



## **Bar Council response to the Law Commission's third consultation paper on Automated Vehicles**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the third joint consultation paper by the Law Commission and the Scottish Law Commission<sup>1</sup> on the law of Automated Vehicles (AV law).<sup>2</sup>
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB.)

### **The Law Commission's Review of AV Law**

4. The Law Commission (at the request of the Centre for Connected and Autonomous Vehicles (CCAV), a joint unit of the government's Department for

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<sup>1</sup> All three of the consultation papers on AV law are joint papers, by both Law Commissions. Solely for abbreviation, this response paper uses the singular title "the Law Commission" to refer to both. This paper addresses the law of England and Wales.

<sup>2</sup> [Consultation paper](#)

Business, Energy and Industrial Strategy and Department of Transport<sup>3</sup>) has undertaken a far-reaching review of the legal framework for automated vehicles, and their use as part of public transport networks and on-demand passenger services. It is a three-year project running from 2018 to 2021 which includes three rounds of consultation, followed by the Law Commission's final recommendations, which it intends to publish in the last quarter of 2021<sup>4</sup>.

5. The Law Commission has published three consultation papers to date (and has completed the first two rounds of consultation, to which it has received responses). Those consultation papers are referred to in this response as follows:

(1) *Automated Vehicles: a joint preliminary consultation paper*, November 2018, Law Commission Consultation Paper No 240, referred to in this document as **CP1**. CP1 looked at issues affecting all AVs, regardless of how they were used. It considered how safety should be assured before AVs are placed on the market, as well as how they should be monitored once on the road. It explored criminal and civil liability. It examined how to adapt road rules for artificial intelligence.

(2) *Automated Vehicles: Consultation Paper 2 on Passenger Services and Public Transport*, October 2019, Law Commission Consultation Paper No 245, referred to here as **CP2**. CP2 focussed upon the regulation of "Highly Automated Road Passenger Services" ("HARPS"), a term which the Law Commission coined to refer to services which will use highly automated vehicles to carry passengers. The paper considered a national operator licensing scheme for HARPS, as well as the private use of such vehicles. It also examined the issues of accessibility for older and disabled people, how to control congestion on public roads and how regulation might integrate AVs with public transport.

(3) *Automated Vehicles: Consultation Paper 3 – a regulatory framework for automated vehicles*, December 2020, Law Commission Consultation Paper No 253, referred to here as **CP3**. CP3 returns to key themes in both previous papers provisionally to propose a regulatory framework for the first self-driving vehicles<sup>5</sup>. That is the paper to which this document responds.

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<sup>3</sup> CCAV website: <https://www.gov.uk/government/organisations/centre-for-connected-and-autonomous-vehicles/about>

<sup>4</sup> Law Commission AV project website (including all the consultation papers and responses): <https://www.lawcom.gov.uk/project/automated-vehicles/>

<sup>5</sup> Summaries of the three papers taken from chapter 1 of CP3.

## The Bar Council's responses to the AV law consultation papers

6. The Bar Council responded to both of the Law Commission's previous joint consultation papers on Automated Vehicles (CP1 and CP2), on 8 February 2019<sup>6</sup> and 3 February 2020<sup>7</sup> respectively.

7. This paper addresses the consultation questions raised by the Law Commission in its third paper (CP3).

8. The paragraph within CP3 to which each question relates appears in the subheadings below.

### Glossary of key technical terms

9. The Law Commission provides both a list of abbreviations and a glossary in CP3, as well as a chapter describing key concepts<sup>8</sup>. This is a shorter list of definitions and abbreviations, which it is hoped will provide a useful background note to the topic. The definitions are quoted from the glossary in CP3, except for the passages within square brackets which have been added by the writers of this response.

**Advanced Driver Assistance System (ADAS):** Vehicle-based electronic systems which provide driver *assistance* [italics added: distinct from automation of the driving task, in an ADS].

**Automated Driving System (ADS):** A term used in the Society of Automotive Engineers' (SAE) Taxonomy to describe a vehicle system that uses both hardware and software to perform the dynamic driving task on a sustained basis [see "SAE" below].

**Automated Driving System Entity (ADSE):** a term coined by the Law Commission (in CP1) for an entity responsible for vouching for the safety of an automated driving system for safety assurance purposes.

**[Automated and Electric Vehicles Act 2018 (AEV Act 2018):** the first British statute to legislate for automated vehicles - not comprehensively but to bring

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<sup>6</sup> Bar Council response to CP1: <https://www.barcouncil.org.uk/uploads/assets/87c77673-4474-49b0-ad5099f58f540b2e/barcouncilresponsetothelawcommissionsautomatedvehiclesconsultation.pdf>

<sup>7</sup> Bar Council response to CP2: <https://www.barcouncil.org.uk/uploads/assets/071e6819-d6fb-4770-8a153d5d733dbbe5/Bar-Council-response-to-the-Law-Commissions-Automated-Vehicles-Consultation.pdf>

<sup>8</sup> CP3 pages ii, v and 11 onwards (chapter 2)

civil claims for compensation for road traffic accidents caused by an AV within the system of compulsory third-party insurance provided for (since 1930) by the Road Traffic Acts (currently by the 1988 Act). Part I of the AEV Act 2018 applies a direct liability upon the owner or insurer of an AV to compensate the victim of an accident injured by an accident caused by an AV when driving itself. Section 1 of the Act provides for listing of automated vehicles by the Secretary of State for Transport. The 2018 Act is not yet in force but is expected to be brought into force – whether in its current form or added to or amended – probably at some time after the Law Commission’s final report on AV law, which is due to be published later in 2021. The arrival of the ALKS technology (below) might be the trigger for the AEV Act to be brought into force.]

**Automated Lane Keeping System (ALKS):** a system which steers and controls vehicle speed in lane for extended periods on motorways. [This is a current technology, which generates current legal questions including: whether and how ALKS would fit the description of an “automated” vehicle which would apply in British law under the AEV Act 2018, if that Act were brought into force without addition or amendment, and what responsibilities a driver of a car using ALKS would owe to other road-users, particularly in relation to resuming control of the vehicle.]

[**Autonomous** (as in “autonomous vehicle”): this word has dropped out of recent glossaries – perhaps due to the use of the word “automated” in the AEV Act, as well as some controversy as to where an “autonomous” vehicle would be placed in taxonomies such as the SAE levels of automation (see below). However, it survives in the title of the specialist policy unit at the Department of Transport (CCAV) and, more recently, has been re-animated in a proposed re-interpretation of the SAE levels, by Dr Philip Koopman<sup>9</sup> (which attempts to remove what the Law Commission has described as the “murky middle” of Level 3 and instead proposes 4 levels, two of which would be automated, and two not). It will be a matter for the Secretary of State to decide as to which guidance to take into account when listing automated vehicles under the AEV 2018 and the Bar Council expresses no opinion of any particular taxonomy. In Dr Koopman’s version, “autonomous” denotes the highest level of automation, i.e. fully automated driving, equivalent to the current **SAE level 5**]

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<sup>9</sup> *A user’s guide to vehicle automation modes* by Dr Philip Koopman, <https://pr-97195.medium.com>; *New AV ‘user’s guide’ to address L3 puzzle* by Junko Yoshida, EE Times, 28 January 2021: <https://www.eetimes.com/new-av-users-guide-to-address-l3-puzzle/>

**Conditional Automation:** a term used in the SAE Taxonomy to describe an automated driving system which can perform the entire dynamic driving task but with the expectation that a user will be receptive and respond appropriately to requests to intervene and to certain failures affecting the vehicle: **SAE level 3**. [In the technical language of the SAE, that “receptive user” is referred to as the **Fallback-Ready User**<sup>10</sup>, who is able to intervene to bring the car into a **Minimal Risk Condition**, i.e. to a stable, stopped position to reduce harm, upon receiving a signal to intervene from the system – a **Transition Demand**.]

[**Data Storage System for Automated Driving (DSSAD)**: a system to store data, required by regulation 8 of the United Nations Regulation on Automated Lane Keeping Systems (ALKS)<sup>11</sup>.]

**Dynamic Driving Task:** a term used in the SAE Taxonomy to describe the real-time operational and tactical functions required to operate a vehicle in on-road traffic, excluding the strategic functions such as trip scheduling and selection of destinations and waypoints.

