RESPONSE OF THE FACULTY OF ADVOCATES

to the

Joint Consultation Paper of the Law Commission and Scottish Law Commission

Automated Vehicles: Consultation Paper 3
A regulatory framework for automated vehicles

INTRODUCTION

1. The Faculty of Advocates responded in February 2019 to the Law Commissions' Joint Preliminary Consultation Paper on Automated Vehicles. In that response, we referred to a number of matters where clearly further and deeper reflection was required. We commented on both the possibilities and the limitations of Artificial Intelligence systems and the assumption that appeared to lie behind the paper that the operating system of an automated vehicle would be self-contained. We drew attention to the circumstance that such a system would more likely be dependent on both interaction with elements of the road infrastructure and with other self-driving vehicles and that relevant data and other elements of the control system might lie not in the vehicle itself but on remote servers. We refer to paragraphs 4, 5, 95 and 96 of our response to the Joint Preliminary Consultation Paper.

2. We also responded in February 2020 to the Consultation Paper 2 on Passenger Services and Public Transport and, in October 2010, to the Department for Transport's Automated Lane Keeping System (ALKS) Call for evidence.

3. We now welcome the opportunity to respond to the present Consultation. As with previous consultations, and with the DfT call for evidence, there are certain questions to which a simple response suffices, but there are others to which there is more than meets the eye. A number of the questions raise interesting and complex issues which require more detailed

consideration, and which expose that there may be unspoken assumptions which lie behind the questions, which assumptions need examination. This is especially the case in relation to the questions asked in relation to Chapter 17, Access to Data, as we discuss below.

CHAPTER 4: SELF-DRIVING AND HUMAN INTERVENTION

Consultation Question 1 (Paragraph 4.114)

18.1 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?

4. We agree with much of the proposed definition. It is important that the definition clearly excludes any suggestion that a user-in-charge must monitor vehicle behaviour (other than remain alert to a transition demand).

5. Some consideration may need to be given to the definition of "screen use". Clearly, a transition demand can interrupt screen use provided by an in-car infotainment system but cannot interrupt non-driving related screen use on an independent device. Given the rapid advances in the performance of mobile devices it is likely that even the most cutting-edge in-car infotainment system will quickly become obsolete in comparison to personal mobile devices. It must therefore be envisaged that the majority of non-driving screen use will be on independent devices (unless specific provision is made to prohibit this). In this context, we refer to our answer to Q6 in the Joint Preliminary Consultation Paper.

6. The question of "sufficient time to gain situational awareness" may also require further definition or discussion. The proposed ALKS Regulation (as described in the Call for Evidence of the Safe Use of Automated Lane Keeping System) proceeded on the basis that a transition demand should be responded to within 10 seconds. We note that the

consultation paper refers to evidence that 45 seconds may be necessary to safely bring an entirely disengaged user-in-charge into a position to safely assume the dynamic driving task.[1]

7. Sub-paragraph (3) of the definition currently requires a self-driving car to be "safe enough". This is a vague expression unless "safe enough" is defined. Fixing this definition is a significant issue and merits a whole chapter of the consultation paper, so it is important that any reference to "safe enough" is a reference to the overall safety standard that has been set for self-driving cars. This could maybe be avoided simply by sub-paragraph (3) requiring the vehicle simply to remain "safe" or continue to "operate within its approved safety case or safety parameters".

8. There is also the difficult issue of what is "safe" or "safe enough" if a driver does not respond to a transition demand within a reasonable time (whether that is 10 seconds, 45 seconds or some other time) or if a catastrophic failure of an important component of the self-driving system (for example, any central processing unit or the vehicle's complete sensor suite) renders the vehicle immediately unable to continue the dynamic driving task. In such cases, it is likely that the safest response is a minimum risk manoeuvre of some nature. This would form part of a vehicle's safety case but may well cause the car to behave in a way that is arguably unsafe by any normal standards but is still safer than continuing in an uncontrolled fashion.

Consultation Question 2 (Paragraph 4.115)

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

9. We agree that self-driving features should be designed so they can be used by people with hearing loss.

10. We are not in a position to comment on the technical question of what non-aural alerts will be sufficient to alert drivers with varying degrees of hearing loss, up to and including profound deafness, to a transition demand. It may be that such non-aural alerts may be distracting or counter-productive for drivers who do not have hearing loss. If this is the case, some thought may have to be given as to how the vehicle is configured to operate as suits the individual driver and how any configuration process is dealt with in the regulatory and

[1] See [4.74] citing a human factors research mentioned in a report from ABI/Thatcham.

approvals process. This may be simpler in a vehicle which is solely or mainly driven by a single driver with hearing loss but may provide greater challenges in vehicles operating on a shared ownership basis, such as a car-pooling, ride-sharing or transport-as-a-service.

CHAPTER 5: HOW SAFE IS SAFE ENOUGH?

Consultation Question 3 (Paragraph 5.118)

18.3 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?

11. We agree. The decision of what is "safe enough" in the context of automated vehicles is quintessentially a policy decision rather than a legal or technical decision. It should be a decision made on behalf of the British public by suitably advised politicians and for which those politicians are accountable.

12. We would recommend that any legislation empowering ministers to make such decisions should make provision about the process to be adopted, to ensure transparency and accountability, and minimise the risk of regulatory capture (given that powerful international commercial interests may be at stake). We would also recommend that provision is made to strike an appropriate balance between ADSE or vehicle manufacturers' interests in confidentiality (for instance, relating to performance or safety test information for their products) and transparency (which will favour the publication of such data).

Consultation Question 4 (Paragraph 5.119)

18.4 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.

13. The acceptable standard of safety is, as discussed above, primarily a policy decision.

14. However, we would consider that the aiming point should be that AVs are as safe as a competent and careful human driver. We accept the point made in the consultation paper that there are some scenarios in which AVs will generally be better than a competent and careful human driver (due, say, to faster reaction times) and some scenarios in which it will

be very challenging for AVs to match the standard expected of a human driver (those requiring wider contextual awareness such as the need to slow down well below the speed limit in presence of an ice-cream van or children playing near a road). We refer back to our discussion in our answer to Q1 of minimum risk manoeuvres which are likely to be objectively unsafe if performed by a human driver but may well be the safest action that can be taken in the circumstances by an automated vehicle.

