

Statutory offences of causing death by driving

A Scottish Sentencing Council consultation

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www.scottishsentencingcouncil.org.uk
sentencingcouncil@scotcourts.gov.uk
[@ScotSentencing](https://twitter.com/ScotSentencing)

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Chair's foreword



I am pleased to introduce the Scottish Sentencing Council's public consultation on Scotland's first offence guideline, covering statutory offences of causing death by driving.

The Council's work to date has focussed on the creation of three general guidelines on the principles and purposes of sentencing, the sentencing process, and the sentencing of young people. These guidelines each apply to all offences. They provide an essential framework for all sentencing decisions in Scotland, but, by their very nature, they do not give any guidance on sentencing for specific offences. With this, our first offence guideline, the Council has entered a new phase of its work - it represents the first time that the Council has set out sentencing ranges and further guidance to help courts select an appropriate sentence.

The draft guideline provides guidance on the nature and duration of sentences for the statutory offences of causing death by dangerous driving; causing death by careless driving when under the influence of drink or drugs; causing death by careless, or inconsiderate, driving; and causing death by driving: unlicensed, uninsured, or disqualified drivers.

The offences covered by the draft guideline, while relatively uncommon, are of significant public concern. They are very serious in nature and can have a devastating effect on the families of victims and others affected by the offence. Circumstances can, however, vary widely between cases, and present significant challenges for sentencers. There can be a large difference between the harm caused – someone's death – and the level of culpability, or blame, of the offender, particularly in careless or inconsiderate driving offences. As a result, cases involving death caused by driving can be among the most complex and emotive dealt with by our courts.

We believe that a guideline that explains how sentences in such cases are decided, listing some of the factors to be taken into account, will help to increase public understanding about the complex issues involved. We also hope that it will aid with the predictability of sentencing

for those involved in these cases and assist the courts in reaching what, at times, can be challenging sentencing decisions.

We have given careful consideration to the draft guideline's style and structure. As with all of our guidelines, it is intended to be concise, easy for sentencers to refer to in court, and accessible to the public. The structure follows the first four steps in our sentencing process guideline. For each offence covered by the guideline, tables are provided at each of the first three steps.

A table at step one (or two tables for offences of causing death by careless driving when under the influence of drink or drugs) lists features to help the court determine which level of seriousness – A, B, or C – the case before it falls into. A table at step two sets out sentencing ranges for each level of seriousness. Factors which may aggravate or mitigate the seriousness of the offence are set out in a table at step three, leading the sentencer to step four in the sentencing process, determination of the headline sentence.

As this guideline will help to shape the approach we take in our future offence guidelines, we are particularly keen for individuals and organisations – even those who may not have a direct interest in death by driving offences – to let us know their views on its style and structure, as well as its content.

In respect of sentencing ranges in the draft guideline, the maximum sentence for two of the offences it covers – causing death by dangerous driving and causing death by careless driving when under the influence of drink or drugs – has recently been raised as a result of the Police, Crime, Sentencing and Courts Act 2022. The draft guideline notes the new maximum sentences. Although it does not include them within the sentencing ranges for these two offences, this would not prevent a court from imposing the maximum sentence where it considers this to be the most appropriate sentence.

It is perhaps worth noting why we have taken this approach. We have very carefully analysed sentences imposed by Scottish courts for these offences over a number of years and sought the views of sentencers who have imposed them. We have considered the findings of these exercises in the light of sentencing practice more generally and in particular

with regard to the High Court's practice when sentencing other offences which result in a fatality, such as murder and culpable homicide.

Based on all of this, we have decided to consult on a draft guideline which sets out sentencing ranges that are broadly in line with current sentencing practice, and which reflects the upper limits of sentences which have been imposed by Scottish courts for each offence covered by the guideline.

The publication of this draft guideline is an important achievement for the Council. All of our guidelines are evidence-based and informed by research and consultation. In developing this draft guideline, we have engaged with a wide range of organisations and people, including the judiciary, the legal profession, criminal justice bodies, and other key stakeholders. On behalf of the Council I would like to thank all of them, and everyone else who has contributed to our work. I am also particularly grateful to my fellow Council members for their diligence. As a result, we have now reached perhaps the most significant stage yet in the development of the guideline – this public consultation.

Our sentencing guidelines must be of use to the courts, court users, and to the public in general. It is vital that we get the widest possible range of views on this draft guideline to help ensure that it is fit for purpose. I encourage you to take the time to consider and respond to this consultation. Every response received will be carefully considered and discussed before any decisions are made in finalising the guideline. I look forward to receiving your views.