**Highly-Automated Road Passenger Services (HARPS):** The term refers to a service which uses highly automated vehicles to supply road journeys to passengers without a human driver or user-in-charge. Some services may resemble taxi, private hire or bus services; others may look and operate differently [HARPS were the topic of Law Commission CP2].

**Highly Automated Vehicle:** a term used in the SAE Taxonomy to describe a vehicle equipped with an automated driving system which can perform the dynamic driving task without requiring a user to be receptive to requests to intervene: **SAE level 4**.

**Operational Design Domain (ODD):** a term used in the SAE Taxonomy to describe the domain within which an automated driving system can drive itself. It may be limited by geography, time, type of road, weather or in some other way.

**Society of Automotive Engineers (SAE):** the society which established the levels of automation of vehicles from 0 to 5 in their technical document J3016. [The SAE was established in the USA in the early twentieth century, shortly

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<sup>10</sup> CP3 page 38, 4.16

<sup>11</sup> UNECE ALKS regulation at

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/087/82/PDF/G2008782.pdf?OpenElement>

after what is now the British Standards Institution (BSI) was founded in the UK. Like the BSI across many industries, the SAE aimed to improve efficiency of production in the automotive industry by standardisation of parts and processes. SAE J3016 – “**the SAE Taxonomy** and definitions for terms related to on-road motor vehicle automated driving systems” - was first published in 2014 . A diagram simplifying the six levels of driving automation, as defined by the SAE (levels 0 to 5 inclusive), is reproduced in CP3<sup>12</sup>. The Law Commission notes that the SAE Taxonomy “*is the most widely used description of driving automation*”<sup>13</sup>, but also that it “*is described as “descriptive and informative, rather than normative” and is “technical rather than legal”*”<sup>14</sup>.]

**User-in-Charge (UIC):** a human who has access to the controls of an automated vehicle, and is either in the vehicle or in direct sight of it. The user-in-charge is not a driver while the automated driving system is correctly engaged but must be qualified and fit to drive. Their main role is to take over following a **transition demand**. They would also have obligations relating to non-dynamic driving task requirements including duties to maintain and insure the vehicle, secure loads carried by the vehicle and report accidents. An automated vehicle would require a user-in-charge unless it is authorised to operate without one.

[The Law Commission also considers the regulation of potential future vehicles “*which are sufficiently automated to be authorised to carry out journeys without a user-in-charge*”, for which it coins the term **NUIC (No User-in-Charge)**. “*The defining feature of NUIC is that it can travel empty. Alternatively, if there are people in the vehicle, these people are merely passengers*”<sup>15</sup>. Apart from passenger services, the Law Commission describes the potential uses of NUICs as including automated freight delivery, snow-ploughing and street sweeping<sup>16</sup>.]

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<sup>12</sup> CP3 page 38 (chapter 4). The Law Commission notes that the diagram, though well-known, is a simplification of the entire SAE Taxonomy, so that the diagram does not stand by itself (page 39, 4.20).

<sup>13</sup> CP3 page 39, 4.20

<sup>14</sup> CP3 page 39, 4.18

<sup>15</sup> CP3 page 213, 13.1

<sup>16</sup> CP3 page 213, 13.4 and 13.5

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

(This chapter considers human intervention in “Path 1” vehicles (namely those in which a human driver is required “*though, as the technology improves, the human would be able to cede the driving task to the ADS [Automated Driving System] in more circumstances*”<sup>17</sup>). In chapter 4, the Law Commission asks “*If a vehicle is driving itself, how far can a human in the driving seat be expected to intervene when things go wrong?*”. It notes the difficulty of pinning down the meaning of “monitoring” (which, through the phrase “and does not need to be monitored by, an individual” is central to the definition of “driving itself” in the AEV Act 2018<sup>18</sup>). It considers how the current main industrial standard classifying levels of autonomy (the SAE Taxonomy) approaches “monitoring”, how these issues have been approached by the United Nations (including in its new ALKS regulation), by other jurisdictions and the views of organisations in the UK.

The Law Commission’s view is “*that if a transition demand is timely and clear, it is reasonable to expect the user-in-charge to respond to it. However, we have strong concerns over any requirement that the user-in-charge should be expected to notice problems in the absence of a transition demand. On this basis, we think that some conditionally automated systems [SAE level 3<sup>19</sup>] will qualify as self-driving while others will not*”<sup>20</sup>.)

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

*The Law Commission provisionally proposes 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*

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<sup>17</sup> CP3 page 16, 2.29: “Two paths to automation”. “Path 2” is where “vehicles are deployed without a human driver in limited local contexts, followed by a gradual expansion of their range in use”.

<sup>18</sup> AEV Act 2018 section 8(1)(a)

<sup>19</sup> CP3 page 38, 4.16 (beneath SAE diagram)

<sup>20</sup> CP3 pages 35 to 36, 4.1 to 4.7

*(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?*

10. The Bar Council recognises the background to this question, which includes the difficult and imminent issue of whether a vehicle with an ALKS system should be listed by the Secretary of State for Transport as an “automated vehicle” under section 1 of the AEV Act (and so subject to the insurer liability system under that Act, for injury and damage claims) or whether such a vehicle should instead exist within the current system of human driver liability. If a vehicle with ALKS were to be listed as “automated”, such classification would require the AEV Act 2018 to be brought into force. So the classification of ALKS might be the question which births British law on automated vehicles.

11. The difficulty of listing an ALKS vehicle as “automated” (as both the Law Commission in this question, and the Department of Transport in its recent ALKS consultation paper have recognised) is that the circumstances and time at which a human driver might be required to intervene, to take back control from the ALKS, are unclear in the abstract, and are relatively untested in real use on roads. The question of the classification of ALKS is currently under consideration by the Department of Transport.

12. The Bar Council also acknowledges the technical background to the question, which includes not only how engineering standards are written and adopted (both at an international and national level) but also the interpretation of those standards (by policymakers, regulators, the courts and the writers of the Highway Code). A particular factor is the interplay between technical standards for vehicles (which, post-Brexit, will be set at the international level by the United Nations but in a more permissive way than under European Union law) and the law as to driver behaviour (which is a matter for national law). Although the laws of vehicle specifications and of driver behaviour have traditionally been separated (because driving has previously been considered an entirely human activity) the advent of more sophisticated driver-assistive and driving-automation technologies will cause those two strands to cross. How the law might respond to that profound change in the technical setting is a question considered by the Law Commission (and it underpins the Law Commission’s recommended reforms of pre and post-vehicle deployment testing, accident investigation etc).



13. The Bar Council's overarching view is that the core purpose of regulation must be protecting the safety of road-users. The Bar Council notes the repeated emphasis in governmental and other official documents upon the potential of automated vehicle technologies to improve road safety.

14. The Bar Council's responses to the Law Commission focus upon the legal aspects. The Secretary of State's classification decision in relation to ALKS and other driving technologies will depend upon a range of aspects, not limited to the legal. As the Law Commission emphasises throughout, an important aspect of ensuring the safety of these new vehicle technologies will be a system of regulation which is both workable and whose fundamental logic is understood by the public.

15. The current systems of civil and criminal liabilities in relation to the activity of driving are centred upon a standard of reasonably careful driving<sup>21</sup>. That is a cogent and familiar idea. For safety on the roads to be achieved in future, the public must know and understand the standard to which people responsible for the movements of vehicles are required to behave. Public trust requires sensible laws. Laws based upon numerous, overtly technical criteria are less likely to be understood or trusted.

16. The Bar Council's responses to the Law Commission's proposals in this question are as follows (the Bar Council understands "self-driving" in this question to equate to "automated" in the meaning of the AEV Act 2018):

*"(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".* The Bar Council agrees. The Bar Council notes that this is consistent with the definition of a vehicle "driving itself" in Section 8(1)(a) of the AEV Act 2018 ("a vehicle is "driving itself" if it is operating in a mode in which it is not being controlled, and does not need to be monitored, by an individual;").