15. We consider that the definition of the safety standard may therefore need to be more nuanced than can be achieved in a single sentence. We would tentatively propose that the definition and publication of the acceptable safety standard (against which the "sufficiently safe" decision is made) should be a duty placed on the Secretary of State rather than one to be enshrined in legislation.

16. We note that safety must be assessed within a specified Operation Driving Domain ("ODD"). For instance, an AV might well reach the standard of a careful and competent driver in a motorway driving environment but not be able to come near that standard in urban driving. As a consequence, we note that there may need to be civil and criminal consequences for a driver who engages self-driving mode in a vehicle where it is outwith its approved ODD (assuming there are circumstances where a vehicle may not be able identify if it is outwith its ODD).

17. We do not consider that the "average human driver" is an appropriate standard. Many drivers sometimes (and a few drivers often) fall below the standard of a careful and competent driver. Whilst replacing human drivers with AVs that are better than the average human driver may hypothetically see a marginal improvement in road safety outcomes, human drivers who drive less safely bear a civil, and possibly criminal, liability for their actions in a way that AVs cannot.

Consultation Question 5 (Paragraph 5.120)

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

18. We have no comment on this as it appears to be a technical issue.

Consultation Question 6 (Paragraph 5.121)

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

19. We agree that this is an important issue. We are aware of a number of examples where algorithm-based or machine-learning-based decision-making has produced discriminatory results that would contravene equality obligations. For example, in the notorious case of *State of Wisconsin v Loomis*[2], Mr. Loomis, having been found guilty of an offence, had been sentenced by the trial judge who, in determining his disposal of the case, had used COMPAS, an AI tool which purported to assess the defendant's risk of recidivism. The Wisconsin Supreme Court found that the use of this tool did not infringe the defendant's due process rights. This decision has come in for a great deal of legal and academic criticism[3] partly on the inability to examine the algorithms used (the "Black Box" problem which we highlighted at paragraph 3 of our Response to Joint Preliminary Consultation Paper) but also because the tool discriminated on the basis of sex and of racial group. The reason why the discrimination existed was because the data sets which had been used to educate the AI system had themselves reflected a bias against minority groups, which arose because police enforcement had been targeted against those groups leading to a disproportionate analysis – the system suggested that black people were at a higher risk of recidivism than white people because a higher number of black people had been prosecuted and found guilty of repeat offences, but that failed to take account of the fact that police and prosecution resources were focussed on black people. The dataset said nothing about the numbers in the respective groups *committing* (as opposed to being prosecuted and convicted of) repeat offences. In light of this experience, AV regulators will require to be vigilant in ensuring that datasets (whether raw data or used in an algorithmic/AI tool) do not reflect inherent biases.

20. We are not in a position to make practical suggestions other than noting that it should be part of the vehicle's safety case to satisfy regulators that the vehicle does not pose greater risks to those with a specific protected characteristic than it does to others. Our comments above about biases which may be inherent in AI tools apply equally here. If there is concern

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2 Supreme Court of Wisconsin 13 Jul 16 https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=171690

3 See, for example, Israni, *Algorithmic Due Process: Mistaken Accountability and Attribution in State v. Loomis* at https://jolt.law.harvard.edu/digest/algorithmic-due-process-mistaken-accountability-and-attribution-in-state-v-loomis-1

that a vehicle may include other non-safety related features which may suffer from similar difficulties, then an equality statement or assessment should form part of the type approval process.

CHAPTER 7: ASSESSING SAFETY PRE-DEPLOYMENT

Consultation Question 7 (Paragraph 7.99)

18.7 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?

21. We agree.

22. In our view, the ultimate liability for the safety of the vehicles must remain with the manufacturer and not be assumed by the regulator. However, we agree that there must be adequate and independent scrutiny of safety claims. The regulatory scheme must avoid the twin dangers of over-reliance on manufacturers' safety case claims (such as may have been the case with the Grenfell cladding) or specific tests (as with the diesel emissions scandal where manufacturers became focussed on achieving the best test performance regardless of real-world performance).

23. We would suggest that the regulatory scheme should provide for independence between the regulatory function and the independent testing function, with the testing function taking a "red team" approach to AV safety, providing a semi-adversarial forum for scrutiny of manufacturers' safety claims. This may assist in mitigating the problem of regulatory capture where regulators can be swayed by commercial priorities or the desire to facilitate innovative practices, rather than rigorously protect public safety.[4] We note that this is the approach

[4] The relationship between the Federal Aviation Authority and Boeing and the pressures on Boeing to

currently taken for the separation of approval authorities and market surveillance authorities (consultation document at paragraph 9.48).

Consultation Question 8 (Paragraph 7.100)

18.8 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.

24. Yes. We agree that the widest possible range of scenarios should be collated. Consultation is an important route to building a representative scenario database and allowing for input from key stakeholders. The scenario database should be regularly reviewed in light of experience and reported incidents. This is necessary to ensure safety cases are scrutinised as comprehensively as possible. However, we note the need to avoid the overly rigid use of scenarios which may simply lead manufacturers to design to those scenarios.

CHAPTER 8: INITIAL APPROVALS AND CATEGORISATION – PROPOSALS

Consultation Question 9 (Paragraph 8.17)

18.9 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?

25. Yes. We agree with this proposal for the reasons set out in the consultation document.

26. It may be clearer if the prohibition prevents unauthorised automated driving systems from being capable of being activated or used. It is feasible that manufacturers of automated driving systems which are not authorised may wish to sell versions of the vehicle with the relevant systems deactivated for use in the UK, either permanently or until authorisation is obtained (in which case they may be capable of being activated after a software update). A blanket prohibition on such systems may (depending on definitions) inadvertently prevent this.