Rt Hon Lady Dorrian
Lord Justice Clerk and Chair of the Scottish Sentencing Council

Part 1

Responding to this consultation

1. Responses to this paper are welcomed by **midnight on Tuesday 22 November 2022**.
2. Responses can be submitted online at:
<https://consultations.scottishsentencingcouncil.org.uk/ssc/death-by-driving-offences>. If you cannot respond online, please contact us about other ways to submit a response. We can be contacted by email at: sentencingcouncil@scotcourts.gov.uk.
3. We will publish the responses we receive, except where respondents ask for confidentiality. Where confidentiality is sought it should be noted that the Scottish Sentencing Council is subject to the [Freedom of Information \(Scotland\) Act 2002](#) so we may be required to release some information if requested.
4. If you have any questions about the consultation process, or have any difficulties with the online response form, please contact us by email at sentencingcouncil@scotcourts.gov.uk or by phone on 0300 790 0006.

Introduction

The Scottish Sentencing Council

5. The Scottish Sentencing Council was established in 2015 under the Criminal Justice and Licensing (Scotland) Act 2010.
6. We have three objectives which, by law, we must aim to achieve when carrying out our functions. We must seek to:
 - promote consistency in sentencing practice
 - assist the development of policy in relation to sentencing
 - promote greater awareness and understanding of sentencing policy and practice
7. Our main responsibilities include:
 - preparing sentencing guidelines for the Scottish courts
 - publishing guideline judgments issued by the Scottish courts
 - publishing information about sentences imposed by the Scottish courts

Developing sentencing guidelines

8. An important part of our role in promoting consistency is to prepare sentencing guidelines for the Scottish courts. When sentencing someone who has committed an offence, a court¹ must take into account any relevant sentencing guidelines. If a court decides not to follow the guidelines, the reasons for that decision must be stated. Any guidelines we develop must be approved by the High Court of Justiciary² before they have any effect. Sentencing guidelines can be general, which means they cover all offences. Or they can be more specific and cover a particular offence or group of offences.

¹ The words “court” and “sentencer” are used in this consultation paper to include judges in the High Court, sheriffs principal, sheriffs, summary sheriffs, and justices of the peace, when presiding over a court.

² <https://www.scotcourts.gov.uk/the-courts/supreme-courts/high-court/about-the-high-court>

Approval process and consultation

9. Sentencing guidelines developed by the Council must be approved by the High Court of Justiciary before they apply to decisions about sentencing. Before submitting a guideline for approval, we must publish a draft of the guideline. We also have to publish a draft impact assessment giving our views on the likely impact, costs, and benefits of the guideline. We are required to consult the Scottish Ministers and the Lord Advocate on these drafts. We must also invite views from anyone else we think should be consulted. To ensure our guidelines are useful, and that we have as much information as we can about their potential effects, we want to hear from as wide a range of people as possible. This includes the public as well as criminal justice organisations, charities, and other organisations which have an interest in the guideline. With this in mind, we consult publicly on all our draft guidelines.

Consultation on the death by driving guideline

10. This paper seeks views on the draft guideline for statutory offences involving causing death by driving.

11. Three guidelines of general application are already in force:

- the [principles and purposes of sentencing guideline, which](#) came into effect on 26 November 2018
- the [sentencing process guideline](#), which came into effect on 22 September 2021
- the [sentencing young people guideline, which](#) came into effect on 26 January 2022

The draft guideline being consulted on will therefore, if approved, be the first offence guideline developed for use by the Scottish courts. It is intended to be read alongside the principles and purposes and sentencing process guidelines, and, where applicable, the sentencing young people guideline.

12. The consultation asks questions on:

- the overall style and structure of the guideline and its interaction with other guidelines
- the content of the guidance contained within the guideline

- the potential impacts of the guideline

The questionnaire can be found at **Part 3** and can be completed online at <https://consultations.scottishsentencingcouncil.org.uk/ssc/death-by-driving-offences>.

13. We have carried out a range of research and consultation to help inform the structure and content of this guideline. We commissioned a literature review examining the available evidence on sentencing in death by driving cases,³ including in other jurisdictions, and have gathered detailed statistical data on sentences imposed in Scottish cases. Two pieces of research on public perceptions of, and attitudes to, sentencing for these offences have been carried out.⁴
14. We consider outside input essential to the development of guidelines. We have engaged with the judiciary in two ways:
- by interviewing them with the aims of better understanding sentencing practice, ascertaining the key challenges when sentencing death by driving cases, and finding out their views about the sentencing of these offences
 - by carrying out testing exercises with sentencers to ensure the draft guideline is both fit for purpose and compatible with the existing general guidelines
15. We have also taken into account discussions with colleagues and sentencing advisory bodies from other jurisdictions to learn first-hand about their guidelines and guidance in use.⁵ This has been especially useful in informing our decisions about the overall style and structure of offence guidelines.