*"(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)*

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<sup>21</sup> In the criminal context, section 3ZA(2) of the Road Traffic Act 1988 provides that "A person is to be regarded as driving without due care and attention if (and only if) the way he drives falls below what would be expected of a competent and careful driver". In the civil context, "Reasonable care means the care which an ordinarily skilful driver or rider would have exercised, under all the circumstances, and connotes an "avoidance of excessive speed, keeping a good lookout, observing traffic rules and signals and so on" (Lord Macmillan in *Bourhill v Young* [1943] AC 92, 104, commentary from 14<sup>th</sup> edition of *Charlesworth & Percy on Negligence* at 11-199).

*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;".* The Bar Council agrees. To use the example of an ALKS vehicle (assuming it was classified as "automated"), the AEV Act 2018 appears to envisage a situation where a driver has failed reasonably carefully to take back control, after receiving a transition demand from the system. The Bar Council notes that the AEV Act 2018 in principle allows reduction for that driver's claim for damages for contributory negligence (section 3(1)). The circumstances in which contributory negligence might be found are not limited by the Act. Section 3(2) of the Act enacts a category of cases where a claim under the 2018 Act by a driver would fail entirely by reason of the driver's negligence ("The insurer or owner of an automated vehicle is not liable under section 2 to the person in charge of the vehicle where the accident that it caused was wholly due to the person's negligence in allowing the vehicle to begin driving itself when it was not appropriate to do so"). If an ALKS vehicle was classified as "automated", section 3(2) might then extinguish a claim under the AEV Act 2018, if the ALKS should not have been activated by the driver in the first place. So the AEV Act 2018, if brought into force on its current provisions, would allow partial or even entire driver responsibility for an automated vehicle.

*"(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."* The Bar Council agrees. If an automated driving system cannot reasonably safely be de-activated by its human user, and the vehicle put into a safe position, its use should not be permitted.

### **Consultation Question 2 (Paragraph 4.115)**

*The Law Commission welcomes views on whether self-driving features should be designed to ensure that they can be used by people with hearing loss.*

17. The Bar Council agrees. As the Law Commission points out, hearing loss affects around 11 million people in the UK, and it is important not to put any obstacles in the way of deaf or hearing-impaired drivers. As well as an access issue, this is a safety issue. Drivers may be using headphones or earbuds which are not linked to the

vehicle's systems and which would prevent them hearing an acoustic alert. Moreover, it is not uncommon for people to be unaware that they have a degree of hearing loss. It is thus prudent to ensure that any prompts are made optically and/or haptically as well as acoustically.

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

(In this chapter, the Law Commission “look[s] at what it means for automated vehicles (AVs) to be safe, or at least safe enough to be deployed on British roads ... consider[s] four possible standards for deciding how safe is safe enough” and opines that it is “not ... possible to prescribe a single, simple answer. Instead the issue of how safe is safe enough involves political judgement”.)

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

*The Law Commission provisionally proposes 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?*

18. The Bar Council agrees.

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

*The Law Commission welcomes 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.*

19. The Bar Council regards standard (a) as the most appropriate of those three. It is essentially the legal standard now applied to human drivers (see above). That standard has been applied by courts in England and Wales over much of the last century, during which time the technologies of vehicles and traffic conditions have changed, and has shown itself to be adaptable to circumstances. That is not to say that standard (a) will never alter (full automation of vehicles might eventually alter the

logic of a fault-based system), but in the Bar Council’s view, this is likely to remain the most appropriate standard in the near-term.

20. In the civil liability context, the Bar Council also notes that the AEV Act 2018 refers to established statutory law in relation to contributory negligence (at section 3(1), applying “whatever reduction under the Law Reform (Contributory Negligence) Act 1945 would apply to a claim in respect of the accident brought by the injured party against a person other than the insurer or vehicle owner”). Although that wording was observed (fairly) not to be straightforward, by the Law Commission in CP1, it might be that it treats the automated system as human, for the purpose of assessing comparative AV and driver fault. That section notably applies a long-established statute, which might lend force to the retention of the established standard of care in relation to primary liability.

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

*The Law Commission welcomes observations on how automated vehicles can be made as safe as reasonably practicable.*

21. This is largely a technical question, on which the Bar Council has little direct insight.

22. However, it will be important to be able to learn from the (inevitable but hopefully rare) instances where an incident does occur. For this reason, the Bar Council would support the continued use of ‘black box’ style data recording devices in automated vehicles, as recommended in the February 2019 Code of Practice: Automated vehicle trialling.<sup>22</sup> This will mean that where there is an incident, it will be more straightforward to establish what has occurred as part of any subsequent inquest, criminal proceedings or civil litigation.

23. On a similar note, there is an important conversation to be had with industry about the ‘explainability’ of AI decisions in automated vehicles. It is widely considered desirable at a policy level for AI decision-making to be more transparent – see for example the joint work of the ICO and the Alan Turing Institute<sup>23</sup> in developing a framework or explaining processes, services and decisions delivered by

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<sup>22</sup> <https://www.gov.uk/government/publications/trialling-automated-vehicle-technologies-in-public/code-of-practice-automated-vehicle-trialling>

<sup>23</sup> <https://ico.org.uk/about-the-ico/news-and-events/blog-ico-and-the-alan-turing-institute-open-consultation-on-first-piece-of-ai-guidance/>

AI, to improve transparency and accountability. However, as John Buyers explains in *Artificial Intelligence: The Practical Legal Issues*, ‘explicability’ can come at a cost:

*“There are technical concerns however that these explanation systems may impair or limit the operation of the core machine learning system (by constraining them to a narrower spectrum of decisions that are human explicable) and may be of limited use where the rationale or decision adopted by the ML system is not capable of human explanation.”<sup>24</sup>*

It follows that developers can be faced with a choice between – at its most stark – an AI system which delivers better outcomes but is not capable of providing explanations for its decisions, or an AI system which delivers less impressive outcomes but is fully explicable. In effect, if you were to require a vehicle to explain itself in human terms, so that you can assess it against the standard of a human driver, it may limit its ability to perform better than a human driver. This will be a difficult and technical conversation, but certainly it is the view of the Bar Council that where “explanation systems” can be included in autonomous vehicles without reducing safety, this should be done. This may best be dealt with by way of non-statutory guidance, as that could be kept up to date more easily than legislation, but would still be taken into account in any assessment of negligence. It could also be included in any guidance prepared by approval authorities on preferred standards and best practice.

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

*The Law Commission welcomes practical suggestions for how AV regulators can fulfil their public sector equality duty.*

24. The Bar Council refers to the suggestions set out in its response to CP2 (the Law Commission consultation paper on HARPS)<sup>25</sup>.

## **CHAPTER 7: ASSESSING SAFETY PRE-DEPLOYMENT**

(This chapter concerns how to assess whether an AV is as safe as it needs to be before it is allowed on the road, and focuses on the practicalities of assessing AV safety.).

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<sup>24</sup> J. Buyers, *Artificial Intelligence: The Practical Legal Issues*, (Law Brief Publishing, 2018)

<sup>25</sup> <https://www.barcouncil.org.uk/uploads/assets/071e6819-d6fb-4770-8a153d5d733dbbe5/Bar-Council-response-to-the-Law-Commissions-Automated-Vehicles-Consultation.pdf>

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

*The Law Commission provisionally proposes 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?*

25. The Bar Council provisionally agrees, for the reasons set out by the Law Commission.

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

*The Law Commission seeks 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.*

26. The Bar Council agrees. This would reassure road user groups – such as cyclists, pedestrians or horse riders – that the needs of particular road users have not been overlooked.

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

(This chapter sets out the details of the Law Commission’s proposal for a national safety assurance scheme for ADSs)

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

*The Law Commission provisionally proposes 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?*

27. The Bar Council agrees, as it did when the same question was posed in CP1.

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

*The Law Commission provisionally proposes 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. The Bar Council agrees.

#### **Consultation Question 11 (Paragraph 8.43)**

*The Law Commission provisionally proposes 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?*

29. The Bar Council agrees with the first and second provisional proposals. The precise methodology of the approval process, in terms of how vehicle features should be assessed (questions (3) and (4)), is outside our expertise.

