

**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?

Sam Henegan

What is the name of your organisation?

Shoosmiths LLP

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

Response on behalf of organisation

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

At the outset of any new innovation or technology, a combined effort between designers, manufacturers, regulators and other stakeholders is vitally important to ensure safety. It would seem sensible for the Secretary of State to assess and approve safety in combination with specialist regulatory input and technical expertise. With very new technology, it is unlikely this could be done without significant input from the manufacturers, other safety groups, and any potential standard essential patent holders in the AV field. In addition, the usual safeguards in terms of appeal to an independent person would seem to be sensible.

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

It makes sense for use of ADS to be approved on an exceptions basis. However, we do believe that this is significantly informed by the definition of "ADS". For example, cruise control, lane assistive tech, blind spot assist, and trailer assist are all currently (in effect) classed as ADS. Therefore, defining the level of automation which requires approval seems sensible, as a preliminary action - otherwise you would be banning existing vehicles.

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.]

Yes

1. If every jurisdiction needed to consider safety cases on a local basis, this would seem to be overly onerous. However, it has been a long standing principle of UK law that derogations can be made from supranational standards for reasons of public safety (e.g. see the current conflict between the EMA and MS over Astra Zeneca vaccines).
2. One system with mutual recognition would have to be in everyone's interests for cost and time reasons.
3. It is imperative to ensure we have a system which is safe and robust, but which avoids red tape and regulatory barriers. That will make such developments harder to implement and may result in manufacturers selling a narrower choice of vehicles to our right hand drive market – something that has already been threatened, as a consequence of Brexit. Any safety programme needs to fit within a globalised world and not have too many UK-based hurdles, as that will stifle innovation and customer choice.

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:

(a) an ADSE is registered as taking responsibility for the system;

(b) the ADSE was closely involved in assessing safety and creating the safety case; and

(c) 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?

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

Other

1. Whilst one safety case and approval would seem to make sense, individual countries must be able to consider the safety elements within the confines of their own risk matrix, road use profiles and local legislation.

2. No response.

3. We already have myriad driver assistive technologies integrated in modern vehicles, operating without issue or specific categorisation. Re-categorising them now seems to be an exercise in shutting the stable door after the horse has bolted. Serious consideration should be given to how any categorisation might affect existing systems.

4. We agree with the idea that the ADSE should not be involved in driver assistance.

5. No response.

6. No response.

7. This notion actually carries some potentially serious implications on the market and might, in fact, conflict with the proposal that ADS may be developed and operated by smaller (non-manufacturer) companies. No current UK criminal legislation requires companies to be of a size to pay an appropriate penalty before operating. This makes no sense and courts are used to making decisions on issuing appropriate fines for sentencing in the event of failures, whether that fine bankrupts the company or not. They can also use actions against directors and senior managers in many regulatory enforcement actions, which is easier and may be more appropriate in cases where a small business has put profit before safety. By legislating on the basis of a pay to play regime, this would inevitably stifle the development of new ADS technology by smaller, more innovative start up companies.

Consultation Question 14 (Paragraph 8.77)

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?

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

Yes

We agree – the framework might also wish to consider competency and technical ability in making those assessments, given the seriousness of the decisions being made.

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.

Without doubt, a risk based release of vehicles should be the basis of any self-driving approvals. We do not allow new drugs to be rolled out without a series of trials, each one less regulated and bigger than the previous, followed by a period of continued monitoring, once released and in general use.

CHAPTER 10: ASSURING SAFETY IN USE

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?

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

Yes

1. Yes. The importance of this comparative analysis cannot be understated as public confidence in ADS will be affected by this. The data sources and methodology of such analysis should be kept under review.
2. Yes. Any such data collection and subsequent use should be consistent with UK data protection laws, including the UK GDPR and Data Protection Act 2018. In particular, transparency measures regarding what, why and for what period data is used should not be exempted, nor should individuals' data subject rights under those data protection laws.
3. No response.

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 should also deal with cybersecurity?

(3) Are other powers needed? (Note that data is discussed in Chapter 17.)

