

Automated Vehicles: The Law Commission Recommendations for the Way Ahead

The Law Commission (together with the Scottish Law Commission) (“LC”) has today published its report on automated vehicles (“AV”) following its third consultation.

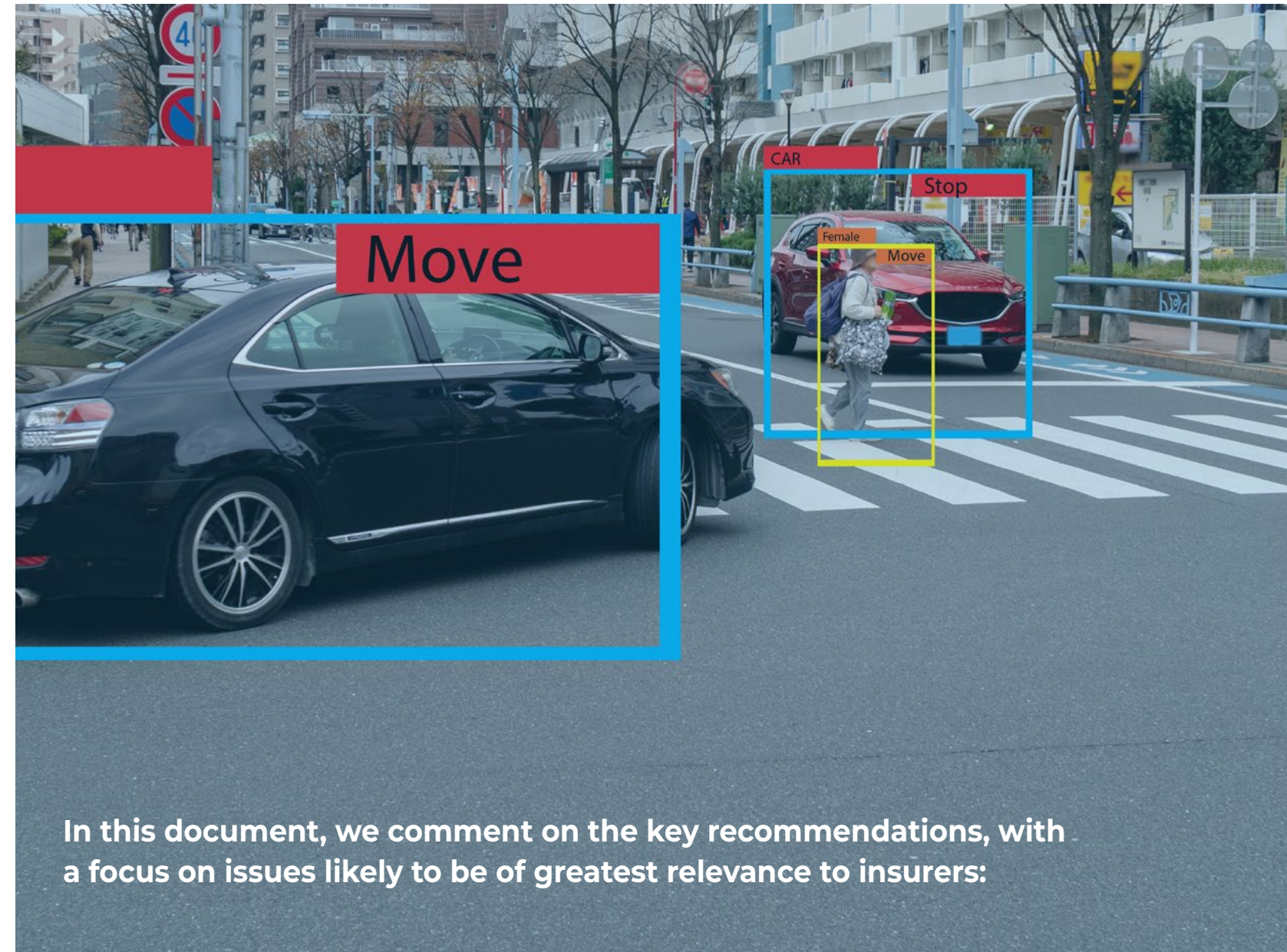
The report makes recommendations to the government and to parliament on the proposed legal framework to be adopted, in order to update the law far beyond the comparatively limited changes brought about by the Automated and Electric Vehicles Act 2018 (“AEVA”) (only Part 1 of which is currently in force that makes a motor insurer liable in the first instance for an AV that has crashed whilst driving autonomously).