**Consultation Question 12 (Paragraph 8.44)**

*The Law Commission invites 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 it is suited to the proposed national ADS approval scheme.*

30. How type approval has worked in practice, and how it might therefore adapt, is outside the Bar Council's expertise.

**Consultation Question 13 (Paragraph 8.71)**

*The Law Commission provisionally proposes 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?*

31. The Bar Council agrees.

**Consultation Question 14 (Paragraph 8.77)**

*The Law Commission provisionally proposes 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?*

32. The Bar Council agrees. The AEV Act 2018 is a first, foundational step in British law of AVs.

33. But the 2018 Act deals substantially only with some insurance questions: with the extension of compulsory third-party insurance to AVs, and provision of a direct action against an insurer. It does not legislate for uninsured or untraced drivers (which, outside AVs, is the subject of a voluntary agreement with the Motor Insurers' Bureau, which has not yet announced its position in relation to AVs). It does not deal in detail with civil liability issues (beyond setting some boundaries – e.g. the Law Reform (Contributory Negligence) Act 1945 applies). It provides for classification of AVs only because it needs to do so in order to distinguish between those claimants having the direct action under the AEV Act 2018 and those without.

34. The AEV Act does not deal at all with the profound questions of criminal responsibility, including corporate criminal responsibility. It does not address questions of when responsibility for the movement of a vehicle in the “murky middle” of SAE Level 3 (where ALKS might be located) passes between AV system and human driver. The technical classification of SAE Level 3 is itself a topic of constant debate, including a recent, post-CP3 suggestion of reform to 4 levels, in which ALKS might fall outside the “automated” definition<sup>26</sup>.

35. Sensible and transparent criteria, at a similar level of clarity to the “careful and competent driver” standard, are required for AVs.

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<sup>26</sup> A user's guide to vehicle automation modes by Dr Philip Koopman, <https://pr-97195.medium.com>; New AV 'user's guide' to address L3 puzzle by Junko Yoshida, EE Times, 28 January 2021: <https://www.eetimes.com/new-av-users-guide-to-address-l3-puzzle/>

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

*The Law Commission seeks 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?*

36. The Bar Council agrees that the decision is sufficiently important that an ADSE aggrieved by a decision should have a right of appeal.

37. The Bar Council would have no objection to the appeal provisions being similar to those in Regulation 19 of the Road Vehicles (Approval) Regulations 2020. However, it is noted that those provisions allow only 14 days after the receipt of the relevant notice for an appeal to be made, and that such appeal notice must “*be accompanied by such documents and further evidence as may be specified in the form and reasonably necessary to support the grounds of appeal*”. The Law Commission may wish to give consideration to allowing longer than 14 days in this context, given the complexity of the issues likely to arise.

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

*The Law Commission seeks 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.*

38. The Bar Council agrees, as it did when similar questions were posed in CP1 and CP2.

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

(This chapter concerns the exercise of ongoing “market surveillance” by regulators and other methods to ensure that vehicles are safe in practice, post-deployment).

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

*The Law Commission provisionally proposes 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?*

39. The Bar Council agrees. However, to be effective, any such scheme would need sufficient funding and personnel to allow proactive investigation and testing. An entity with statutory responsibilities and powers is nonetheless toothless if it does not have the means to run a meaningful market surveillance programme. We appreciate, of course, that matters of funding are beyond the remit of the Law Commission.

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

*The Law Commission provisionally proposes 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?*

40. The Bar Council provisionally agrees. The final point, about the power to require an ADSE to communicate clearly to consumers the abilities and limitations of their system, is particularly important, given that misunderstandings about the limitations of these systems are widespread.

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

*The Law Commission welcomes 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.)*

41. As to the first aspect of this question, the Bar Council notes the example given by the Law Commission at 10.23 of “where a manufacturer obtains type approval for an ADS system from the Luxembourg type approval authority, certifying among other things that the vehicle complies with UK traffic laws. An aspect of UK law then changes. We think that UK regulators should have powers to require an update in these circumstances. When the update is produced it may then be simpler and quicker for the manufacturer to deal with a local regulator (who understands the legal change) rather than return to Luxembourg for approval.” The Bar Council sees that there may be some saving in time by taking such an approach. However, this is likely to be the sort of issue which will become a routine part of the work of type approval authorities. In principle, Bar Council considers that it would be preferable for this role to be retained by the type approval authorities only. If in practice it emerges that this leads to delays and backlogs, the position can be reviewed.

42. As to the second aspect of the question, the Bar Council agrees that cybersecurity should be one of the responsibilities of a generic in-service safety assurance agency. While the Law Commission suggests as an alternative the establishment of a specialist unit, it is unclear what the benefits of that would be. The Bar Council’s provisional view is that it would be preferable for cybersecurity to be considered alongside other aspects of safety.

43. As to the third aspect of the question, the Bar Council has not identified any additional powers that would be necessary beyond those discussed in the Law Commission paper.

#### **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?*

44. The Bar Council considers, as it did in 2018, that a single body is preferable. As the Law Commission flags, the advantage of such an approach is that it would bring

together expertise and would stop problems from falling between demarcation lines. The number of technical, legal and policy specialists in this area is still small, and it makes sense to concentrate their expertise. Moreover, this is an area where much of the apparent safety (when considered on initial approval) will be predicated on the availability of rolling software updates after deployment, so it makes sense for one authority to combine both functions to ensure full accountability.

### **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)?*

45. The Bar Council does not suggest formal mechanisms, but notes the breadth of factors and interests involved in AV regulation (see Chapter 10 of CP3: eg. road use and traffic regulation orders are affected by AVs, as are the needs of road-users including pedestrians). Broad consultation seems likely to be required.

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

(This chapter concerns the question of how to deal with breaches of traffic rules and how to learn from collisions, so as promote a culture of safety. The Law Commission examines how road rules might be adapted to apply more effectively to AVs, and suggests a move away from the current emphasis on criminal prosecution.)

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

*The Law Commission provisionally proposes 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?*

46. The Bar Council agrees.

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

*The Law Commission provisionally proposes 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?*

47. The Bar Council agrees. However, care must be taken to ensure that serious transgressions receive appropriate sanctions. For example, the prospect of senior managers who have cut corners to save money – that is, acted in a morally reprehensible way – and thereby holding some responsibility for a death, albeit perhaps very remotely, avoiding criminal liability and instead, as outlined at para 11.52, merely meeting the deceased’s relatives to discuss future improvements, is not one the public are likely to relish.

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

*The Law Commission provisionally proposes 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?*

48. The Bar Council agrees.

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

*The Law Commission provisionally proposes 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?*

49. The Bar Council agrees.

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

*The Law Commission provisionally proposes that the UK Government should establish a forum for collaboration on the application of road rules to self-driving vehicles.*

*Do you agree?*

50. The Bar Council agrees, for the reasons set out below.

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

*The Law Commission welcomes views on:*

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

51. The Bar Council notes and agrees with the Law Commission's observations - particularly as to the need for driver training for those using existing ADAS systems, as well as near-future AVs. The British system of driver training is based upon a test of competence at the outset of a driver's experience, and guidance provided in the Highway Code. Both measures were introduced (with compulsory third-party motor insurance) in the 1930's, and both were (and remain) premised upon full driver control of a vehicle.

52. As the RAC Foundation and the University of Nottingham have noted<sup>27</sup>, the driving task is about to change: from control to supervision of a moving vehicle. The

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<sup>27</sup> RAC Foundation and University of Nottingham, *Driver Training for Future Automated Vehicles*, October 2020, at

<https://www.racfoundation.org/research/safety/driver-training-for-future-automated-vehicles>

character and skills of driving have altered. That change has arguably already occurred, with Advanced Driver Assistance Systems (ADAS). The Bar Council notes the current rarity of driver training for ADAS and ADS and the lack of a body taking responsibility for the provision of such training. A striking feature of the responses to questions about training in CP1 was the high level of support for such training in principle, yet the lack of agreement as to who was to provide it (manufacturer, insurer or others)<sup>28</sup>.

53. As to composition and public engagement processes of the forum, the Bar Council defers to the organising body (whether the Department of Transport or another).

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

(This chapter develops the concept of the ‘user-in charge’. This is a concept which has been explored in CP1 and CP2. In essence, a user-in-charge is an individual: (1) who is not driving because an ADS is engaged; but (2) who is physically present in the vehicle or in direct sight of the vehicle, with access to controls; and (3) who must be qualified and fit to drive.)

