

Stewarts' Response to the Law Commission Consultation 3: A Regulatory Framework for Autonomous Vehicles

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About Stewarts

Stewarts is an international litigation firm specialising in complex high value disputes. Our practice areas include Personal Injury, Clinical Negligence, International Injury and Aviation. Within these practice areas, the claims we undertake exclusively relate to injuries of the utmost severity or death. Our specialisms are recognised by top-tier rankings in the leading legal directories, Chambers, the Legal 500 and the Times.

Whilst there are many firms of solicitors which do some complex and high-value personal injury litigation, we are one of very few firms in the UK that exclusively specialise in such claims and do not conduct claims relating to non-disabling injuries (aside from the rare scenario when there are secondary claimants involved in the same incident as a claimant with severe injuries).

Introduction

Stewarts welcome the opportunity to respond to the Law Commissions' third consultation on the regulatory framework in relation to automated vehicles. We respond to this consultation from the perspective of ensuring access to justice and full compensation for our seriously injured clients, and with reference to our responses 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 (AEVA) 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*¹, but it is our view that in order to protect victims of accidents, both the Road Traffic Act (RTA) 1988 and the AEVA should extend beyond UK roads. There is scope for AVs to cause injury away from the UK 'roads and public places'. It is quite possible that, for example, a walker is injured by an AV on a footpath across private land, such as an automated tractor. The victim should still be able to rely on the strict liability regime within the AEVA, even though the incident occurred somewhere other than a 'road or public place'.

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.

¹ *Damijan Vnuk v Zavarovalnica Triglav d.d.* Case C-162/13

Response

Chapter 1: SELF-DRIVING AND HUMAN INTERVENTION

Q1 - 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.

We agree with FOCIS that there is more to do in terms of ensuring drivers are educated as to what the various automated features are capable of, as well as the requirements of a user in charge. We note and agree that the vehicles should have a user in charge in the vehicle, able to respond to a transition demand from the vehicle. Driver education will be key in ensuring the user in charge knows when he/she is expected to intervene in the driving task, and that essentially the only intervention would be following a clear transition demand issued by the vehicle.

As discussed in the Paper (paras 4.58-4.59), the German StVG² contains a regime in which the 'driver' would remain responsible for the AV even where engaged in other tasks. In France, current legislation allows for strict liability under the current road traffic legislation. Therefore, our proposals in this response into the rewording of the AEVA detailed in our response to question 52 below, should not be considered to be out of step with other EU countries. We agree with the Law Commission that the law must be clear as to what 'self-driving' is, and it is imperative that an individual/user in charge remains receptive to clear alerts from the vehicle. If a user in charge is injured in or by an AV, there should be no need for him/her to prove that the vehicle 'caused' the injury, subject to any contributory negligence on his/her part.

Q2 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 to ensure equality and avoid disability discrimination.

². The updated Strassenverkehrsgesetz (StVG) permits the use of vehicles with highly and fully automated features that perform the dynamic driving task

Chapter 5: HOW SAFE IS SAFE ENOUGH?

Consultation Question 3 (Paragraph 5.118)

Q3. 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.**

We agree with FOCIS that a very high standard of safety would be expected by the public, particularly with the removal of ‘blame’ from the human user in the vehicle in respect of accidents. The paper is clear that this will be a significant cultural shift, where there is an accident involving an AV. Therefore, it is reasonable for the public to expect the vehicle to be safer than the average human driver (c). In any event, as stated in our previous response, the public may not be convinced or reassured by a comparison between automated driving systems and human drivers.

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. Automated vehicles should be capable of detecting vulnerable road (and pavement) users, and is put through stringent tests in relation to a number of collision scenarios.

Consultation Question 6 (Paragraph 5.121)

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

Consultation with road users, drivers and pedestrians will be necessary. Those with disabilities should not be left out of these consultations as their experiences of the roads would be widely varied, and different to regular drivers or road users.

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?

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, alongside ensuring testing is in line with changes in the law, such as updates to the Highway Code.

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.

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 level³, which would have the 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 Question 9 of the first consultation, such a scheme would be needed to encourage public confidence.

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 Road Traffic Act 1988 requires a complete overhaul. If the approval process is clear, public confidence in the vehicles will increase.

Consultation Question 12 (Paragraph 8.44)

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

- (4) how it works in practice; and**
- (5) 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**

³ Para 4.105 of the Law Commission Consultation Paper Summary

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?

Yes. We echo FOCIS comments 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?

A new legislative framework should provide regulation making powers as above, however, in addition, the Road Traffic Act 1988 should be overhauled as part of this process, given it has long been unfit for modern driving and will not be the place to make legislative updates or revisions, as to regulation of AVs.

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.

This seems sensible but we would suggest that if this is the case that the relevant Code of Practice is followed and other road users are alerted to their presence.