27. We would propose that a statutory limit is set on this power to ensure that the exemption procedure cannot be exploited to circumvent the normal safety approvals process. We

compete with a non-US aircraft manufacturer are widely believed to have contributed to the safety and regulatory failures which led to the crash of two Boeing 737 Max airliners.

would propose that the exemption procedure should require an interim safety statement from the regulator commenting on the possible safety implications of the proposed test or trial authorisation. The public road is not a test track, so the test and trials procedure should be used only on systems which are believed to be safe, not to test whether systems are safe.

Consultation Question 10 (Paragraph 8.25)

18.10 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?

28. This appears to be principally a policy and implementation issue, so we offer no definitive comment.

29. We note that, in the event that inter-vehicle communication begins to feature in type approval standards (for instance, so as to allow self-driving vehicles of different types to form road trains, communicate about intentions or hazards or engage in other forms of collaborative behaviour), then there will need to be close alignment between those aspects of any national scheme and UNECE approvals if vehicles approved under different schemes are to be compatible.

Consultation Question 11 (Paragraph 8.43)

18.11 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?

30. We accept the point made in the consultation document that the requisite regulation-making powers already exist with respect to type approval for the "design, construction, equipment and marking" of vehicles.

31. However, we are concerned that the type approval of ADS is very different, both technically and in policy and safety terms, from the type approval of other vehicles and vehicle components. We refer to our answer to consultation questions 3 and 7 where we discussed the need for any regulatory scheme to provide for transparency and accountability and for there to be independence in testing.

32. We would recommend that consideration is given to providing for a separate regulation-making power for ADS type approval that requires a robust and transparent approvals process. We note that the consultation recommends that new regulation-making powers are created for categorisation decisions (at paragraphs 8.72 to 8.76). Our view is that regulations for ADS type approval should also be dealt with under this new regulation-making power.

33. For similar reasons, we agree with the comments at paragraph 8.35 of the consultation document, meaning that the type of vehicle to which an ADS may be installed must be defined clearly within the relevant safety case. We envisage it may often be necessary to define this down to a particular make, model and production variant of a vehicle. In some cases, even minor options (such as the exact variant of different possible headlight solutions) may need to be specified in the type approval, to ensure that performance is not

different between vehicles which have been tested and other variants with different characteristics with which the ADS has not been tested.

Consultation Question 12 (Paragraph 8.44)

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

(1) how it works in practice; and

(2) how well is it suited to the proposed national ADS approval scheme.

34. The current appeals process is an administrative review procedure and is not a process in which members of Faculty have involvement. We can offer no comment on the practical operation of the current system.

35. In our view, any process of appeal against an ADS type approval decision should be provided for in a separate regulation-making power for ADS type approval, as discussed in our answer to consultation question 11.

Consultation Question 13 (Paragraph 8.71)

18.13 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?

36. Yes. We agree with this proposal for the reasons set out in the consultation document.

37. We note the comments at paragraph 8.70 of the consultation paper about the requirement for the financial standing of ADSEs to be guaranteed and for their obligations to be funded if they become insolvent. We agree this will be important. The ongoing requirements on an ADSE – for instance in providing regular map and data updates – will be very significantly more onerous than in conventional vehicles. Whilst insolvency will obviously pose challenges for ongoing support, commercial pressures may well lead to manufacturers withdrawing support to older vehicles as numbers dwindle, or even to newer vehicles that have not sold in the numbers anticipated by the ADSE. Consideration should be given to requiring ADSEs to absolutely guarantee the length of support at the time of purchase to protect purchasers from being left with vehicles which are no longer supported. Consideration should also be given to how support is to continue to be provided in the event of the ADSE being wound up. We can foresee that, in the event of support ceasing, for whatever reason, without an effective contingency procedure, all of the previously supported vehicles would cease, overnight, to be capable of being lawfully driven.

Consultation Question 14 (Paragraph 8.77)

18.14 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?

38. Yes. We refer to our answer to consultation questions 3, 6, 7 and 11 where we discussed the need for any regulatory scheme to provide for transparency and accountability and for there to be independence in testing. This higher level of scrutiny and transparency should be enshrined in primary legislation.

Consultation Question 15 (Paragraph 8.78)

18.15 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?

39. In our view, the categorisation decision is equivalent to, or an important component of, the decision as to whether a vehicle is “sufficiently safe to drive itself”. As set out in our answer

to consultation question 3, this is a decision which should fall to the Secretary of State, advised by the independent regulator.

40. If the Secretary of State is the decision-maker, then it does not seem appropriate to have a higher authority to whom a formal appeal could be made. As with all decisions made by ministers under delegated powers, there would be a remedy in judicial review. There could be a formal process for requesting reconsideration of a decision, although it is not clear how that would differ from simply making a fresh application for categorisation.

Consultation Question 16 (Paragraph 8.83)

18.16 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.

41. We have some significant concerns about this proposal as currently worded. As we mention at our answer to consultation question 9, the public road is not a test track. We consider the comparison with pharmaceutical trials to be inapt. Those participating in pharmaceutical trials are volunteers. The road users and pedestrians have not volunteered to be crash-test dummies for automated vehicle safety testing. However, we accept that there is good reason for deployment of a new type of vehicle to be undertaken in limited numbers at first. But this should only be to provide assurance of the safety of a vehicle which is already believed to be safe, not to gather data about, or establish the safety of, a vehicle which is not already believed to be safe.

42. It is not clear how this proposal overlaps or is distinct from the tests and trials proposal discussed at consultation question 9. As with our answer to that question, we consider there may be a requirement to provide a statutory limit on this power to ensure that the exemption procedure cannot be exploited to circumvent the normal safety approvals process. We would propose that the exemption procedure should require an interim safety statement from the regulator commenting on the possible safety implications of the proposed test or trial authorisation.

CHAPTER 10: ASSURING SAFETY IN USE

Consultation Question 17 (Paragraph 10.82)

18.17 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?