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

*The Law Commission provisionally proposes 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?*

54. The Bar Council is in broad agreement with the provisional definition. However, it is unclear if the wording above is intended to be the full statutory definition. It is noted that CP3 at 12.15-16 helpfully explains the concept of ‘in direct sight’ as requiring “visual contact with the vehicle. As such, it is best defined as close enough

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<sup>28</sup> The Law Commission, *Automated Vehicles: Analysis of Responses to the Preliminary Consultation Paper*, pages 68 to 72.



to read the number plate of the vehicle (which is approximately 20 metres)” and as including the requirement “actually to see the vehicle, by wearing glasses or contact lenses if necessary. However, the sight must be direct, without using remote connectivity or mirrors.” It may be prudent for any statutory drafting to include some of this material. It is not inherently obvious that “in direct sight” requires being close enough to read a number plate, for example. One may in ordinary speech describe oneself as in direct sight of an object if it can be directly perceived at all.

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

*The Law Commission provisionally proposes 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?*

55. The Bar Council broadly agrees with the logic of a “longstop” proposal (though it raises some queries, below). The Bar Council recognises the force of the safety point that (regardless of their classification as “automated” or otherwise in law) the “*first generation of self-driving vehicles are likely to rely on transition demands to be safe*”<sup>29</sup>.

56. The background to this question is, again, the difficult area of the transition of control from an AV back to the human driver. This engages the “*murky middle*” of SAE Level 3 (to use the Law Commission’s phrase from CP1), where the moment at which a driver (or “user-in-charge”, as the Law Commission describes that person) ought to take back control of the vehicle, as a matter of fact and – in the proposed regulation – as a matter of law.

57. This proposal is to fix a particular moment in time (the end of the transition demand period) as the moment at which civil and criminal liability would attach to the user-in-charge (subject to some exceptions, such as medical emergency incapacitating the UIC<sup>30</sup>).

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<sup>29</sup> CP3 at 12.32

<sup>30</sup> CP3 at 12.33

58. The Bar Council notes the implication that civil liability, at least, might attach to a user-in-charge at an earlier moment. Each case turns upon its own facts. A case could arise in which the circumstances made it reasonably clear to the UIC that they needed to take back control sooner than the end of the transition period, and that the period in which the AV did not need to be monitored (to adopt the AEV Act definition) had ceased. Whether, in such a case, the classification of the vehicle as an AV would interact with the definition of the “end of the transition longstop” regulation elsewhere to (a) protect the UIC from any liability at an earlier stage or (b) leave the UIC vulnerable to civil liability to injured others where the UIC had failed to intervene earlier or (c) produce some other result, cannot yet be foreseen. That might be an issue which the courts are asked to decide.

59. The Bar Council sees the logic of the end of the transition period being the *last* moment at which civil and criminal liability could arise. But whether this would be a longstop period (and earlier failure could still result in civil and/or criminal liability) should also be considered. The issue of whether this would create a presumption of liability, or be strict (the proposal of a criminal offence seems to suggest the latter) should also be considered.

60. This is in part a technical question, and assistance from experts in engineering, and particularly upon human reactions in emergency situations (which are beyond the expertise of the Bar Council) is likely to be useful. As a recent practitioners’ book observed of the proposed criminal offence of a UIC “failing to avert a risk”, in CP1, *“While a new offence along these lines might usefully remind supervising drivers of their responsibilities, it could also encourage inappropriate intervention. No consensus has yet emerged”*<sup>31</sup>.

### **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.*

61. In the Bar Council’s view, this should be permitted. As the Law Commission points out, this situation has parallels with learner drivers being permitted to take driving lessons on motorways, which recently (and for sound reasons) became legal.

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<sup>31</sup> *The Law of Artificial Intelligence* (1st edition, Sweet & Maxwell, 2020) at 11-02.

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

*The Law Commission provisionally proposes 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?*

62. The Bar Council agrees, with the proviso (perhaps obvious and unnecessary) that the new offence(s) relating to being unfit should be separate from those relating to being unqualified. Similarly, unfitness through drink or drugs should be separate from being over the prescribed limit. Any substantial divergence from the structure of comparable existing offences would risk confusion.

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

*The Law Commission provisionally proposes that persons carried without a user-in-charge should be guilty of a criminal offence. Do you agree?*

63. The Bar Council agrees.

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

*The Law Commission seeks 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.*

64. The Bar Council's view is that both (1) and (2) should be required for this offence to be made out.

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

*The Law Commission provisionally proposes 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, the Law Commission welcomes views on alternative legal tests.*

65. “Could not have” is a test that risks imposing too high a burden on the user-in-charge who takes over control of the vehicle. There is a *range* of acceptable human driving skill – above the level of what should be considered criminal. That range applies among individuals of course, but also within individuals: the hypothetical “competent and careful driver” cannot sensibly be considered to drive at all times at only one specific level of skill. So, it is not hard to conceive of a situation in which, following a culpable collision, it can properly be said that (a) a competent and careful driver *might have* avoided the offence (i.e. it is not the case that they *could not have*), but (b) the actual driver drove in a way that was nevertheless within the range of reasonable responses in all the circumstances.

66. There should be a very heavy burden on the ADS not to create situations that are dangerous, or even merely appear to be. When they do so, the human driver should be given very wide latitude.

67. It may be useful to consider, by way of analogy, how the criminal law deals with the issue of *novus actus interveniens*. Per Goff LJ, as he then was, in *R v Pagett* (1983) WL 215490, “...the crucial feature [of a *Novus Actus Interveniens*] [is] that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim’s death, to the exclusion of the act of the accused.” So, even a sub-standard human driving intervention need not absolve the ADS of responsibility, just as a sequential causal chain of bad human driving can leave all individuals criminally liable for the final collision.

68. One option, which has the benefit of conceptual parsimony, is for the user-in-charge to be “driving” as soon as he takes over control and for the standard of his driving to be judged against the standard of the hypothetical competent and careful driver, *taking into account all the relevant circumstances* in the usual way. Those circumstances would surely include the fact that the ADS created a difficult situation.

69. A question remains: does the *decision* to take over control of the Dynamic Driving Task (DDT), or at least the decision plus the pressing of the button to carry it out, itself amount to “driving”? It would be strange and anomalous if it were otherwise (if it isn’t “driving”, then what is it?) But should that decision – as distinct from the performance of the DDT that follows the decision – ever be capable of being

subject to criminal sanction as bad driving? It is submitted that, at least in the earliest period of AV use, it should not.

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

*The Law Commission provisionally proposes 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?*

70. The Bar Council agrees.

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

*The Law Commission provisionally proposes 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?*

71. The Bar Council agrees.

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

*(This chapter concerns “vehicles which are sufficiently automated to be authorised to carry out journeys without a user-in-charge. In the absence of an agreed terminology,” the Law Commission refers to them “as “no user-in-charge” vehicles, or NUICs. The defining feature of a NUIC is that it can travel empty. Alternatively, if there are people in the vehicle, these people are merely passengers. They have no legal responsibility for the way that the vehicle drives and are under no obligation to intervene.”)*

### Consultation Question 37 (Paragraph 13.67)

*The Law Commission provisionally proposes 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?*

72. The Bar Council does not regard either option as satisfactorily proven at this time. The Bar Council provisionally suggests that NUICs, including the question of which NUICs fall within the insurance regime of Part I of the AEV Act 2018, should be the subject of regulation particular to NUICS. Such regulation might refer to the AEV Act, but the distinctive nature of NUICs seems to favour regulation for NUICS otherwise than just under the AEV Act 2018. Different considerations apply to particular types of NUIC. If the approach to the problem were to seek to accommodate all types of NUIC within the existing AEV Act 2018 definition of “driving itself”, the risk might be of overcomplicating an already difficult test, in its application to other vehicles.

73. That is not a conclusive but a provisional view, as NUIC technology continues to grow, both technically and commercially. This is an area in which AV law will particularly need to adapt to a variety of novel technologies.

74. The Bar Council’s provisional reasons follow.

75. The Bar Council notes and agrees with the Law Commission’s characterisation of remote operation of vehicles as “*a step into the unknown*”<sup>32</sup>.

76. The Bar Council notes, in particular, the following unknowns:

- a The difference in technical and industrial views (described by the Law Commission<sup>33</sup>) as to whether or not a remote operator would assume such control of a remote vehicle. The facts are therefore not settled, and the operation of remote vehicles might develop along either line, or in an unforeseen way.