In doing so, the LC has looked to the future where fully automated electric vehicles are able to drive themselves without the user in charge (what we traditionally have referred to as the

driver) being ready to take control at a moment’s notice, i.e. two significant steps beyond the imminent authorisation of vehicles with an automated lane keeping system (“ALKS”; as of now at least, an advanced form of driver assistance) and, beyond Tesla’s current ‘full self-driving’ capabilities which requires a driver to take control the moment the car can no longer cope with the situation.

Like the LC, we shall refer to such an autonomous driving system as ‘ADS’. This fully autonomous operation may be on prescribed roads/conditions (e.g. on a motorway or dual carriageway) or indeed over more varied and unpredictable roads.

These recommendations come at a time when the public are increasingly embracing electric vehicles (we have all seen how many Tesla cars are now on the road; 23% of BMW/Mini vehicles sold in 2021 were electrified).





A Legal Definition of what is Autonomous Driving

We have referred above to Tesla's 'full self-driving' capabilities. Tesla refers to such a system as 'Autopilot'. Despite Tesla stating that "Current Autopilot features require active driver supervision and do not make the vehicle autonomous." it can give the impression that such technology amounts to automated driving and negates the need for the driver to step in when things go wrong (which they still do) although the system could be considered comparable to a plane's autopilot system.

To avoid arguments as to what is and what is not truly autonomous the LC recommends a new authorisation scheme to decide whether any given ADS feature is or is not self-driving as a matter of law. The aim being to clearly distinguish such driving features which are truly autonomous (such that the driver need not remain vigilant and responsible for what the vehicles does) from lesser systems which do require the driver to take over in an instant. It is proposed to be an offence to describe a system as an ADS if not properly authorised as such.

A Legal Distinction between Vehicles that are being used Autonomously and Not

The LC says: "While a vehicle is driving itself, we do not think that a human should be required to respond to events in the absence of a transition demand (a requirement for the driver to take control). It is unrealistic to expect someone who is not paying attention to the road to deal with (for example) a tyre blow-out or a closed road sign. Even hearing ambulance sirens will be difficult for those with a hearing impairment or listening to loud music."

By legally defining what is an ADS, the law can then differentiate the liability position when things go wrong (including civil liability under AEVA) with a vehicle is being used with an ADS in full operation. The LC proposals effectively create a dual system of liability (both civil and criminal) and regulation between vehicles that are either being driven in the traditional sense (with or without driver aids) and vehicles which are truly autonomous and being used as such.

'User in Charge'

A vehicle which is capable of self-driving in some circumstances will of course still have to have driving controls, so the concept of a driver is not going to be entirely lost. However, where the vehicle operating with ADS engaged, the notion of a driver at such a time makes no sense beyond it being a short-hand description of the person being in the driving seat. The LC had already recommended previously that any legislation refer instead to a 'user in charge'. This remains the case.

The LC recommends that the 'user in charge' will retain duties, such as arranging compulsory insurance and checking loads/ children are properly restrained. Such a 'user in charge' may also be required to take over driving in response to a 'transition demand', if the vehicle encounters a problem it cannot handle (so there will still be a need for that person to possess the appropriate driving licence). Such transitional demands need to be clear and timely, with the LC suggesting there ought to be something like a 10 second time period for the driver to regain control, multi-sensory signals to warn the driver to take control and, mitigation against the risk of injury (e.g. the car bringing itself to a stop in its lane).

The LC suggest that initially the user in charge should be subject to precautionary rules about what they can and cannot do whilst the vehicle is driving autonomously. For instance, they would be prohibited from sleeping (although how that might work in practice seems debatable: on a long journey home late at night where the car is driving itself, falling asleep might be considered an almost inevitability).

Might one think an obvious benefit of paying considerably more for a vehicle that has truly autonomous driving capability that would be that it could drive the owner home from a pub safely. If the LC's recommendations are adopted, that would not be permissible, and one might question why someone would actually ever pay for the privilege of autonomous driving capability at all (Tesla currently charge £6,800 for the full self-driving capability).

The LC also highlight that there may be ADS features which can be authorised which do not require a 'user in charge' at all, e.g. a completely autonomous taxi where every seat is occupied by a fare paying passenger. Such a class of vehicle would be run by a 'no user-in-charge' ("NUIC") operator who would also need to be licenced. One can well envisage the big tech corporations being key NUIC operators (see for example Waymo's self-driving taxis).