43. Yes. We agree with this proposal for the reasons set out in the consultation document. We adopt the comments made in our answer to consultation question 7 about the form of the regulatory structures and processes required to avoid regulatory capture.

Consultation Question 18 (Paragraph 10.83)

18.18 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?

44. Yes. We agree with this proposal for the reasons set out in the consultation document.

45. As discussed in the consultation document, we consider the term “maps” may be inadequate to capture the environmental data required by AVs to support their safe operation. It is clear that the safe operation of AVs is dependent on this environmental data and other software (and perhaps hardware) being kept up-to-date. We agree that regulators should be able to require the ADSE to be responsible for this. We would note that data or software being out-of-date should be treated as a fault condition by an ADS in the same way as the failure of a physical component. In our view, this requirement to ensure that

software components of the ADS (including maps and other environmental data) are kept up to date will be a central part of the ADS safety case. We have already commented (in our response to consultation question 13) about the difficulties that may arise if, whether as a result of a commercial decision or another intervening event (such as insolvency), these updates cease to be produced by the ADSE.

Consultation Question 19 (Paragraph 10.84)

18.19 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.)

46. This is a policy and implementation issue, so we make no comment beyond noting that it seems likely that some software updates may well apply on a national (rather than international) basis, in which case a UK-based approval would be appropriate.

Consultation Question 20 (Paragraph 10.100)

18.20 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?

47. We consider that such an authority should be independent from the type approval authority. We refer to our comments about independence in our answers to consultation questions 3, 7 and 11. We have already proposed that pre-deployment testing should be separated from the regulator or type approval authority. It may be that there is benefit in the pre- and post-deployment testing function being conducted by a single body independent of the regulator.

Consultation Question 21 (Paragraph 10.101)

18.21 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)?

48. As discussed above, we consider it important that the regulator is seen to be as open and transparent as possible.

CHAPTER 11: INVESTIGATING TRAFFIC INFRACTIONS AND COLLISIONS

Consultation Question 22 (Paragraph 11.24)

18.22 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?

49. Yes. We agree with this proposal for the reasons set out in the consultation document. It also occurs to us that the behaviour of an automated vehicle may in certain circumstances be as much a result of its own characteristics as of its surroundings. We would therefore also suggest that the regulator might have the power of coordinating where necessary with the authorities responsible for the upkeep of roads in, for example, investigating whether a dangerous response by automated vehicles may be explained by the conditions in or layout of a maintained road.

50. In some such cases it is conceivable that minor modifications to surroundings, to make them more 'AV-friendly', may promote public safety with greater ease and less expense than requiring numerous, disparate ADSEs to modify technology that, though superficially performing the same function, may do so on the basis of quite different equipment and software. The regulator might therefore have the power to notify local authorities or other highway authorities of improvements that may be indicated. We defer to potential regulators and the relevant authorities whether the regulator should have any mandatory powers in this regard.

51. We also note for completeness that this may require the regulator to interact with devolved authorities, though do not at present see that anything turns on that in principle in this context.

Consultation Question 23 (Paragraph 11.53)

18.23 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?

52. Yes. We agree with this proposal for the reasons set out in the consultation document. Please also see the response to question 22, above.

Consultation Question 24 (Paragraph 11.54)

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

(1) the amount of any monetary penalty; and

(2) the steps which should be taken to prevent re-occurrence of a breach.

Do you agree?

53. Yes. We agree with this proposal for the reasons set out in the consultation document. We would add that a mechanism of redress for ADSEs against such decisions should be clearly available, whether by judicial review or statutory appeal.

Consultation Question 25 (Paragraph 11.69)

18.25 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?

54. Yes. We agree with this proposal for the reasons set out in the consultation document. It strikes us that such a unit would have to be particularly well funded to attract the range of necessary expertise.

Consultation Question 26 (Paragraph 11.82)

18.26 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?

55. We agree so long as such a forum is neither parochial nor divorced from the wider discussion required to assure that there is no unexpected or unwarranted divergence in the expected behaviour of autonomous vehicles in different jurisdictions. This appears to us to be an area where the focus should be on international cooperation.

Consultation Question 27 (Paragraph 11.83)

18.27 We welcome views on:

(1) the issues the forum should consider;

(2) the composition of the forum; and

(3) its processes for public engagement.

56. We have no specific comment in response to this question, save to refer to our answer to question 26.

CHAPTER 12: THE USER-IN-CHARGE

Consultation Question 28 (Paragraph 12.24)

18.28 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?

57. Not entirely. As to (1), we agree that it is sensible for the definition of 'user-in-charge' to include a person who is in a position to operate the controls of a vehicle, i.e., who is in the driver's seat, or is the only person in the vehicle and, as explained below, ought properly to be in the driving seat. We doubt whether any other person can reasonably be expected to meet the requirement to be able to take control of the vehicle, potentially within 10 seconds.[5] It is doubtful that a person in another seat could do so in time: they must react, perhaps safely put away a hot drink or deal with a child, unbuckle themselves, and get into the driving seat within 10 seconds. The suggestion that a person is able to regain control of the vehicle to the extent necessary (which may not be possible remotely) merely because they are able to read its number plates also strikes us as unconvincing. The application of such a rule, even of thumb, would also vary unduly, based on the person's quality of vision and the lighting conditions. This appears to us a situation that favours a bright-line rule: the user-in-charge must be in the driving seat if in the vehicle or (but only if the approach taken in other respects makes it necessary to allow for the user-in-charge to be outside the vehicle) in sufficient proximity to the vehicle as to be able, within the necessary time, to get to the driver's seat and assume manual control of the vehicle.

58. As to (2), we agree as to 'dynamic driving offences' but do not see why the user-in-charge, the vehicle having been brought to rest in a position where it is apt to attract a parking ticket, should leave it there. He or she should move the vehicle to where it belongs, provided that it is capable of being moved. We see no obstacle to his or her doing so.

[5] We note the discussion of 'sufficient time to gain situational awareness' at [4.90] to [4.93] of the consultation document and refer to our earlier comments in the response to Q1.