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<sup>32</sup> CP3 Page 215

<sup>33</sup> CP3 page 215

b the wide range of remote vehicles – from future HARPS vehicles to small delivery robots (the latter are already in operation – see e.g. the ‘Starship’ delivery robots<sup>34</sup>). The pandemic is said to have contributed to greater interest in remote delivery services, but the circumstances in which remote vehicles might thrive – and which NUICs are likely to come into widespread use - are not yet clear.

77. The Bar Council also notes some safety concerns, as outlined by the Law Commission, which include cybersecurity<sup>35</sup>.

78. Against that background, the Bar Council notes, again, the undeveloped state of British AV law. Part I of the AEV Act 2018 is an insurance measure, to extend the existing system of compulsory third-party insurance to AVs. That insurance system grew from the use of entirely driver-controlled motor vehicles, and was established in the 1930s. The AEV Act adapts that system (largely, it appears, envisaging self-driving cars and lorries) to automated vehicles. But further adaptation of the law seems inevitable: evidenced both by the rapid expansion of transport technologies and by the need for the Law Commission’s wide-ranging consultation.

79. Remote vehicles (NUICs) are both a new species of vehicle, and divide into sub-species. As the Law Commission describes, NUIC sub-species behave differently to each other: some require remote driving (which the SAE, for example, does not regard as self-driving, ADS behaviour) and some require remote assistance (while otherwise acting as an ADS)<sup>36</sup>. Remote back-up drivers are said themselves to create a “grey area” in terms of self-driving<sup>37</sup>. NUICs have a wide variety of physical characteristics (as noted above – from full-sized passenger vehicles to small delivery robots), and those characteristics will affect the behaviour of other road users. The Bar Council agrees with the Law Commission’s view that NUICs present a spectrum of possibilities<sup>38</sup>.

80. For those reasons, and understanding that the insurance position of particular NUICs must be clear, the Bar Council provisionally suggests that the regulation of each distinct category of NUICs should be treated in a particular way, as each category

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<sup>34</sup> E.g. BBC News website, *Robot grocery delivery service expands to Northampton*, 25 November 2020:

<https://www.bbc.co.uk/news/uk-england-northamptonshire-55076342>

<sup>35</sup> CP3 pages 215 to 219

<sup>36</sup> CP3 page 220

<sup>37</sup> CP3 page 223

<sup>38</sup> CP3 page 221

is likely to require a distinct answer. As to the process of categorisation, that will be a matter for expert technical and industrial advice, because of the variety of vehicle characteristics.

*The Law Commission welcomes 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”.*

81. For the reasons set out above, the Bar Council agrees that the AEV Act 2018 definition of “driving itself” does need bespoke treatment, in its application to NUICs. The Bar Council’s provisional suggestion is that NUICs require bespoke regulation, and that such regulation should identify the insurance regime applying to the particular NUIC (possibly by categorising NUICs).

#### **Consultation Question 38 (Paragraph 13.86)**

*(NB. The Bar Council notes that the numbering of the sub-questions starts in the Law Commission’s report (at page 311) from (4), so adopts that numbering).*

*The Law Commission provisionally proposes 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?*

82. The Bar Council agrees.



83. In addition to the proposed criminal offense of usage of an ‘unlicensed’ NUIC vehicle, consideration should be given to other methods of ensuring NUICs remain within the licensing system. The experience in relation to e-scooters offers some useful parallels. July 2020 saw rental e-scooters become legal on roads in Great Britain for the first time. Private e-scooters remain prohibited save on private land, and their use outside this context attracts a £300 fixed-penalty notice and six penalty points. Nonetheless, private e-scooters are a common sight on urban commutes. The harm that might be done by an ‘unlicensed’ NUIC vehicle is significantly greater than may be done by a private e-scooter. It may be appropriate to find a mechanism for it to be regularly checked that an appropriate supervision and maintenance contract is in place *and* that the licensed operator is being permitted any requisite access to the vehicle, for example by linking this to the MOT.

#### **Consultation Question 39 (Paragraph 13.92)**

*The Law Commission welcomes views on whether NUIC operators should be required to demonstrate professional competence through a safety management system, as set out in a safety case.*

84. In the view of the Bar Council, the safety case approach is appropriate. As CP3 identifies at 13.3-13.5, the potential use of NUICs is wide ranging, from small delivery pods, to heavy goods vehicles, automated snow ploughs and passenger transport. A safety case approach will be appropriately flexible.

#### **Consultation Question 40 (Paragraph 13.108)**

*The Law Commission provisionally proposes 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?*

85. Yes, for the reasons given in CP3.

**Consultation Question 41 (Paragraph 13.109)**

*The Law Commission provisionally proposes 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?*

86. Yes. As CP3 identifies at 13.100 in relation to maintenance “*At present we are not in a position to distinguish between conventional and new repair and maintenance requirements. The two may be interlinked, as where replacing a broken windscreen requires realignment of the sensors, or changing a tyre affects a tyre sensor. To err on the side of caution, we think that, initially, the licensed operator should be legally responsible for all maintenance. However, this would be subject to a regulation-making power to delegate some responsibilities to the registered keeper, if safety permits.*” There may well be a case, once there is some practical experience of this type of scheme, for handing back responsibility for some discrete elements of maintenance to the registered keeper. Likewise it makes sense for the operator initially to be responsible for insurance, but to retain the possibility of transferring this responsibility to the registered keeper in future.

**Consultation Question 42 (Paragraph 13.116)**

*The Law Commission welcomes views on how accessibility standards for Highly Automated Road Passenger Services (HARPS) might be developed.*

*The Law Commission provisionally proposes 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?*

87. The Bar Council agrees.

*The Law Commission welcomes views on what the set interval for periodically re-consulting the accessibility advisory panel should be.*

88. This is a matter for the EHRC and representative groups comprising the panel. The Bar Council suggests that, whatever interval is set, it should be sufficient to take account of and allow reaction to new technologies and their consequences (including indirect but significant consequences, such as road and pavement alterations).

#### **Consultation Question 43 (Paragraph 13.133)**

*The Law Commission welcomes views on who should administer the operator licensing scheme.*

89. The Bar Council maintains its tentative view in its response to CP2, which was:

*“Our tentative view is that the system of HARPS operator licensing should be administered by the Traffic Commissioners. They have a great deal of experience in the area of Goods Vehicle Operator’s Licences and Public Service Vehicle licences. The licensing scheme for HARPS will involve similar principles and it makes sense for the same body to be applying those in respect of Automated Vehicles. Particular expertise will be required and as such we would tentatively suggest that specially trained Traffic Commissioners be responsible for administering HARPS operator licensing. We would encourage joint working with the agency responsible for authorising Automated Driving System Entities (ADSE). Whichever body is given this administration role it will require substantial change.”<sup>39</sup>*

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

(This chapter concerns proposals to create new criminal offences specific to ADSEs.)

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

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<sup>39</sup> Bar Council response to CP2, page 9, para.36:

<https://www.barcouncil.org.uk/uploads/assets/071e6819-d6fb-4770-8a153d5d733dbbe5/Bar-Council-response-to-the-Law-Commissions-Automated-Vehicles-Consultation.pdf>

*The Law Commission provisionally proposes 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?*

90. The Bar Council agrees. AVs being an entirely new technology, and one about which many people will feel considerable apprehension in the early period of their introduction, it is entirely appropriate to do as the Commission proposes, and adopt the more restrictive elements from existing offences that apply to comparable industries.

91. However, the issue of causation, discussed in paras 14.92 to 14.96, might benefit from further consideration. In *R v Wilson* (2018) EWCA Crim 1184, a new test for causation was established for fatal driving offences: "significant increase in risk"; the "but for" test is no longer a necessary condition. So, if a road death occurs, and a piece of bad driving significantly increased the *risk* of the death, then despite the fact that the death might have happened even without the bad driving, the bad driving can be found to have "caused" the death. A similar approach had been taken in the controversial mesothelioma tort case of *Fairchild v Glenhaven* [2003] 1 AC 32, but it is entirely novel in the criminal law.

92. Whether or not that approach to criminal causation is correct and fair, the Commission's proposals in relation to causation in the proposed new offences are even more widely drafted: "we provisionally propose that the representation or non-disclosure should increase the risk of an adverse incident of the type that caused the death or serious injury" (14.94). This could impose the most severe criminal liability

even when the specific adverse incident that occurred was probably not “caused”, in any ordinary sense, by the representation or non-disclosure.