³ [Causing death by driving offences Literature Review](#), (September 2018) prepared for the Scottish Sentencing Council by Dr Rachel McPherson and Professor Cyrus Tata, Centre for Law, Crime & Justice, The Law School, Strathclyde University.

⁴ [Public perceptions of sentencing, National survey report](#), (September 2019) prepared for the Scottish Sentencing Council by Carolyn Black, Rachel Warren, and Rachel Ormston of Ipsos MORI Scotland and Professor Cyrus Tata of the University of Strathclyde; [Public perceptions of sentencing in Scotland Qualitative research exploring causing death by driving offences](#), (February 2021), prepared for the Scottish Sentencing Council by Susan Reid, Hannah Biggs, Kaushi Attygalle, Konstantina Vosnaki (ScotCen) Dr Rachel McPherson (University of Glasgow) and Professor Cyrus Tata (Strathclyde Centre for Law, Crime & Justice, Law, School, University of Strathclyde)

⁵ This has included engagement with the following: Sentencing Council for England and Wales; Northern Ireland Sentencing Group; The Judicial Studies Committee and Irish Sentencing Committee of the Republic of Ireland; the Tasmanian and Victorian Sentencing Advisory Councils; and the US National Association of Sentencing Commissions.

Why are we developing this guideline?

16. Death by driving cases, as with any cases involving the loss of life, are of particular public concern and can be among the most serious and complex which come before the courts for sentence.
17. The level of public understanding of the law and practice in relation to sentencing in these cases is not always high and we believe a guideline will provide an opportunity to address this. There are particular challenges for the courts in sentencing death by driving cases: circumstances can vary significantly between cases and there can often be a large discrepancy between the harm caused and the culpability (or blameworthiness) of the offender. In addition, there are comparatively few death by driving cases, meaning that sentencers may be less familiar with the sentencing exercise.

Public awareness and attitudes

18. In 2019, we published independently-conducted research by Ipsos MORI which examined, among other things, public attitudes to death by driving offences.⁶ As part of the research, participants were asked to carry out sentencing exercises based on a death by careless driving and a death by dangerous driving case scenario. For the former, the estimated sentence was a community payback order and for the latter, the estimated sentence was four years' imprisonment.⁷

Death by careless driving scenario

The offender is a 32 year-old man, with no previous criminal convictions. On his way to work, he was driving within the speed limit along a country road

⁶ [Public perceptions of sentencing, National survey report](#), (September 2019) prepared for the Scottish Sentencing Council by Carolyn Black, Rachel Warren, and Rachel Ormston of Ipsos MORI Scotland and Professor Cyrus Tata of the University of Strathclyde; [Public perceptions of sentencing in Scotland Qualitative research exploring causing death by driving offences](#), (February 2021), prepared for the Scottish Sentencing Council by Susan Reid, Hannah Biggs, Kaushi Attygalle, Konstantina Vosnaki (ScotCen) Dr Rachel McPherson (University of Glasgow) and Professor Cyrus Tata (Strathclyde Centre for Law, Crime & Justice, Law, School, University of Strathclyde)

⁷ Scottish Sentencing Council (September 2019), pp. 22-26. Likely sentences for the scenarios were agreed based upon sentencing data, where available, and the professional experience of the report authors, their consultants, members of the Scottish Sentencing Council, and the Council's secretariat.

in daylight. On approaching a junction, he was distracted by an insect and did not notice an oncoming car. He pulled out in front and the two cars collided. The driver of the other car, a 26-year-old woman, was killed. The offender was breathalysed and the test result was negative. He pled guilty to causing death by careless driving.

19. For the death by careless driving scenario, the majority of respondents gave a sentence in line with the estimate: the most common sentence, given by just over a quarter (26%) of respondents, was a community payback order. However, answers ranged widely, from no sentence beyond disqualification from driving (6%), to a prison sentence of more than fifteen years (1%). Overall, one in five (21%) respondents thought the offender should get a prison sentence. The results indicate that respondents are more likely to think that a custodial sentence or a financial penalty would be appropriate than is current practice, and are less likely to consider a community sentence.

Death by dangerous driving scenario

The offender is a 32 year-old man, with no previous criminal convictions. On his way to work, he was driving 70 mph in a 50 mph zone during wet weather with poor visibility. When approaching a sharp bend, he did not slow down and lost control of the vehicle, colliding with an oncoming car. The driver of the other car was killed. The offender was breathalysed and the test result was negative. He pled guilty to causing death by dangerous driving.