1. No comments.

2. It would be beneficial if the scheme also covered cybersecurity as we consider that appropriate cybersecurity is integral to the delivery of safe and reliable AV's. However, a concern is that any appropriate regulator must have appropriate expertise in this complex and rapidly evolving areas. Whilst we would support regulation being subject to the ultimate oversight of a single regulator we consider that it would need to cooperate closely in this regard with other government agencies such as NCSC.

3. No comments.

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?

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

Yes

We consider that any statutory scheme should also require the investigation and remediation of cyber-security incidents involving AV's even where they have not directly caused traffic infractions etc.

Consultation Question 25 (Paragraph 11.69)

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

(1) to analyse data on collisions involving automated vehicles;

(2) to investigate the most serious, complex or high-profile collisions; and

(3) to make recommendations to improve safety without allocating blame.

Do you agree?

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

Yes

A specialist incident investigation unit would seem prudent in ensuring those investigating incidents have available the tools and knowledge to understand the determination of issues from both a technical and engineering standpoint, as well as properly delineating issues between the hardware and software.

However, practical consideration will need to be given to the manner in which such an unit could operate with a disparate approach being taken to proprietary software platforms by most of the major automotive manufacturers at present (many of which have systems that can be corrupted if a non-authorised party accesses the software).

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?

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

Yes

We agree with subsection 1. We also agree in principle with subsection 2 but consider that some qualification should be made in accordance with section 3(2) of the Automated and Electric Vehicles Act 2018. For example, the person in charge has no liability as a driver except when any criminal offence or civil penalty (such as a parking ticket) was caused wholly due to the person's negligence in allowing the ADS function when it was not appropriate to do so.

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?

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

Yes

We agree. Following the end of the transition demand period, the user in charge should re-acquire the legal obligations of a driver. It occurs to us that no other legal framework could operate successfully. Accordingly, we are also in agreement to sub section 2 (given the answer to sub section 1).

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?

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

Yes

We agree and would advocate that the concept of “roadworthiness” also factor in the maintenance of up-to-date software, where such software impacts on the proper operation or safety of the vehicle. However, we believe that these responsibilities (notably in respect to safety-related software updates) should only sit with the user-in-charge where the requirement for such an update has been brought to their attention. For example, if a recall notice or warning has been issued by the manufacturer requiring the user-in-charge to take the vehicle to a local service centre for manual software updating by X date. If the user-in-charge does not comply with that notice, then it would be reasonable for them to take responsibility for the resulting failure of roadworthiness of the vehicle.

However (again, as regards safety-related software updates), where software in the vehicle is updated routinely via firmware-over-the-air (i.e. not subject to a safety notice or recall), it would be unreasonable for the responsibility for ensuring these updates happen to sit with the user-in-charge.

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

Consultation Question 38 (Paragraph 13.86)

We provisionally propose that:

(4) the regulation of self-driving vehicles should distinguish between an Automated Driving System Entity (which vouches for the design of the system) and an operator (responsible for the operation of individual vehicles);

(5) all vehicles authorised for use on roads or other public places with no user-in charge should either:

(a) be operated by a licensed operator; or

(b) be covered by a contract with a licensed operator for supervision and maintenance services;

(6) it should be a criminal offence to use a NUIC vehicle on a road or other public place unless it is operated by a licensed operator or is covered by a contract with a licensed operator for supervision and maintenance services.

Do you agree?

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

Other

1. No response.
2. No response.

3. Any commercial vehicle could and should be considered within the Traffic Commissioner / Vehicle Operator Licensing Regime and Health and Safety at Work Act 1974 (and associated regulations in terms of being fit for purpose, properly risk assessed, guarded, shut offs, etc.)

Consultation Question 43 (Paragraph 13.133)

We welcome views on who should administer the operator licensing scheme.

It would seem to make sense for commercial vehicles to continue to be operated by the HGV / PSV system – i.e. the Traffic Commissioner. Albeit, that department will no doubt need further expertise and investment to manage this.