Liability for AVs

The LC sensibly and, uncontroversial, points out that a ‘user in charge’ should not be liable for a motoring offence caused by the ADS malfunctioning when in operation. The LC have instead recommended that if the ADS function performs in a way which would be criminal if performed by a driver, this ought to be a regulatory offence. The vehicle manufacturer (which the LC refer to as the Authorised Self-Driving Entity (“ASDE”)) could therefore face sanction for not ensuring that one of its vehicles when operating under ADS obeys traffic laws.

The LC, understandably, do not seek to amend the legal position set out in AEVA so far as civil liability is concerned although some minor recommendations are made.

The LC reasonably enough states that it would be unfair to treat the victims of uninsured AVs less favourably than the victims of other uninsured vehicles, but simply recommends that the government puts measures in place to provide compensation to the victims of uninsured AVs. This would therefore mean entering into new agreements with the MIB.

A key issue for insurers who are faced with meeting claims in the first instance when things go wrong with AVs is actually being

able to analyse and understand what has led to the vehicle malfunctioning. A vehicle’s data may well be completely indecipherable without the manufacturer’s support and co-operation. The LC have therefore sensibly recommended that specific legal provision should be made requiring those who control data from such vehicles (typically the ASDE) to make it available to insurers in order to determine liability for a claim. That still leaves the question of the data being provided in a way which can be reasonably understood.

In terms of the data, the LC has proposed that the data should include the date, time and location of each occasion when:

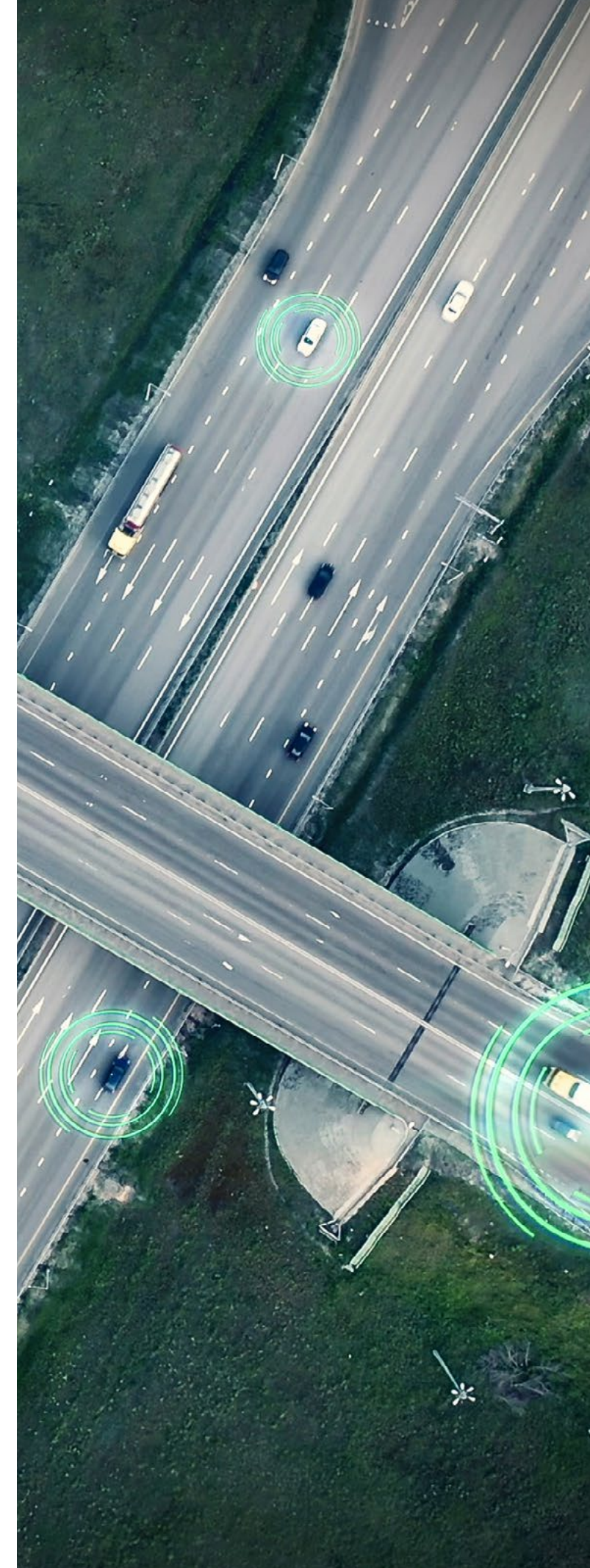
- (1) a self-driving ADS feature is activated or deactivated;
- (2) a transition demand is issued; and
- (3) a collision is detected.