20. For the death by dangerous driving scenario, most respondents (77%) felt that the offender should receive a prison sentence. However, only around a fifth (18%) of respondents were in line with probable sentencing practice, with the majority being more lenient, thinking either a shorter prison sentence (38%) or a non-custodial sentence (23%) would be appropriate. There was a wide range of views on the most appropriate length of custodial sentence but the most common custodial sentence, given by around a quarter of respondents (26%), was of one to three years.

21. Participants were also asked what sentence they thought the court would, in reality, impose for the offence. For the death by careless driving offence, respondents most commonly felt that the actual sentence would be tougher⁸ than the sentence that they personally felt the offender should get, with almost four in ten (37%) giving this answer. A similar proportion (30%) felt that the sentence would be more lenient and only one in five respondents (20%) thought it would be the same as the sentence they personally felt was appropriate.
22. By contrast, when asked what a court would give for the death by dangerous driving scenario, around a third of respondents (32%) thought that the actual sentence would be more lenient (32%) than what they thought appropriate, with similar proportions believing a tougher sentence would be given (34%) or the offender would get the same sentence (27%) in reality.
23. Further in-depth research carried out on our behalf⁹ found that, generally, participants in focus groups did not have a clear understanding of death by driving offences, nor always of the difference between dangerous and careless driving. There was also a lack of awareness of the full extent of the factors taken into account in the sentencing of these offences, with some participants changing their views on sentencing after considering the full range of factors which might be involved. The same study also explored attitudes to sentencing in these cases, and the general feedback was that sentencing for these offences is less severe than participants thought it should be. This perception was attributed to charge reductions, sentence discounting and automatic early release arrangements. Some, the family members of victims in particular, were disappointed that the maximum sentences are not used by courts.
24. It is clear to us that the guideline offers an opportunity to improve public knowledge about sentencing practice in these cases and to improve understanding about the complex issues involved. Our hope is that this will also aid with predictability of sentencing for all those who might be involved in these cases.

⁸ 'Tougher' being the language employed within the survey.

⁹ Scottish Sentencing Council (February 2021)

Challenges for sentencers

25. We understand that death by driving cases are particularly challenging for sentencers because of the complexities in assessing culpability against the limited degree of variation in terms of harm. Our research with sentencers suggests that the sentencing exercise is more straightforward in death by dangerous driving as opposed to death by careless driving cases, as the level of culpability for the actions that led to the offence is generally more apparent.
26. Interviews with sentencers highlighted a palpable level of unease in considering the seriousness of the offence in causing death by careless driving cases, with participants voicing disquiet that public attitudes focused on the outcome of these offences, rather than the actions leading up to them. Sentencers mentioned that in many of these cases the accused had never been in any trouble before, and it was a set of perhaps unfortunate circumstances that led to the incident and catastrophic outcome. Typically, sentencers felt that the resulting harm in the offence did not equate to the level of culpability for both death by careless and death by dangerous driving offences.
27. While there is existing guidance, in the form of the Sentencing Council for England and Wales' guidelines on causing death by driving offences,¹⁰ which are referred to by the Scottish courts, there is a recognition of those guidelines' limitations in respect of Scottish cases. In particular, some sentences available in England and Wales, such as suspended sentences and other disposals, do not apply in Scotland.¹¹ Moreover, the current guidelines in England and Wales are presently the subject of consultation.¹² In addition, we would note that since our research with sentencers was carried out, our sentencing process guideline, which, among other things, provides a specific framework

¹⁰ There are four guidelines covering offences under sections 1, 2B, 3A, and 3ZB and s3ZC of the Road Traffic Act 1988. Each is available separately on the Sentencing Council for England and Wales's website at <https://www.sentencingcouncil.org.uk/crown-court/>.

¹¹ Courts in England and Wales have access to suspended sentences which are analogous, but not identical, to CPOs in Scotland, while the provisions of early release schemes also vary between jurisdictions. For a more detailed discussion, see Gormley et al, 2022, [The Methodological Challenges of Comparative Sentencing Research](#), Edinburgh, Scottish Sentencing Council

¹² [Sentencing Council for England and Wales Business Plan 2020-21](#), p.21; [Motoring Offences: Consultation](#)

for offence guidelines in the Scottish context, entered into force on 22 September 2021. This is therefore an opportune time to develop guidance specific to the Scottish context.