Consultation Question 29 (Paragraph 12.37)

18.29 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?

59. Yes.

Consultation Question 30 (Paragraph 12.45)

18.30 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.

60. Yes. It seems to us to be desirable that learner drivers should learn how to operate autonomous vehicles. We agree with the rationale proposed, that learners should be able to do so on the same terms as they are allowed to drive on a motorway. We are concerned, however, that lack of means and opportunity for such training for many may have a negative effect on public safety.

Consultation Question 31 (Paragraph 12.53)

18.31 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?

61. Tentatively, yes. We have less hesitation in agreeing to (1). As to (2), the degree of culpability appears to us to be significantly less than (1). The consultation document does not say so in terms, but we would expect, and urge, that that be reflected in the available sentences for the two respective offences.

Consultation Question 32 (Paragraph 12.59)

18.32 We provisionally propose that persons carried without a user-in-charge should be guilty of a criminal offence.

Do you agree?

62. We agree in principle with the question posed at paragraph 12.59. We do so subject to important reservations bearing in mind the further invitation for views in paragraph 12.58, which affects the desirable scope of such an offence. We note the reference in paragraph 12.57 to the clear rule in relation to bicycles, which relates to whether or not a bicycle is constructed so as to carry one, or more than one person. In the case of an automated motor vehicle, there may not be anything which would be apparent to its occupants to indicate whether or not it is an automated vehicle, or an automated vehicle driven in its operating domain. Further, it cannot be presumed that a person being conveyed in the vehicle would reasonably know or be able to tell whether the person in charge of the vehicle is, or is not, qualified to be a user in charge. This does, indeed, suggest that there is the potential for unfairness (similar to the matters expressed at paragraph 12.55) which requires to be considered. That said, a requirement to prove knowledge as an element of the offence, as mooted at paragraph 12.58, seems to us unnecessary to meet these concerns. Some of the examples given at paragraph 12.55 strike us as variously improbable. For example, we do not understand why a blind person should be unaware that there is no person in the driver's seat, merely because he or she cannot see that person. Further such problems could be capable of being dealt with in another manner, such as by the age of criminal responsibility or by the differing ways in which offences by children would be approached and disposed of. Requiring proof of knowledge therefore seems unduly burdensome. That said, we see the desirability of a *defence* of lack of knowledge and would suggest that knowledge therefore be removed as an element of the offence itself and replaced with a defence that, for example, the person could not reasonably have been expected to know, in light of the circumstances and their own characteristics, that there was no user in charge.

Consultation Question 33 (Paragraph 12.60)

18.33 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.

63. Please see our response to question 32.

Consultation Question 34 (Paragraph 12.66)

18.34 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.

64. We would agree, if the test for the proposed defence was that a competent and careful driver could not reasonably have avoided the offence. Omission of reasonableness would mean that even the most remote possibility of avoidance would exclude the defence.

Consultation Question 35 (Paragraph 12.94)

18.35 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

(5) ensuring child passengers wear seatbelts.

Do you agree?

65. We agree with proposals 1, 3, 4 and 5. Proposal 2 is perhaps more complicated than it first seems. If there is some mechanism intended which would alert a user-in-charge about to set off, to an uninstalled critical update, then that would allow us to agree to proposal 2. In a situation where a car is shared between two people, such as husband and wife, and each assumed the other had taken care of whatever the update was, then if the absence of the update was not made obvious to the user-in-charge next to use it, we suggest criminal

liability should not automatically attach to that UIC. Enforcing effective design of vehicle status communication would obviate this problem.

Consultation Question 36 (Paragraph 12.95)

18.36 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?

66. We agree.

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

Consultation Question 37 (Paragraph 13.67)

18.37 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?

18.38 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".

67. We agree, but as the discussion in the consultation papers makes plain, this is not straightforward territory. Technology failure might create a situation in which the ADS and the remote operator vie for steering and braking control. Who would be at fault for any resultant collision? The answer might be that in such situations, where full longitudinal and lateral control is not available to the remote person, then the state of self-driving continues until extinguished by full control becoming available to the remote person.

Consultation Question 38 (Paragraph 13.86)

18.39 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?

68. We agree.

Consultation Question 39 (Paragraph 13.92)

18.40 We welcome views on whether NUIC operators should be required to demonstrate professional competence through a safety management system, as set out in a safety case.

69. This seems sensible, given the enormous risks that could arise through incompetence.

Consultation Question 40 (Paragraph 13.108)

18.41 We provisionally propose that, irrespective of the nature of the vehicle, a licensed operator should be under a duty to:

(1) supervise the vehicle;

(2) maintain the vehicle;

(3) insure the vehicle;

(4) install safety-critical updates and maintain cybersecurity; and

(5) report accidents and untoward events (as defined by the regulator).

Do you agree?

70. We agree. There is no other sensible candidate for these responsibilities.

Consultation Question 41 (Paragraph 13.109)

18.42 We provisionally propose that legislation should include a regulation-making power by which some or all of these duties could be transferred to the registered keeper or owner, if it was shown that it was appropriate to do so.

Do you agree?

71. We agree but observe that the system for the assessment of appropriateness of transfer was one in which the two parties might well have opposing views, and effective machinery for resolution of such conflict is required.

Consultation Question 42 (Paragraph 13.116)

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

18.44 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?

We welcome views on what the set interval for periodically re-consulting the accessibility advisory panel should be.

72. We agree and have no view to offer on frequency beyond suggesting the inclusion of an 'on-demand' facility, to deal with acute unforeseen issues in the early stages.

Consultation Question 43 (Paragraph 13.133)

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

73. We consider that the scheme should be administered by the DVSA on behalf of the Traffic Commissioners. It appears to be a task broadly aligned with existing obligations held by DVSA.

CHAPTER 14: CRIMINAL OFFENCES BY ADSES AND THEIR SENIOR MANAGERS

Consultation Question 44 (Paragraph 14.107)

18.46 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?