CHAPTER 15: NEW WRONGFUL INTERFERENCE OFFENCES

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 consider that this is essential as there is the potential for severe harm to arise from either damage to critical infrastructure on which AV's rely or a cyber-attack on central control systems. Whilst these are likely to constitute separate offences, we consider that it would be helpful if there was a single regime dealing with all offences involving AV's to ensure clarity and sentencing consistency.

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?

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

Other

Whilst we cannot comment on the risk of harm arising from damage to physical road infrastructure, our experience of cyber incidents is that considerable damage is often caused by hackers acting recklessly or causing disruption for other criminal purposes and we would consider that an intent element similar to that for offences under Section 3 of the Computer Misuse Act may be appropriate to incident involving cyber-attacks on a vehicle or central control system.

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.]

Yes

We agree; whilst the Automated and Electric Vehicles Act 2018 confirms that the usual rules regarding contributory negligence apply, we consider the addition of section 3(2) in the AEVA 2018 in particular assists in providing an adequate framework at this stage. We consider it is important that an owner or insurer of a vehicle is not liable where an accident was caused wholly due to person in charge's negligence in allowing the vehicle to begin driving itself when it was not appropriate to do so.

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

We agree that some form of protection needs to be in place to compensate the victims of accidents caused by uninsured AVs. At present when an uninsured driver is involved in an accident, victims are compensated through the Motor Insurer's Bureau. This framework would likely be sufficient where the accident was caused by an uninsured driver. If an accident was caused by an AV, the assessment of the ability of the ADSE to pay (see question 13) may be adequate without a stand-alone compensation scheme such as the MIB.

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

We agree. Product safety law and the Consumer Protection Act 1987 undoubtedly has limitations with the advent of more advanced technologies. However, these limitations are not unique to automated vehicles. We consider that evidence of automation decision making ("black box" data), state of art defences and the interrelation of software to hardware would all benefit from consideration at some stage. However, seeking to construct an autonomous vehicle only framework would, in our view, lead to inconsistency with other consumer products. This inconsistency is likely to be detrimental in an area of law where consumer "expectation" plays such a major role.

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

We consider that it is important that data is collected and preserved in order to facilitate accident investigation. Vehicle data is also potentially important for law enforcement purposes and/or other public goods such as monitoring road user behaviour, although there is a stronger case that these interests should be balanced against individual rights to privacy. We consider that privacy rights could be managed by a combination of storing data locally on the AV only and/or data being collected by the manufacturer on an anonymised basis. At present we consider that the UNECE position on data retention creates a potential inconsistency with the treatment of similar data which is already collected regarding road users by mobile phones, satnav and telematics systems.

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.]

Other

In respect to routine disclosure to insurers, we consider that this proposal is sensible in that it will assist insurers in determining where fault lies in an incident, reduce the prevalence of insurance fraud and speed the payment of claims to drivers. Such a principle is also likely to have a positive effect on insurance premiums and the willingness of insurers to provide policies covering AV's. That said, the benefits of this approach would have to be carefully balanced with the inevitable consequence on the user-in-charge's data privacy rights and the practicalities around gaining consent / providing appropriate privacy notices for the wholesale processing of AV-related personal data in this way.

In respect to disclosure of data in the context of insurance-related cases brought before a court, we do not consider a standalone legislative duty is required. The Civil Procedure Rules in civil court cases already provides an existing framework for disclosure of documents (including electronic documents) where they have relevance to a potential claim. The Civil Procedure Rules include a framework both for disclosure before and during court proceedings.

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

1. It is not clear whether the proposed three-year period would serve as a minimum period or whether deletion would be mandatory on expiry of that period. We would expect the former, on the basis that further retention may be required given the limitation period for legal claims and/or on the basis that individuals may exercise their rights of retention under Article 18 UK GDPR. On which point, we consider there must be a framework whereby DSSAD data can be stored for at least six years from any accident or injury (either as an exception to the proposed rule or a stand-alone obligation). We consider the ADSE's will be under material risk if DSSAD data is only kept for three years but a potential claimant is at liberty to pursue a legal claim (once that data has been deleted) at a later date.
2. Yes. The period should be subject to a privacy risk assessment which should be maintained, in each case, in accordance with the UK GDPR.