28. For the reasons outlined above we believe that, in addition to improving public understanding and awareness of sentencing in death by driving cases, a guideline will be of assistance to sentencers in the Scottish courts.

Approach

29. We developed the draft guideline with the following particular aims in mind:

- 1) To promote public awareness and understanding of, and confidence in, sentencing for statutory offences of causing death by driving by:
 - improving awareness of the law and practice as it relates to sentencing
 - improving understanding of the complex issues involved in the sentencing exercise
 - explaining how sentencing decisions are made and why
- 2) To promote consistency and predictability in sentencing for death by driving cases by setting out a framework for the approach to the sentencing exercise and providing guidance on appropriate sentences.
- 3) To be useful to sentencers, legal practitioners, and others who are involved in the delivery and administration of criminal justice, or who participate in or observe such cases, for example: the families of victims, the media, or support organisations.

30. The guideline is expressed as clearly and simply as possible. It is not intended to cover every possible situation. Instead, it sets out the factors which are common to death by driving cases and what consideration should be given to these in deciding an appropriate sentence.

31. In order to ensure our guidelines are as accessible to the public as possible, we have avoided jargon and provided clear explanations of concepts where we can. With the

Council's objective to promote consistency in sentencing in mind, and to mitigate against the application of the guideline leading to an inadvertent increase in appeals, we have also sought to be as precise as possible in our use of language, recognising of course that a degree of interpretation will always be necessary.

Part 2: The draft guideline explained

Overview

Applicability

32. The draft guideline applies to all offenders who have been convicted of one of the following offences under the Road Traffic Act 1988:

- section 1 (causing death by dangerous driving)
- section 3A (causing death by careless driving when under influence of drink or drugs)
- section 2B (causing death by careless, or inconsiderate, driving)
- section 3ZB (causing death by driving: unlicensed or uninsured drivers)
- section 3ZC (causing death by driving: disqualified drivers)¹³

Structure

33. The different statutory offences of causing death by driving are addressed separately within the draft guideline in order of seriousness. In respect of each, guidance is provided to assist the court in determining the headline sentence. This approach follows the general framework set out by steps 1-3 of the sentencing process guideline:

- At step 1 (assess seriousness), guidance is provided on the assessment of seriousness, including a table which lists various factors which might be present for specified categories of seriousness
- At step 2 (select the sentencing range), sentencing ranges by reference to the categories of seriousness are provided
- At step 3 (aggravating and mitigating factors) a non-exhaustive list of aggravating and mitigating factors is provided. These might increase or reduce the sentence, and may move the headline sentence outwith the range selected at step 2

¹³ The text of the various offences is available at:

<https://www.legislation.gov.uk/ukpga/1988/52/part/II/crossheading/driving-offences>

Interaction with other guidelines

34. Courts must have regard to all applicable guidelines when sentencing.¹⁴ The principles and purposes guideline and the sentencing process guideline apply to all offences, including death by driving offences. The draft guideline is therefore intended to be read alongside those guidelines and has, in particular, been drafted to complement the sentencing process guideline, which provides sentencers with a general framework for making sentencing decisions.
35. The sentencing process guideline was developed with a view to ensuring that it would not be necessary in offence guidelines to repeat each step in the sentencing process guideline (for example, it is not considered necessary to repeat in each guideline the requirement to consider any time already spent in custody). This approach is intended to allow offence guidelines to be succinct and easily referred to in the court setting. The sentencing process guideline therefore provides guidance on the further considerations courts may or may not require to take into account before imposing the final sentence, including reduction for a guilty plea, consideration of time spent in custody, and ancillary orders.
36. The principles and purposes guideline provides that the overarching principle of sentencing is of fairness and proportionality. The sentencing process guideline makes it clear that this should be considered throughout the sentencing exercise. This will be of particular importance when sentencing for multiple offences.
37. These general guidelines are intended to complement and facilitate the development of offence guidelines. When sentencing in a death by driving case it is therefore expected that, in addition to the guideline on death by driving offences, courts will have regard to both the general principles and purposes and sentencing process guidelines, as well as to the sentencing young people guideline if it is applicable.
38. The sentencing young people guideline does not include guidance on its particular effect on offence guidelines. It provides that the nature and duration of a sentence imposed on

¹⁴ Section 6 of the Criminal Justice and Licensing (Scotland) Act 2010

a young person should be different from that which might be imposed on an older person being sentenced for the same, or a similar, offence; and, specifically, that a custodial sentence for a young person should be shorter than for an older person for the same, or a similar, offence.