93. We have a natural desire to impose higher penalties when a bad outcome arises. What are sometimes referred to as “result” crimes, as opposed to “conduct” crimes, are common in the criminal law, particularly with driving offences. Distracted fiddling with the car radio leads to no more than penalty points and a modest fine. The same action, the same wrongdoing, which just so happens, as a matter of chance, to result in a death, might lead to several years imprisonment. There is a good argument that the moral turpitude of an act is frozen as soon as completed, and that therefore the huge disparity in penalty is irrational. But to the extent that this irrationality is a part of our natural human moral compass which is required to be instantiated in law, we should not lose sight of the fact that it depends on the bad outcome actually having been *caused*. The bad act – the misrepresentation about the aircraft part (paras 14.95 and 14.96) or, as the case may be, the distracted fiddling with the car radio – is itself a punishable wrong on the basis of the risk it creates. The increase in punishment when there is a fatal collision depends on the bad act having actually *caused* it.

94. An alternative way of approaching the conduct/result disparity would be to apply the severe punishment whenever the risk is increased – *unless* it can be shown that no bad outcome was in fact caused, either because no bad outcome occurred or because no sufficiently strong causative chain exists. In other words, the wrongdoer is in all cases punished severely for increasing the risk, but is given the benefit of good luck; rather than being punished leniently other than in cases of bad luck.

95. The causal terrain between an ADSE’s misrepresentation and a death is so broad and so murky, and the risk arising from a misrepresentation so obvious and so serious, that there is a good argument that the burden of proving good luck, to escape the more severe penalty, should fall on the ADSE, rather than requiring the prosecutor to prove bad luck.

96. The Commission also seeks views (para 14.105) on whether an ADSE should be under a duty to present information in a clear and accessible form. The Bar Council agrees that it should, and it should be subject to criminal sanction as the Commission suggests.

#### **Consultation Question 45 (Paragraph 14.108)**

*(NB. The Bar Council retains the numbering used in CP3 at page 313 and 314)*

*The Law Commission seeks 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—*

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

*(4) 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.*

*The Law Commission sees 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:*

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

*(6) an adverse incident of that type occurred; and*

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

*The Law Commission sees 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.*

97. The Bar Council is in broad agreement with the proposed elements of these offences - although in relation to Offence D, refers the Commission to its responses regarding causation given in answer to the previous question.

**Consultation Question 46 (Paragraph 14.109)**

*The Law Commission welcomes 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.*

98. The Bar Council agrees that it should.

**CHAPTER 15: NEW WRONGFUL INTERFERENCE OFFENCES**

(This chapter addresses public concerns about the potential for interference with automated vehicles. While most conceivable forms of interference are already criminal

offences, some amendments and clarifications may be appropriate, as discussed in this chapter.)

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

*The Law Commission provisionally proposes 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 ?*

99. In CP1, the question was asked as to whether “Under section 25 of the Road Traffic Act 1988, it is an offence to tamper with a vehicle’s brakes “or other mechanism” without lawful authority or reasonable cause. Is it necessary to clarify that “other mechanism” includes sensors?”. At that stage, the Bar Council’s view was that no amendment was necessary, as “mechanism” would be interpreted to include sensors in any event. However, it is understood that other consultees to CP1 pointed out that “mechanism” could be interpreted as being limited to physical apparatus, thereby excluding software. This has prompted the present rather wider question. In answer to the present question, the Bar Council considers that it would certainly be helpful to clarify that “mechanism” applies to software installed within the vehicle. Given the desirability of an amendment to s.25 on that basis, the other point might as well be clarified as part of the same amendment.

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

*The Law Commission welcomes views on whether the tampering offence should apply to external infrastructure required for the operation of the AV.*

100. It is understood that by this question, the Law Commission has in mind infrastructure such as “networks, beacons, or the data held within the system” (CP3 at 15.9). Tampering with physical infrastructure such as beacons would generally already come within Section 1(1) Criminal Damage Act 1971. However, in that Act, “property” means property of a tangible nature, whether real or personal – s.10. As such, it seems that intangible networks or data would not be covered by that Act. It is possible that some relevant harms would be caught by, for example, s.3ZA of the Computer Misuse Act 1990, which is designed to cater for computer misuse where the impact is to cause damage to critical national infrastructure including power plants and transport networks. However, depending on the method of tampering used, this offence would



not necessarily apply in all cases. In the circumstances the Bar Council agrees that it would be useful to establish a separate offence of tampering with external infrastructure required for the operation of an AV, by analogy with existing offences for tampering with railway infrastructure.

**Consultation Question 49 (Paragraph 15.53)**

*The Law Commission provisionally proposes 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?*

101. The Bar Council agrees, although refers back to the discussion of causation and aggravated penalties in the answer to question 44; (as the General Council of the Bar of England and Wales, the Bar Council responds in relation to (1)).

**Consultation Question 50 (Paragraph 15.55)**

*The Law Commission provisionally proposes that the appropriate mental element for the aggravated offence is intent to interfere with a vehicle, the road or traffic equipment.*

*Do you agree?*

102. The Bar Council agrees.

**Consultation Question 51 (Paragraph 15.62)**

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

103. The Bar Council agrees with para 15.59 – i.e. that “lawful authority” and “reasonable excuse” are separate restrictions on the scope of the offence – and with the thrust of 15.61 – i.e. that an “approved work” defence is not required. Juries and the common law can be left to deal with novel factual scenarios as they arise.

## **CHAPTER 16: CIVIL LIABILITY**

(This chapter concerns the provisions of Part I of the Automated and Electric Vehicles Act 2018, and whether those provisions require amendment or addition by regulations, before the Act is brought into force.)

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

*The Law Commission 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?*

104. The Bar Council agrees.

105. In its response to CP1 the Bar Council (echoing the comments of the Law Commission in CP1) found some difficulty in the language of section 3, in relation to contributory negligence, and called for review, but considered the courts to be well-placed to deal with questions of causation.

106. The Bar Council's current position in relation to the wording of section 3(1), (applying "*whatever reduction under the Law Reform (Contributory Negligence) Act 1945 would apply to a claim in respect of the accident brought by the injured party against a person other than the insurer or vehicle owner*") is that, although that wording is not straightforward, a possible reading is that it treats the automated system as human, for the purpose of assessing comparative AV and driver fault. However, the complexity of the wording is such that it might be reviewed.

107. The Bar Council notes that the assessment of "*the extent to which the provisions of this Part ensure that appropriate insurance or other arrangements are made in respect of vehicles that are capable of safely driving themselves*" is part of the report which Section 7 of the AEV Act 2018 requires the Secretary of State for Transport to lay before Parliament "*no later than two years after the first publication of the list [of automated vehicles] under section 1*". The other matter upon which the Secretary of State must prepare an assessment report is "*the impact and effectiveness of section 1*". So, to that extent, the Act provides for its own review.

**Consultation Question 53 (Paragraph 16.32)**

*The Law Commission provisionally proposes that measures should be put in place to compensate the victims of accidents caused by uninsured AVs.*

*Do you agree?*

108. The Bar Council agrees.

**Consultation Question 54 (Paragraph 16.47)**

*The Law Commission provisionally proposes 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?*

109. The Bar Council agrees that product liability law should be reviewed to take account of the challenges of emerging technologies.

110. As indicated in the Bar Council's response to CP1, the current uncertainty in relation to whether software not incorporated within a physical medium is a 'product' creates a particular difficulty. On the current state of the law, it is highly likely that software pre-loaded on to the on-board computer of a vehicle would be considered a product and thus come within the CPA 1987. However, an 'over the air' update to an autonomous vehicle (such as those utilised by Tesla) would fall into a grey area.

111. CP3 references (at 16.37) the 1996 decision in *St Albans CDC v International Computers Ltd* [1996] 4 All ER 481. Since then there have also been relevant decisions (albeit not in a CPA 1987 context) in, *inter alia*, *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281 and *Computer Associates UK Ltd v The Software Incubator Ltd* [2018] EWCA Civ 518. In the latter, in 2019 the Supreme Court made a reference to the Court of Justice for a preliminary ruling (*Software Incubator Ltd v Computer Associates (UK) Ltd*, Case C-410/19) referring the following questions:

1. where a copy of computer software is supplied to a principal's customers electronically, and not on any tangible medium, does it constitute 'goods'

within the meaning of that term as it appears in the definition of a commercial agent in Article 1(2) of Directive 86/653/EEC of December 1986 on the co-ordination of the laws of Member States relating to self-employed commercial agents?