The LC propose that required data should be stored for 39 months from the date when it is recorded and, where a request is made for it within that period, until the required data has been given to the insurer. Presumably that time-period is intended to allow a reasonable time from a collision to a claim being made (limitation for a personal injury claim being 3 years). However, claims involving pedestrian

claimants can be brought long after a collision has occurred. Property damage claims can also be brought up to six years after an event. It will be important for insurers to ensure, as best they can, that they are made aware of any potential claim in good time. One might have thought that it would have been helpful to provide for an insurer to be informed, as of right by the ASDE, that a collision had been detected of any vehicle they insured.

The LC’s report also has some interesting things to say about the role of product liability in dealing with claims arising when a vehicle has ADS operational, including that it is considered that “product liability law is likely to play only a limited role in the regulation of self-driving”. The LC appear to have reached this view because they say litigation will be limited to claims brought by insurers against vehicle manufactures and that “often both sides would be able to resolve matters without recourse to the law”. That view could be seen by some as optimistic.

Section 2(1) of AEVA essentially imposed a form of strict liability on insurers of AVs in circumstances where damage has been caused to any person (including the insured person) by the AV driving itself. Section 5(1) of the AEVA then provides that the insurer has two years from the date of settling a claim to pursue a





recovery from “any other person liable to the injured party in respect of the accident”.

The most obvious targets for such a recovery claim will be the vehicle manufacturer or software developer both of which could be liable directly to the injured party under the Consumer Protection Act 1987 (“CPA”). That is because the CPA imposes strict liability on producers and importers, and, in some circumstances, suppliers, in circumstances where they have supplied a product which has caused damage, provided the product was supplied within the last 10 years. (It is worth noting here that the CPA was recently amended as a result of Brexit so that an importer is now defined as a party which imports the relevant product into the UK rather than into the EU as was the case before.)

It is this part of the process that the LC appears to suggest will not generate a great deal of litigation. The LC suggests (in a footnote) that the findings of the regulator will often be highly influential (if not determinative) such that litigation will not be necessary. However, this approach is not necessarily borne out by other areas of product liability litigation.

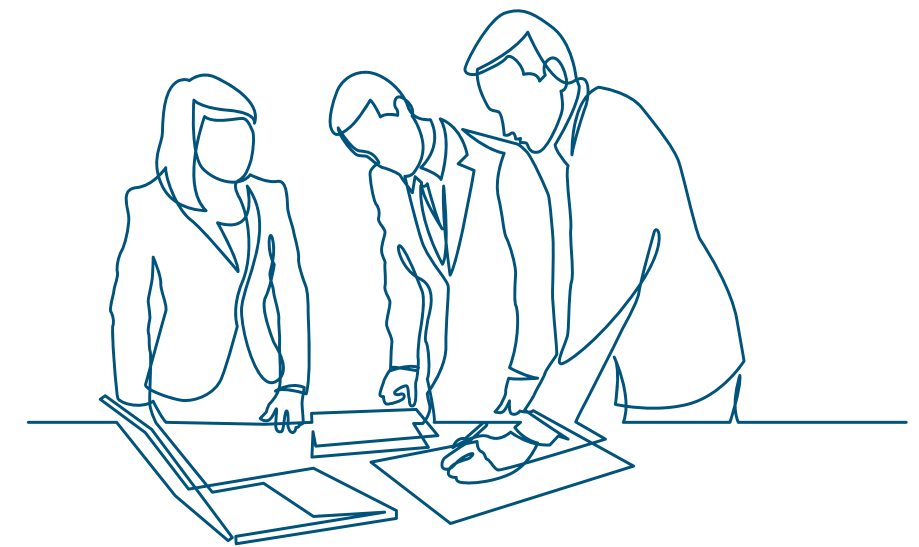
Further, the LC’s views also potentially ignores the following:

1. The fact that in many claims there will be damage to the AV itself which is not covered under AEVA and may generate separate product liability litigation – perhaps in contract against the dealership.
2. The possibility insurers will be able to pursue not just vehicle manufacturers but also importers (into the UK, from 2021) and, in some circumstances, suppliers under the CPA – which will likely result in the types of multi-party and/or cross border litigation typically seen in product liability claims.