74. We agree that it should be a criminal offence to omit safety-relevant information or include misleading information when either putting a vehicle forward for classification or when responding to information requests from the regulator. Commonly the creation of such an offence requires that the omission or misleading inclusion is done *knowingly*, or perhaps with a specified malign intention which requires to be proved if the offence is to be made out. The omission of such qualifications is sometimes justified where the public interest outweighs the risk of conviction for accidental wrongs (such as with certain aspects of firearms legislation) but such strict liability offences are uncommon. The rationale behind such strict liability is understood to be the creation of an anxious mindset in those trusted to report results, leading to the greatest of care to avoid accidental breaches. The legislature requires to give careful thought before creating any strict liability offence. This is recognised in the proposed defence to Offence A below.

75. We do not agree that the offence should be limited to senior managers. We suggest that there should be discretion allowed to the prosecuting body to decide whom it is appropriate to prosecute. A problem with the approach indicated is that egregious conduct by more junior staff could not ever be prosecuted, and convictions for senior staff duped by underlings would either be unjust or unattainable from decision makers who perceive the injustice. The definition of 'senior managers' might be problematic within widely varying business structures.

76. We disagree that the offence should not apply to more junior employees for the same reason as above.

77. We reluctantly agree with the suggestion that the offence should be aggravated by grave consequences such as death or serious injury but urge that such legislation is carefully worded. For this to avoid being arbitrary there requires to be some link between the blameworthiness of the act or omission and the gravity of the consequence. The text in the consultation paper surrounding this point correctly (to our mind) identifies the sense in requiring some foreseeability element, such that the act or omission invited more serious consequences of the sort that eventually occurred. We note the acceptance of this reasoning in the form of offence D below.

78. We agree that, in Scotland, the offence should be prosecuted by the Procurator Fiscal. Procurators Fiscal are capable of developing the required speciality in the way they have done with Health and Safety prosecutions, and general road traffic crime.

Consultation Question 45 (Paragraph 14.108)

18.47 We seek views on the following proposed offences.

Offence A: non-disclosure and misleading information in the safety case

When putting forward a vehicle for classification as self-driving, it would be a criminal offence for the ADSE to

(1) fail to provide information to the regulator; or

(2) provide information to the regulator that is false or misleading in a material particular where that information is relevant to the evaluation of the safety of the ADS or the vehicle.

The ADSE would have a defence if it could show that it took reasonable precautions and exercised all due diligence to prevent the wrongdoing.

The penalty would be an unlimited fine.

Offence B: non-disclosure and misleading information in responding to requests

When a regulator requests specific information from an ADSE (whether before or after deployment), it would be a criminal offence for the ADSE to

(1) fail to provide information to the regulator; or

(2) provide information to the regulator that is false or misleading in a material particular where that information is relevant to the evaluation of the safety of the ADS or the vehicle.

The ADSE would have a defence if it could show that it took reasonable precautions and exercised all due diligence to prevent the wrongdoing.

The penalty would be an unlimited fine.

Offence C: offences by senior management

Where offence A and/or offence B committed by a body corporate is proved—

(1) to have been committed with the consent or connivance of an officer of the body corporate; or

(2) to be attributable to neglect on the part of an officer of the body corporate, then that officer is guilty of the offence.

An officer includes any director, manager, secretary or other similar officer or any person who was purporting to act in any such capacity.

We see this as equivalent to offences under the Human Medicines Regulations 2012 and General Product Safety Regulations 2005, which carry a penalty of a fine and/or a maximum two years' imprisonment.

Offence D: aggravated offences in the event of death or serious injury following non-disclosure or provision of misleading information to the AV safety regulator

Where a corporation or person commits Offences A to C, that offence is aggravated where the misrepresentation or non-disclosure:

(1) related to an increased risk of a type of adverse incident; and

(2) an adverse incident of that type occurred; and

(3) the adverse incident caused a death or serious injury.

We see this as equivalent to the offence of causing death by dangerous driving, which carries a penalty of an unlimited fine and/or a maximum of 14 years' imprisonment.

79. Offence A. We agree with the proposed description of the offence. On the question of punishment, we suggest that, where the accused entity is a natural person, consideration is given to making available a wider range of disposals. It is within contemplation that failures of the sort to be prosecuted could be on a large scale, or with the prospect of dreadful consequences. Where blame rests with a natural person in such a case, the limitation of punishment to a fine might well not fit the crime.

80. Offence B. Subject to an obvious requirement that such requests must have a specified period within which there must be compliance, we agree with the description of the offence. We refer also to our comments in relation to the preceding offence where we suggest widening the range of disposals available to the court when dealing with natural persons who have been convicted of an offence.

81. Offence C. We agree with the proposed extension to offences A and B which this offence represents. We note the broader scope for punishment, which aligns with our suggestions in relation to the two preceding offences.

82. Offence D. We agree with the proposed definition of the aggravated offence, but on the question of sentence we foresee the possibility of offences which exceed the gravity of the RTA s.1 offence in the comparison. In RTA cases, where the criminality is extraordinary in its gravity, such a death can be prosecuted by the common law offence of culpable homicide, which has no upper limit in penalty (see *HMA v Purcell* 2007 [HCJAC] 13). Legislation which allowed a similar extension of prosecution would facilitate a more nuanced approach, which we would commend.

Consultation Question 46 (Paragraph 14.109)

18.48 We welcome views on whether an ADSE should be under a duty to present information in a clear and accessible form, in which safety-critical information is indexed and signposted.

83. We consider that the creation of such a duty is attractive in principle, but likely to be attended by difficulties in practicability of prosecution in the breach. The attendance of such difficulties

should not be seen as a bar to the creation of such a duty though, since the duty would seem certain to act towards the improvement in communication of safety critical information.

CHAPTER 15: NEW WRONGFUL INTERFERENCE OFFENCES

Consultation Question 47 (Paragraph 15.10)

18.49 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?