39. In relation to youth specifically, this could be addressed in various different ways within the guideline. It could be stated that it allows the selection of a lower level of seriousness (given that the offender's level of maturity at the time of the offence may affect their culpability, as provided for in the sentencing process and sentencing young people guidelines). Or the guideline could indicate that a sentence towards the lower end of the range should be selected (this would be to treat youth and maturity more akin to a mitigating factor). In relation to youth in particular, the High Court has made it clear that the offender's youth should be in the sentencer's mind from the outset.¹⁵
40. It is our intention that general and offence guidelines should be complementary and capable of being applied alongside one another, and that offence guidelines should apply as broadly as possible where they are relevant. In addition, we believe there is a reasonable public expectation that offence guidelines will apply to all persons being sentenced for the offence they cover. Although we have no current plans to do so, the Council may decide in future to prepare further general guidelines dealing with certain types of offender, such as for persons with mental welfare difficulties or the elderly. If offence guidelines are disapplied in favour of general guidelines it could result in offence guidelines applying in an ever-decreasing number of cases and would likely raise questions as to the utility of offence guidelines to the courts and to the public.
41. The draft guideline therefore includes guidance to the effect that the court may select a sentence outwith the range identified after the initial assessment of seriousness if the

¹⁵ See, for example, [JB v HMA \[2020\] HCJAC 35](#), in which the Appeal Court stated "It is clear from the authorities to which we have referred that the exercise of sentencing a child such as the appellant does not involve a direct or arithmetical equation with sentences which might be appropriate for adult offenders. From paragraph 4 of his sentencing remarks it appears that the sentencing judge has carried out a form of discounting exercise, taking as his starting point the sentence that would be appropriate for an adult offender. To that extent we consider that the sentencing judge erred in his approach" (para 12).

application of another guideline requires it. This would allow flexibility for any future general guidelines that might apply.

Style

42. For ease of reference, the draft guideline employs a combination of narration and tables and is intended to be succinct. Some sentencers have expressed to us a preference for the narrative format incorporated in the England and Wales sentencing guidelines, to allow for an element of elasticity and discretion. Others would prefer a more graphical approach where the sentencing process, including factors influencing judgment, would be presented in a 'grid' form, which it has been suggested would be easier to comprehend and follow.
43. The draft guideline has been developed with a view to providing useful guidance to sentencers whilst preserving the flexibility and discretion they have told us is required. The use of tables as a visual aid is, in fact, intended to enhance flexibility, rather than limit sentencers' discretion. We have considered and tested various approaches and have found that the use of tables with narration has generally been welcomed during testing with sentencers. It is our belief that the approach adopted will be similarly helpful to other users of the guideline and members of the public.
44. The draft guideline provides guidance on each of the statutory offences in order of seriousness.¹⁶ We welcome views on whether this ordering is useful, or if it would be more helpful to list the offences as they appear in the Road Traffic Act 1988.¹⁷

¹⁶ That is, section 1 (causing death by dangerous driving), followed by section 3A (causing death by careless driving when under influence of drink or drugs), section 2B (causing death by careless, or inconsiderate, driving); and sections 3ZB (causing death by driving: unlicensed or uninsured drivers) and 3ZC (causing death by driving: disqualified drivers).

¹⁷ With section 1 offences at the fore, followed by section 2B, 3ZB and 3ZC, and, lastly, section 3A offences.

QUESTIONS

Q1) Do you agree or disagree that the general structure of the guideline, providing guidance in line with steps 1 to 3 of the sentencing process guideline, is appropriate?

- Agree
- Disagree

Please provide any reasons for your response.

Q2) Do you agree or disagree that the style of the guideline, employing narrative and tables, is helpful?

- Agree
- Disagree

Please provide any reasons for your response.

Q3) Do you agree or disagree that the draft guideline makes the relationship between this guideline and other applicable guidelines clear?

- Agree
- Disagree

Please provide any reasons for your response.

Q4) Is there anything that can be done to make the relationship between this guideline and other applicable guidelines clearer?

- Yes
- No

Please provide details along with any reasons for your response.

Q5) Do you consider that the offences should be listed within the guideline by order of seriousness, the order they appear in the Road Traffic Act 1988, or in any other order?

- Seriousness
- Order in the Road Traffic Act 1988
- Other order (please specify below)

Please provide any reasons for your response.

Specific aspects of the draft guideline

Purposes of sentencing

45. The principles and purposes of sentencing guideline provides a list of purposes a sentence may seek to achieve. This draft guideline does not emphasise any particular purposes or purposes of sentencing. However, it is worth noting that participants in focus group research expressed an interest in rehabilitation as a purpose of sentencing in causing death by driving cases.¹⁸ In respect of section 2B (causing death by careless driving) cases in particular, the offence is often a result of a set of unfortunate circumstances that led to the incident and catastrophic outcome.