The LC also considered whether the CPA will be fit for purpose in an era where many products, like automated vehicles, will now be ‘connected’ and may evolve over time including, for example, via updates and artificial intelligence. Indeed, last year the Office for Product Safety and Standards (“OPSS”) sought views on possible changes to UK product safety post-Brexit to address factors like new technologies such as artificial intelligence and products which can make autonomous decisions.

The OPSS response acknowledged that there were challenges posed by new products and technologies including determining which party is responsible when software goes wrong. Similarly, the European Commission has indicated it plans to revise the Product Liability Directive (upon which the CPA is based) including by removing obstacles to bringing claims in respect of digital products.

We do not know yet whether the UK’s product safety regime will change but we can certainly see the types of issues that will need addressing.



Responsibility for AVs

The LC's recommendations are usefully summarised in the following table which summarises the proposed recommendations of who is responsible for what when it comes to AVs:



Other Changes

Such a profound re-writing of significant sections of traffic laws also raises the spectre of wholesale reform of compulsory motor insurance. Our current model is, in essence, based on the framework first introduced in 1930. The Road Traffic Act 1988 was already arguably ripe for an overhaul given how long it has been in existence (albeit with various amendments). Remember this Act covers a wide range of motoring matters including criminal offences.

So far as compulsory insurance is concerned, the Act is premised on the concept of a driver using the vehicle and liability being dependent on human error. The AEVA at least partially addresses the problems of liability when things go wrong with an AV which is, at the minimum operating with ALKS, but there are still significant potential issues.

For instance, does the concept of the insurer only insuring specified 'uses' of the vehicle (such as social, domestic and pleasure purposes) actually have any conceivable justification when dealing with vehicles which are in a fully autonomous driving mode? How does the concept of authorised insured drivers square with the new concept of a 'user in charge'? Should it make any difference who the 'user in charge' is if a collision is not dependent on their experience/characteristics? Clearly if a 'user-in-charge' has to revert to becoming the driver at a few seconds' notice, an insurer may not wish to prove cover for the vehicle, regardless of who is behind the wheel. These are issues with the AEVA just does not begin to tackle; the AEVA is designed as an adjunct to part VI of the 1988 Act.

ASDE

Needed for all on-road AVs. Puts the AV forward for authorisation as having self driving features and is legally responsible for the performance of the AV. Responsible for the safety case. Must be of good repute, and have appropriate financial standing in the UK.

User in charge

A User-In-Charge ("UIC") is a human in the vehicle with access to the controls. The UIC must:

1. Be qualified and fit to drive
2. Be receptive to a transition demand
3. Be responsible for the condition of the vehicle
4. Report accidents

Examples of use cases where a UIC may be required:

Sub-trip features such as a motorway chauffeur or traffic jam assist where an element of conventional driving is needed to complete a journey.

NUIC operator

To obtain NUIC operator licence, the operator must:

1. Be of good repute
2. Have appropriate financial standing
3. Have centre of operations in GB
4. Be professionally competent to run the service
5. Submit a safety case

Licence conditions of NUIC operator may include:

1. Carrying insurance
2. Maintain the vehicle
3. Check the load is secure
4. Report accidents and near misses
5. Not impede traffic flow
6. Check the route and pay any tolls and charges

There may be additional licence conditions for certain use cases - e.g. for passenger services and freight

Conclusions

The proposals the LC has set out are broadly welcomed by us as sensible, if not largely predictable. There will not be any imminent changes to the law – such proposals will need to be considered carefully by government (which funded the report) and key stakeholders (including the motor insurance industry). There will be considerable detailed work required with secondary legislation once the basic framework of primary legislation can be implemented.

The need for such reform to deal with fully automated vehicles is also not time-critical (yet) given that the government has not even begun to licence vehicles with ALKS (although the first licenced vehicles should be announced in the coming months). Equally there is no room for complacency – technology is rapidly progressing and what may, to many, seem almost the stuff of science fiction is soon to become science fact, at least for high-end/prestige vehicles.

In many ways, what the LC have done in respect of the issue of liability (including product liability) and compulsory insurance and how these issues are dealt with in practice, is little more than a 'toe in the water'. The issues around dealing with claims when things go wrong is something which will become clearer as matters progress but ultimately until AVs are operating on UK roads, the full extent of the legal and practical challenges around liability for AVs remains to be fully assessed.



If you have any questions about the information contained within this document please do not hesitate to get in touch.



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