84. We agree. We observe that some software may not be on the vehicle itself but may be accessed from a central hub (for instance, weather information). We suggest that the reference to software should be broader than suggested, such as "any software installed within, utilised or intended to be utilised by the vehicle."

Consultation Question 48 (Paragraph 15.11)

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

85. We can see that there is good reason for re-enacting the law to deal with unauthorised interference with vehicles or infrastructure. We refer to our answers to consultation questions 34 and 37 of the Joint Preliminary Consultation Paper.

Consultation Question 49 (Paragraph 15.53)

18.51 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?

86. We make no comment as to the law as it applies in England and Wales.

87. In our response to the joint preliminary consultation (at Q32), we noted that the conduct at which the proposed aggravated offence strikes may fall within the definition of murder, culpable homicide or culpable or reckless conduct. Nonetheless, we took the view then that a specific offence may provide greater clarity.

88. On reflection, we now consider that the better option is not to create a new offence in Scots law. We note that s22A does not currently apply to Scotland and we are not aware that the issues which led to that offence being created in England and Wales have been encountered in Scotland, given the inherent flexibility of the relevant Scots common law offences.

89. The justifications mentioned in the consultation document do not persuade us. We consider that this criminal offence is not a principal part of the legislative regime for automated vehicles, so any consideration of harmonisation of the law about unlawful interference with autonomous vehicles or their associated infrastructure is outweighed by the importance of harmonisation of the criminality of culpable and reckless conduct of any nature across Scots law. Similarly, the Scots courts and Scottish prosecutors are well able to deal with the established Scots common law offences and develop any caselaw within the framework of Scots law. Creating a new statutory offence (which would presumably also require the enactment of the existing s22A offence into Scots law) would in reality add uncertainty to Scots law and complicate prosecutions here.

Consultation Question 50 (Paragraph 15.55)

18.52 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?

90. For the reasons discussed in our response to consultation question 49, we note that this question would not arise if interference with vehicles, road or infrastructure is dealt with under the existing Scots law offences.

Consultation Question 51 (Paragraph 15.62)

18.53 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.

91. For the reasons discussed in our response to consultation question 49, we note that this question would not arise if interference with vehicles, road or infrastructure is dealt with under the existing Scots law offences.

CHAPTER 16: CIVIL LIABILITY

Consultation Question 52 (Paragraph 16.24)

18.54 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?

92. The approach of section 2(1) of the Act is to impose liability on the insurer of the vehicle to indemnify both the insured person and any third party in respect of losses arising as the result of an accident occurring whilst a vehicle is driving itself. It is then for the insurer to avail itself of the existing law, if so advised, to recover its losses. In effect, the statutory provision does not seek to reform existing principles of liability, including such issues as contributory negligence and remoteness, so much as to insert the insurer as a "buffer" between the injured party and any possible wrongdoer. We say "any possible wrongdoer" as there may well be situations where the accident may have happened without fault. In this respect, parties suffering loss occasioned by a self-driving vehicle are in a stronger position than parties injured by a vehicle being manually driven as they have the benefit of no-fault indemnity and, even if there is fault, do not require to establish it.

93. We can see that insurance-based no-fault compensation may well be necessary to encourage public confidence in the new technology., If the insurance industry can accommodate itself to such a regime, the proposal to postpone any further review until a later date is acceptable. This is because it is the insurers, rather than injured parties, who become, in effect, the guinea pigs (though it may be that the public could suffer indirectly should the proposal lead to a general increase in motor insurance premiums).

94. We also believe that such a future review may involve issues wider than self-driving vehicles. We comment above on the differing outcomes depending on whether a vehicle is or is not under automatic operation at the time of an accident, and this might open up a question (on which we express no view) as to whether to introduce a no-fault regime for all motor claims, as already exists in a number of jurisdictions internationally. It seems sensible to consider such possible reforms as part of a wider review once more practical experience is gained.

Consultation Question 53 (Paragraph 16.32)

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

Do you agree?

95. We expressed above the view that the no-fault compensation regime for self-driving vehicles raises issues as to whether there should be a similar regime for manually driven vehicles. This arises from the policy consideration of whether different outcomes for injured persons can be justified depending upon whether or not vehicles are being driven in self-driving mode at the time of an accident. Similarly, there seems an innate unfairness in not providing compensation to victims of accidents for which uninsured self-driving vehicles are responsible, where there would be an insurer of last resort in the case of vehicles being driven manually by uninsured drivers. Accordingly, we agree with the proposal, though we do not underestimate the difficulties which may arise in agreeing such a scheme.

Consultation Question 54 (Paragraph 16.47)

18.56 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?

96. The increasing extent to which products of all types are dependent on software for their operation, and the increasing use of remote downloads of software to maintain the effective operation of those products, require a fundamental review of the law of product liability. Further layers of complication are added by the use of AI systems, which may often be opaque in their operation. We refer to paragraphs 57 to 60 of our response to the Joint Preliminary Consultation Paper.

97. There is, we believe, a very high imperative to reviewing product liability in relation to self-driving vehicles, not least because the operation of a physical object which is capable of causing serious injury or death is, more than ever before, wholly dependent upon the use of software, when in self-driving mode. However, we agree that the issue, though particularly pressing in the case of self-guiding vehicles, is one which ranges across a much wider range of products including, potentially, products which are entirely "virtual". Accordingly, it would not be appropriate to conduct such a review in the context of self-

driving vehicles in isolation; but the urgency of the issue suggests that there is an immediate imperative for a wider-ranging review of product liability.

CHAPTER 17: ACCESS TO DATA

Consultation Question 55 (Paragraph 17.65)

18.57 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?

98. We agree that the self-driving regime as contemplated by the Law Commissions clearly warrants the collection of data for these purposes. However, it seems to us that the real issue is not whether the data should be collected, but, rather, the limitation of the use of data to those narrow, and justifiable, purposes only.

