include the obligation to make reasonable adjustments; the duty to provide designated wheelchair spaces to certain vehicles; and the requirement to allow passengers who wish to travel with an assistance dog to be accompanied by their dog for the duration of the journey. The regulations seek to ensure passengers with disabilities can embark and disembark the vehicle with safety and without unreasonable difficulty, and that they are permitted to travel safely and in reasonable comfort.

The Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) Regulations 1990 (SI 1990/1020) place obligations and duties on the drivers of public service vehicles and their conductors in respect of passengers. Again, these require people to be able to provide assistance and when they are removed from CAVs, this will have to be considered when determining who can, as at present, help wheelchair users on and off the vehicle; offer help for wheelchair users in the use of wheelchair restraint systems; and assist persons with disabilities (but who do not use wheelchairs) on and off the vehicle when needed. This also includes the use of ramps which currently require a trained conductor for its safe use and storage.

It should be noted that national law allows for the driver / conductor of a bus to prevent a person with a disability from boarding or leaving the vehicle: in the event that a fault or failure of any equipment would mean that it is not safe to do so; if the number of passengers currently on board results in an insufficient capacity for a person with a disability to be accommodated; and situations exist where the driver / conductor may not be able to fulfil the duties outlined in the Conduct Regulations due to a potential risk to the health and safety of themselves, the person with a disability, other passengers or in respect of the security of the vehicle.

It might also be worthy of note that the 'UK Connected and Automated Mobility Roadmap to 2030' launched by Zenzic, a company established by the government and industry in 2018, in its Legislation and Regulation section of the Roadmap, omits to specifically outlining disability as a factor in its 'Golden Threads' of Legislation and Regulation; Safety; CAM Services; Public Acceptability; Infrastructure; and Cyber Resilience.

Whilst the government is considering the legislative provision of CAVs in respect to equality, it might also wish to review the distinctions between national law and the UN Convention on the Rights of Persons with Disabilities. Signatories to the Convention, are required to take appropriate measures to ensure that people with disabilities have equal access to transport. This includes identifying and then removing obstacles to accessibility. The Convention goes beyond the prohibition of disability discrimination, rather it requires an equality norm that seeks to equalise the 'lived reality of persons with disabilities.'

It will be noted that under national law, a requirement exists for service providers to make reasonable adjustments to avoid discrimination on the basis of a person's disability. The UN

Convention refers to signatory states ensuring that, for both public and private providers, reasonable accommodation must be provided. The essence of reasonable accommodation requires, in the present instance, service providers to promote equality and the elimination of discrimination so the person with a disability does not encounter a disproportionate or an undue burden. The nature of the distinction between reasonable adjustments and the Convention obligation of reasonable accommodation is profound. To begin, a breach of the reasonable accommodation duty is a distinct form of discrimination rather than a sub-set of direct and indirect forms of discrimination. It is not a prohibited act but, as Waddington (2013) has observed, is a form of discrimination which may result in an increased awareness of the rights-based nature of the duty to accommodate, and a recognition amongst people with disabilities and service providers of the seriousness of a failure to comply with this duty.

The definition of the word 'reasonable' in reasonable accommodation has been discussed by the Convention Committee (2018) which concluded that whilst reasonable is a single term, the concept of reasonableness is not to be misread as an exception, distinct qualifier or modifier to the duty. The Committee held that the reasonableness of an accommodation should be considered in light of the relevance, appropriateness and effectiveness for the person with a disability and that the accommodation will be reasonable where it achieves the purpose for which it is being made and is tailored to meet the requirements of the person with a disability. Ultimately, this means that it is the suitability of the measures adopted by the service provider in respect of facilitating the participation of persons with disabilities that will be the overriding principle.

The Convention Committee has concluded that the reasonableness of accommodations is not to be assessed in relation to costs – rather the issue of cost would be an assessment under a disproportionate or undue burden defence argument.

The Convention also allows for the positive action, at Art. 5(4), of signatory states which includes specific measures necessary to accelerate or achieve de facto equality of persons with disabilities. Such actions shall not be considered discrimination. Importantly, and in respect to the requirement of reasonable accommodation, positive action is not a mandatory imposition under the Convention. However, it is also possible, particularly in respect of human rights and the Convention Committee's statements on the matter generally, where permanent positive action measures are required, dependent upon the circumstances and context, to circumvent particular impairments or the structural barriers of society. Yet, the nature of a non-mandatory Article results in a difficulty in using the particular 'right' as a stand-alone mechanism to assert protection against a discriminatory act.