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; such a scheme written into legislation should increase consumer confidence as to safety of AVs and their compliance with the law.

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. We agree with FOCIS that the ADSE should take more responsibility to ensure relevant updates are in place to increase safety of AVs generally. Any such responsibility to communicate through training is imperative. We agree in principle that the regulator should have the power to require the ADSE to complete the above steps within any AV before it is used, rather than that responsibility being on the end user/ 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.

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 question.

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 FOCIS that where the fault truly lies with the ADSE, there should be a range of sanctions available to ensure any issue is rectified promptly and appropriately. This should include wider compliance with the Highway Code.

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 support the idea of restorative conferences with accident victims and/or victims' families, where possible and where the accident has involved serious injury or death. As FOCIS comment, such a conference could 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:

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

Do you agree?

We agree and echo FOCIS' response to this question.

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 paper⁴ 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, particularly if they are required to investigate the most serious, complex or high profile collisions. We do not consider this would detract from the current regime of specialist police investigations as to road accidents generally.

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.

⁴ Paras 11.46-11.68

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.**

The composition of such a forum should include a number of user groups, insurers, accident victims and those with disabilities. Any forum should be chaired by an independent expert.

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 agree with FOCIS' response on this question and reiterate our previous response to Consultation 1, Q1(2), particularly as to the need for clear guidance as to when the user in charge is required to take control. It will be necessary to update terminology as to the user in charge in both civil and criminal road traffic legislation, given the user in charge will not be considered to be a 'driver' in the traditional sense. As stated above, public education will be paramount in ensuring understanding of the relevant duties of users in charge and agree that a list of duties should be formulated.

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 following a transition demand should place liability on the user in charge. 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. Innocent victims ought not to face the cost, delay and uncertainty of any liability disputes as between the ADSE/user in charge/ insurer and/or manufacturer.

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.

We echo FOCIS' response to this question and agree with this proposal, on the basis any instructor or accompanying person, should be approved for AVs

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.

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.

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 AVs are driving at 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 we agree.

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. We echo FOCIS that the level of monitoring remotely is made clear, as well as responsibilities following an accident.

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. Consultation with relevant stakeholders is crucial if the vehicles are not going to exclude members of society who have different accessibility needs.

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. We agree that steps should be taken to minimise any risks taken by developers which jeopardise user safety within an AV and to punish those who are demonstrated to have

knowingly done so; we consider the above to be reasonable steps in this regard. However, we consider that defining 'senior managers' could be difficult and suggest that the legislation allows for a compliance officer who is personally responsible for the provision of the relevant information, and who is then required to ensure that they have the relevant knowledge of the AV and to report the same as and when required. If someone was required to be placed at board level with this responsibility, it would be easier to both police and enforce safety controls.

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 reiterate the above suggestion for overhaul of the RTA 1988.

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 and security should be implemented at such sites.

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?

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 this Consultation series. The responses detailed in the paper⁵ 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 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" 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. As detailed in our response to question 1 above, such a rewording/realignment to ensure true strict liability is already in place in road traffic legislation in other EU jurisdictions

⁵ Paras 16.15-16.23

and does not represent a radical shift in wording or interpretation of the AEVA to ensure more certainty for victims of accidents, where an AV was involved.

Section 3(2): There should be further guidance as to when it is 'not appropriate' to allow a car to 'drive itself' and to ensure the 'user in charge' understand their responsibilities, so that 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 proposed requirement of a 'user in charge' (who is not engaged in other activities) may alleviate some of these issues in relation to the various levels of automation, particularly regarding SAE level 3, but the position is still unclear in relation to causation and contributory negligence.

In particular 'drivers' and user in charge 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 user in charge will not be liable if the ADS was engaged. Evidence of the engagement or disengagement of the system should be provided to insurers.

This provision of the Act is limited 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. As stated in our response to Consultation 1, as the AEVA only applies to insured AVs, the MIB should be required to deal with any uninsured claims and we agree that this must be resolved between the MIB and government before AVs are released onto the roads on a wider scale.

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 and envisage some accident victims will still face highly technical Consumer Protection Act claims 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.

We echo FOCIS' comments in relation to this question and agree that any changes to product liability law should include AVs, but that the AEVA strict liability regime must be fully considered in order to offer full protection to innocent injured accident victims.

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. Such information will be crucial in relation to accident investigation and any claims for injury in relation to proving the speed, date and location of a vehicle.

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. If the data is not provided automatically, which we consider it should be, it should be provided within promptly upon request.

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. We agree with FOCIS that it may not be sufficient for cases involving incapacity or product defects, and agree a longer time frame should be imposed where an accident report involves serious injury or death. We agree with FOCIS proposal that 10 years is necessary.

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.