99. Reference is made in paragraph 17.49 to the way in which a record of places visited might itself constitute special category personal data. There is a similar but more acute issue where the vehicle is used by a solicitor or advocate in the course of his or her business or an individual in visiting his or her lawyer. Such location data can (as with the special category data examples given) constitute an infringement of ECHR article 8 privacy rights, which are qualified rights. There may be little problem in justifying the sort of intrusion on article 8 rights as discussed above. However, the mere fact that an individual visited a lawyer may itself not only fall into the category of privacy rights under ECHR article 8, but also fall to be protected by legal professional privilege under article 6, which (unlike the article 8 right) is an absolute and unqualified right, strongly indicating that there are no circumstances in which data subject to legal professional privilege can be collected.

100. This is not, at root, a new problem, and has been considered by the CCBE in its *Recommendations on the protection of client confidentiality within the context of*

surveillance activities[6] and *Recommendations on the protection of fundamental rights in the context of 'National Security'*.[7]

101. However, the problem has hitherto manifested itself in more conventional contexts. Clearly, in devising a system for data gathering, care should be taken to accommodate this particular problem, for example, by allowing data gathered in circumstances where legal professional privilege applies to be limited only to anonymised data or even not gathering any such data at all, although that might prevent the use of self-driving vehicles to convey lawyers and clients to meetings, at least in circumstances attracting legal professional privilege. If such data is susceptible of being collected, then we would recommend the use of the measures listed in the CCBE papers.

Consultation Question 56 (Paragraph 17.71)

18.58 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?

102. This proposal has only our qualified consent, for there may be cases where the disclosure may be disproportionate in relation to the infringement of Article 8 rights and impermissible in relation to article 6 rights. If such an obligation is to be imposed, it should be hedged with appropriate safeguards, as discussed in the previous paragraph.

Consultation Question 57 (Paragraph 17.81)

18.59 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?

103. We agree a balance needs to be struck between minimising a legal requirement to retain data and the availability of such data to assist with dispute resolution or the investigation of criminal offences. We note the discussion about the lawfulness of data retention under the GDPR and ePrivacy Directive. However, retention of data from self-driving vehicles will inevitably engage the Convention right to privacy under Article 8 of the ECHR and may, in

[6] Recommendations on the protection of client confidentiality within the context of surveillance activities.
[7] Recommendations on the protection of fundamental rights in the context of 'National Security'.

some circumstances, also engage Article 6, as explained above. Regardless of the lawfulness of processing, any potential interference with Article 8 privacy rights must be proportionate to the legitimate aim pursued and it should also be noted that any gathering, processing or retention of data subject to legal professional privilege is simply not permitted at all under Article 6.

104. We accept that the 3-year limit may seem a plausible starting point, given its neat alignment with the normal period of limitation in personal injury actions. However, we are concerned that simply adopting this period may well be disproportionate if other measures (such as a much shorter retention period with a notification provision) can substantially achieve the same aim. We would question whether some of the scenarios mentioned in the consultation document at paragraph 17.76 would occur sufficiently frequently to make it proportionate for all vehicles to retain data for as long as 3 years as a contingency against the occurrence of one of these relatively rare circumstances.

105. We would also comment that any assessment of the proportionality of location data will depend on a number of technical factors. For instance, whether the data is stored onboard the vehicle or transmitted and stored (or copies stored) centrally by the ADSE; whether data will be encrypted or protected by any other technical means; whether data will be stored in a form in which it can be accessed by the driver or a third party (such as a garage) with the necessary equipment; whether data will be aggregated with other data by ADSEs or other service providers (for instance, a car pool provider may also retain the identities of drivers); and whether data will be accessible to subsequent owners or users of a vehicle.

106. With strong protections, such as a limited data set stored with technical protections that provide strong protection against access to data in any other circumstances than by the ADSE acting under their legal duty to provide a time-limited extract of data in response to a legitimate request for data from an identified vehicle, it may be possible for storage for a relatively longer period to be proportionate, though we should still have concerns over storage for a three year period. In order to give some context to this, it is worth recalling the provisions of paragraph 232(1) of the Air Navigation Order 2016 which mandates a data retention period of at least 25 hours for data stored in a flight data recorder. We fully appreciate that, in the case of automated vehicles, a period of data retention measured in hours would clearly be insufficient. However, no matter what supposed benefits a period designated in years might be thought to bring, we entertain severe doubts whether any such

retention period would be judged to be proportionate in relation to the fundamental right to privacy under ECHR article 8 and whether it would be compliant with both the data minimisation principle under Article 5(e) and the requirement for privacy by design under Article 25 of the GDPR.

107. It is reasonably likely that, in the majority of cases where access to data might be required, the need for such access should have become apparent within a relatively short time. We appreciate that there may be other cases where this is not so, but a balance requires to be struck. This balance may differ depending on the class of vehicle and its use. For example, the same privacy concerns may not apply to a commercial vehicle or a police car. Further, it might be possible to justify the creation of a mechanism for data relating to a particular specified vehicle or vehicles to be kept for relatively longer periods on a case-by-case basis and on cause shown.

108. In any event, if the requirement to store location data is to be enshrined in the criteria for an ADS to be classified as self-driving, the requirements for providing sufficient protection to that data should also be clearly set out.

109. The consultation paper at paragraph 17.88 indicates that there is no detail yet available as to the likely international standards for the retention of a much fuller data set (including video data) from the time around a collision or other similar incident detected by the vehicle. We note that similar concerns will apply to any arrangements for the retention of this data.

Consultation Question 58 (Paragraph 17.95)

18.60 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?

110. It is, of course, the case that the data protected by the GDPR is restricted to personal data – which is to say data pertaining to natural persons, so it is theoretically possible to figure a case where no personal data would be involved (for example a driverless vehicle owned by a company which is remotely controlled by an AI system which is carrying only goods and which collides with a lamp post on a deserted road, where no people are present). Such

examples are likely to be few and far between. Hence, we agree that the default requirement should be GDPR compliance subject also to our comments above requiring measures which also comply with the ePrivacy Directive and are proportionate in terms of ECHR Article 8 and do not infringe ECHR Article 6.