It is also worth remembering the commentary offered by de Schutter (2007) in respect of the structural forms of discrimination as these cut across different spheres – including transport, housing, access to healthcare and so on – which may result in a situation where the prohibition of discrimination in one or more of these spheres will not suffice to ensure effective equality. Thus, the advancement of special measures or indeed what may be otherwise termed privileges which are aimed at accelerating the attainment of de facto equality may indeed be necessary to avoid the very structural discrimination which the Convention seeks to end. Such a position is endorsed by the Human Rights Committee and the United Nations Committee on Economic, Social and Cultural Rights.

CHAPTER 7: 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?

[Respondents chose from the following options: yes; no; other.]

Yes

Safety in a variety of contexts need to be considered and it should be required of OEMs to provide this data, empirically tested, to give confidence that both the hardware, and software, are suitably robust and effective for use by the public.

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?

[Respondents chose from the following options: yes; no; other.]

Yes

Yes, but in regards to point 2, it must be subject to safeguards, including appropriate insurance and liability cover, to give confidence that the testing is necessary and safe.

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?

[Respondents chose from the following options: yes; no; other.]

Other

In terms of point 3, it depends on where responsibility will rest in the event of accident / failure of the system. If the OEM is provided with an escape where, for instance, they have not produced the software which is subject to failure and has caused loss, and in the event that no state underwriting of the loss is available, such a scheme may leave third- and first party victims with problems in securing compensation.

Consultation Question 11 (Paragraph 8.43)

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?

[Respondents chose from the following options: yes; no; other.]

Other

The RTA 1988 is woefully out of date and is not fit for purpose in 2021. It requires a new, albeit consolidating piece of legislation which can accommodate new driver aids and technology. It is also necessary given Brexit and the inherent problems with retained EU law and the current confusion over which decisions and interpretations from the Court of Justice remain applicable in a post-Brexit UK.

For point 2, no, the whole system needs to be considered rather than individual aspects of the vehicle. As soon as individual parts/aspects of the vehicle are able to be designated as ADS, confusion can be caused to consumers. They must be protected from claims by retailers and OEMs as to what 'self-driving' actually means. Tesla and its full self-driving mode feature is one such area which causes confusion given the feature is not currently available in the UK and is unlikely to be so in the immediate future - yet it is an option available to buy when ordering the vehicle.

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.

Yes, in so far as the state-backed insurance systems or equivalent are in place to ensure the safety of the public who might come into contact with such vehicles.

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?

[Respondents chose from the following options: yes; no; other.]

No

Section 3(2) of the Act provides that the insurer is not liable to the person 'in charge of the vehicle' where the 'accident that it caused was wholly due to the person's negligence in allowing the vehicle to begin driving itself when it was not appropriate to do so'. This relates to the entire problem with the legislation at present – confusion as to what self-driving means in the context of CAVs. This should refer to a fully autonomous vehicle and not a feature-rich driver's aid. Its inclusion is often referred to be included to appease the insurance industry as, without it, they would likely not provide the cover for these vehicles. The insurance system needs to be modified for single driver/user accidents and mass vehicle accidents which might occur following some catastrophic (software) failure.

Allowing an insurer or insured to escape, partially, through the operation of s. 3(2) should be reconsidered.

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?

[Respondents chose from the following options: yes; no; other.]

Yes

The MIB systems, as it applies to uninsured and untraced vehicles should be used as a model for its incorporation here.

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?

[Respondents chose from the following options: yes; no; other.]

Yes

Product liability as it applies to CAV software in particular would benefit from review and clarification to identify the extents of liability.

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?

[Respondents chose from the following options: yes; no; other.]

Other

There should not be a system where self-driving modes are activated or deactivated. The nomenclature needs to be changed so the term self-driving means just that, the vehicle is operated independently of the person in the vehicle / behind the wheel (in old terms). This would then remove the need for vehicles to be traced which causes significant problems for privacy and potential infringements of peoples' rights (not limited to the understanding of these terms under the European Convention).

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?

[Respondents chose from the following options: yes; no; other.]

No

Unnecessary and causes privacy problems. Insurers will likely use the data collected to further their own interests rather than operating to the benefits of users.

Indeed, given the introduction of tree self-driving vehicles, the entire system of insurance should be reviewed to determine whether it is fit for purpose in these circumstances.

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?

[Respondents chose from the following options: yes; no; other.]

Other

Guarantees would be needed as to how these data are stored, accessed and for the purposes necessarily incurred. Would these be anonymised? Could they be used to identify specific users / those in regions etc? Would these be accessible by OEMs / stored by them, accessible by insurers? There are many issues to be determined before a decision could be reached.

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?

[Respondents chose from the following options: yes; no; other.]

Other

It needs to go far beyond the GDPR. The Investigatory Powers Act allows for data to be accessed and potentially infringes on privacy. The CAV with telemetric and camera data would be a very valuable source of information of the users and those external to the vehicle who are picked by the cameras. Careful thought is required before decisions are made on how and in what form data are collected, stored and available to bodies including the regulator.