2. where computer software is supplied to a principal's customers by way of the grant to the customer of a perpetual licence to use a copy of the computer software, does that constitute a 'sale of goods' within the meaning of that term as it appears in the definition of commercial agent in Article 1(2) of Directive 86/653/EEC?

112. The decision is awaited, but the Advocate General handed down an opinion on 17 December 2020 which proposed that the Court should answer both questions in the affirmative. In any event, these multiple pieces of recent litigation in relation to the status of software is a strong pointer that a review of this area would be beneficial.

113. Current product liability law is a poor fit with autonomous vehicles in various other respects. The Law Commission identified some of these in CP1 at 6.68-6.84 and in CP3 at 16.38. Most notably, claims for property damage under the CPA 1987 can only be brought by consumers. Moreover, the statutory scheme does not confer liability for any loss or damage to the product itself, meaning that the owner of an autonomous car with a defective component cannot recover under the CPA for damage to the rest of the car that may have been caused by the defective component, even though the car is likely to be an asset worth thousands of pounds. Further, the CPA 1987 provides for a ten year 'long stop' provision, which means that a claim can only be made in the first ten years of a product's lifespan. This limits its utility in the context of vehicles which may be used for much longer.<sup>40</sup> These factors again point to the need for a review.

114. However, as the Law Commission identifies, this is a matter that should be reviewed generally, rather than simply for AVs. Many of the same issues arise in the context of, for example, medical AIs.

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<sup>40</sup> According to the SMMT 2018 Automotive Sustainability Report, 'The average age of a car at scrappage in 2015 reached 13.9 years, which is on a par with the 2014 performance. The lowest scrappage age, 13 years, was recorded in 2009, a result of government's scrappage scheme. Furthermore, the average age of a vehicle on the road has increased, from 6.8 years in 2003 to 7.8 recorded in 2015.' [www.smmmt.co.uk/industry-topics/sustainability/average-vehicle-age](http://www.smmmt.co.uk/industry-topics/sustainability/average-vehicle-age)

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

(This chapter “is not concerned with all data issues. Instead it focuses on a limited set of questions. What data is necessary to enable our proposals to work in practice? And how can this data be collected, stored and disseminated in a way which is compatible with the GDPR and which safeguards privacy?”<sup>41</sup>)

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

*The Law Commission provisionally proposes 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?*

115. The Bar Council agrees.

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

*The Law Commission provisionally proposes 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?*

116. The Bar Council agrees that the availability of data relevant to road traffic accident claims involving AVs is essential to the efficient working of the insurance regime upon which British liability law now rests, and to the efficient and proportionate conduct of legal claims in the courts.

117. The Bar Council notes the need for adequate safeguards to protect the privacy of litigants and security of data, particularly in terms of securing such data from loss and in terms of restricting the data to that relevant to legal claims.

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<sup>41</sup> CP3 at page 288, 17.6

118. The Bar Council also notes the need for insurers to inform drivers clearly of their contractual obligations to retain data relevant to accident claims. This is another factor tending in favour of increased driver training in relation to ADAS and ADS.

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

*The Law Commission provisionally proposes 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?*

119. The Bar Council understands the rationale for the immediate imposition of a three-year data retention period, and recognises that there is good reason for that to be, at least, the aspiration. However, we think that there are a number of practical concerns which need to be considered in detail before any final decision is reached.

120. The Bar Council notes that this is an issue both disputed by representatives of claimants and defendants in personal injury litigation, and subject to practical considerations.

121. Downloading of data from a vehicle and storage of that data on a server is a significantly novel and onerous feature of AVs (the UN ALKS regulation requires the manufacturer to provide instructions on how to access the data<sup>42</sup>). It is an example of a way in which AV driving carries new responsibilities, not typically imposed on private (as opposed to commercial) owners and operators of conventional vehicles (another – possibly less onerous – new responsibility is the updating of safety-critical software: see section 4(1)(b) of the AEV Act 2018). It is therefore, merely as a matter of practice, a way in which the relationship between insurer and driver will change as a result of AVs.

122. A further technical factor is how the data is to be stored by the driver: namely that the size of data might be such that storage on a server might be required. The Law Commission describes server storage in relation to DSSAD data over a period of six months<sup>43</sup>. So a further aspect of AV driving (and of the driver/insurer relationship) might also be regular downloading of data, using software compatible with that

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<sup>42</sup> UN ALKS regulation 157, regulation 8.4.5, at

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/087/82/PDF/G2008782.pdf?OpenElement>

<sup>43</sup> CP3 at pages 291, para.17.26, and 299, para.17.72.

DSSAD, and the arrangement of sufficient server storage, presumably both by the driver.

123. The Bar Council notes the Law Commission's reason for proposing three years as the retention period in CP3<sup>44</sup>: three years from the date of a road traffic accident is the primary and usual period of limitation for issue of a claim for personal injury (whether under the AEV Act 2018<sup>45</sup> or otherwise). But, as the Law Commission notes, that period can be longer: there is a further period, after issue, within which a Claimant must serve proceedings, and the primary limitation period may be extended. The Bar Council notes that retention of data beyond the relevant primary limitation period for claims is sometimes recommended by insurers. So, even if three years were the chosen period, it would not be long enough to guarantee an insurer access to DSSAD information in every claim.

124. The Bar Council's provisional view is that, given the practical constraints of data storage (which require a degree of organisation by the user of the insured vehicle), setting a long period of retention might cause practical difficulties. We suggest that more research may be needed as to the typical volume of data which would be involved in this process, and the attendant cost (which would have to be borne by one of the relevant parties) and other implications, such as the ecological and cybersecurity consequences of the storage of vast amounts of data, some of which may be sensitive. We note that a three-year period would be much greater than the six month period adopted elsewhere<sup>46</sup> - that may not be a sufficient reason to adopt the policy of other countries, of course, but their choices in this regard, and the rationale for those choices, will inform the debate. As this data will likely include personal data, it may be sensible to involve the ICO in those discussions.

125. In its response to CP1, the Bar Council favoured "*an injured person being required to notify the police about an alleged incident within a set period, such as 6 months, from the date of the occurrence of the incident, so that data can be preserved. The police should then immediately notify the insurer shown on DVLA records*". The Bar Council was "*against failure of an obligation by an injured person to notify the alleged incident within a set period having the consequence of barring a claim for personal injuries*" and was against the alteration of limitation periods.

126. The Bar Council's tentative suggestions, in response to CP3, are that

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<sup>44</sup> CP3 pages 299 and 300, para's.17.73 to 17.80

<sup>45</sup> Schedule to AEV Act 2018, part 11, inserting new section 11B into the Limitation Act 1980.

<sup>46</sup> CP3 at pages 291, para.17.26, and 299, para.17.72.

- a Greater consideration should be given to whether a 3 year period for DSSAD data retention is practically-achievable. The determination of what is “practically achievable” should be informed by advice from DSSAD technical specialists, as well as from technical specialists in the motor insurance and legal sectors;
- b this new feature of the driver/insurer relationship should be clearly communicated to drivers, in the case of AVs (and might be part of an education programme which includes other new aspects of that relationship, including software-updating);
- c Pre-injury claim protocols should include provision for timely downloading and provision to the insurers of all drivers of DSSAD, accident-relevant data; and
- d The period for DSSAD data retention should be kept under review.

### **Consultation Question 58 (Paragraph 17.95)**

*The Law Commission provisionally proposes 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?*

127. The Bar Council agrees. Data will be an essential tool for safety of AVs. For the reasons described, security of and effective access to data will be essential to the adjudication of legal disputes involving AVs and to the development of good and effective AV law.

**Bar Council<sup>47</sup>**

**18<sup>th</sup> March 2021**

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<sup>47</sup> Prepared for the Bar Council by Alex Glassbrook (Temple Garden Chambers), Adam King (QEB Hollis Whiteman) and Lucy McCormick (Henderson Chambers) on behalf of the Law Reform Committee



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