46. Any or all purposes of sentencing¹⁹ may be appropriate depending on the circumstances of the case. Particularly in relation to causing death by dangerous driving, there may often be circumstances where the sentence may seek to express disapproval, deter, and/or punish the behaviour leading to the incident, for example in a case involving racing or driving while intoxicated. The Council does not therefore consider that it is necessary to emphasise any particular purpose or purposes of sentencing for the offences covered by the draft guideline.

¹⁸ Scottish Sentencing Council (February 2021)

¹⁹ [Principles and purpose of sentencing](#), Sentencing guideline, effective from 26 November 2018

QUESTION

Q6) Do you agree or disagree that the draft guideline should not emphasise any particular purpose or purposes of sentencing?

- Agree
- Disagree

Please provide any reasons for your response.

Assessing seriousness

47. For each offence covered by the guideline, step 1 provides guidance on the assessment of seriousness. The sentencing process guideline provides that seriousness is determined by two things: the **culpability** of the offender and the **harm** caused by the offence. In the case of the offences considered here, the Council views the harm as being defined in statute as death having been caused. Consequentially, all offences will carry a very high level of harm. This means that the guidance provided focuses on the culpability of the offender. It is recognised that there may be other factors present which can lead to the offence being regarded as more serious for sentencing purposes, and some of these are listed in the guideline as aggravating factors.

48. For causing death by dangerous driving and causing death by careless driving offences, culpability is primarily assessed by reference to the quality of driving involved. For causing death by driving whilst unlicensed, uninsured, or disqualified, the assessment is made by reference to whether the offender was driving whilst disqualified or while uninsured and/or unlicensed. For causing death by careless driving when under the influence of drink or drugs offences, culpability is determined by the level of intoxication and the standard of driving.

49. Sentencers are guided to consider a table listing various features of seriousness which might be present in the circumstances of the offence. The levels of seriousness are given alphabetical descriptors (levels A, B, and C, with A being the most serious). The guidance explains that the lists of features of seriousness are not exhaustive and that the court may have regard to any other features which it considers relevant to the

assessment of seriousness. The features listed are therefore determinant of the assessment of the seriousness of the offence and are separate from the consideration of aggravating and mitigating factors.

50. The sentencing process guideline provides guidance to sentencers on the need to avoid double-counting factors under both steps 1 and 3 (step 3 relates to consideration of aggravating and mitigating factors). As that guidance will apply to every sentencing decision it is not repeated in this draft guideline.

Multiple features of seriousness

51. The following issues relate to cases in which multiple features of seriousness are present. They are primarily relevant to the offence of causing death by dangerous driving, this being the only offence in respect of which the guideline as currently drafted sets out more than one feature of seriousness under any level. If multiple features of seriousness were to be included in respect of any other offence(s) the same issues would arise in respect of those, and indeed are likely to arise in future offence guidelines.

52. The draft guideline (at paragraph 6 of step 1 of the guidance on causing death by dangerous driving) provides that where features of an offence are present from more than one level of seriousness, the court should balance the relative significance of these features in arriving at a decision as to which level of seriousness the case falls into. We are conscious of the possibility of a single aspect of a case disproportionately increasing the assessment of seriousness, and creating potential for unfairness as well as inadvertently increasing sentences.

53. In addition, the draft guideline (again at paragraph 6 of step 1 of the guidance on causing death by dangerous driving) states that where multiple features of seriousness from level B or C are present, this may indicate a higher level of seriousness. For example, there may be a situation where all, or many, of the factors listed as indicative of a level B offence are present, such that the offence should be considered a level A offence. It may also be that multiple factors would already be considered to amount to the level A feature: "Prolonged and deliberate course of bad driving, with a disregard for the danger being caused to others". On balance we consider that the matter, having been highlighted

within the draft guideline, is one for the court to consider with regard to the circumstances of the case and that if the guidance were more specific to the number or particular features, this would likely be overly complex.

54. We have also sought to distinguish between “gross impairment” and “impairment” for the purposes of the assessment of seriousness. The guideline refers to the voluntary consumption of alcohol or illegal drugs, or driving after the consumption of medication where the offender knew, or should have known, about the likelihood of impairment in consequence, as possible causes of impairment. The “other causes” of impairment mentioned in the guideline might include, for example, driving with uncorrected defective eyesight.

55. We welcome views on the approach to seriousness set out within the guideline and the listed features of seriousness generally, and in relation to two specific matters in relation to the guidance on death by dangerous driving offences in particular.

Racing

56. Death by driving cases being comparatively rare, there are very few examples of cases involving racing enabling us to reach a firm conclusion on practice in this regard. However, it appears to us that racing cases *in general* are presently categorised as being in the medium level of seriousness, with particularly bad instances being categorised in the highest level of seriousness.

57. The Council considers that there is a strong argument for the inclusion of racing as a feature of the most serious of these offences. We note that, while the Sentencing Council for England and Wales’ guideline on death by dangerous driving offences currently includes racing as a feature of level 2 seriousness (level 1 being the highest category of seriousness)²⁰, its present consultation proposes classifying racing as indicative of the highest level of seriousness.

²⁰ [Causing death by dangerous driving, definitive guideline](#), Sentencing Council for England and Wales. The current guideline on death by dangerous driving offences identifies ‘greatly excessive speed, racing or competitive driving against another driver’ as a level 2 feature of seriousness.

58. It may be considered that, depending on the specific circumstances, racing is not necessarily indicative of the highest level of culpability. For example, is a driver more culpable in circumstances where two cars spontaneously pull away from traffic lights and accelerate for a short, straight distance, compared to a prolonged, arranged race along winding roads?
59. The Council's view is that racing is a deliberate act involving two or more people with a common purpose, representing a disregard of the risk of harm to others. And where racing has resulted in a death, engaging in racing of any sort is likely to involve a high degree of culpability. The treatment of racing as indicative of a more serious offence, would, in our view, properly reflect the high level of culpability involved in such a scenario. The increased likelihood of a more severe sentence would also, we hope, serve as a deterrent to this behaviour. Classifying racing as a feature of one level of seriousness may also assist in promoting consistency in how cases involving racing are sentenced. The guideline as drafted therefore includes racing as a feature of Level A seriousness for death by dangerous driving offences.
60. We consider there are four options in relation to the categorisation of racing within the guideline:
- Option 1) include racing in Level A only. This is the Council's preferred option, for the reasons set out at paragraph 49 above.
 - Option 2) include racing in both Level A and Level B seriousness, with suitable descriptions (for example, 'racing over a prolonged distance and/or at grossly excessive speeds' in Level A and simply 'racing' in Level B);
 - Option 3) include racing in either Level A or Level B with an indication that it could move into another level of seriousness depending on the nature of the racing (for example, include racing in Level B but specifying that 'racing over a prolonged distance at grossly excessive speeds should be categorised as level A')

Option 4) include racing in Level B, noting that application of the guideline as presently drafted provides the option for moving a driving case from Level B to A: a particularly bad racing case could be regarded as possessing a combination of Level B features (racing, and driving at grossly excessive speed for the road and/or prevailing conditions).

61. We are conscious that any change to practice in death by dangerous driving offences has the potential to lead to consequential changes to practice in dangerous driving and causing serious injury by dangerous driving cases. We therefore welcome views on the four options outlined above and their potential implications for practice in relation to other offences.

Standard of driving

62. Level B refers to “driving that created a **substantial** risk of danger”, while Level C refers to “driving which created a **significant** risk of danger” (emphasis added). We presume that sentencers will already be familiar with the language as it is used within the England and Wales guideline but we would be interested to know whether the difference between the quality of driving for level B and level C offences is sufficiently clear. We would be interested in views on whether Level B should instead refer to “driving that created a **very significant** risk of danger” to make the distinction more clear.

QUESTIONS

Q7) Do you agree or disagree that the approach to the assessment of seriousness set out at step 1 for each of the offences covered by the guideline is appropriate?

- Agree
- Disagree

Please provide any reasons for your response.

Q8) Are there any changes that should be made to the features of seriousness listed at step 1 of each offence?

- Yes
- No

Please provide any reasons for your response.

Q9) Do you agree or disagree that the difference between the quality of driving under level B seriousness and level C seriousness for death by dangerous driving offences is sufficiently clear?

- Agree
- Disagree

Please provide any reasons for your response.

Q10) Do you agree or disagree that the feature of seriousness regarding the quality of driving for Level B offences should instead refer to “driving that created a very significant risk of danger” to make the distinction more clear?

- Agree
- Disagree

Please provide any reasons for your response.

Q11) In relation to the categorisation of racing in death by dangerous driving offences, which of the options presented at paragraph 60 of the consultation do you consider the most appropriate?

- Option 1 (include racing in Level A only)
- Option 2 (include racing in both Level A and Level B seriousness, with suitable descriptions)
- Option 3 (include racing in either Level A or Level B with an indication that it could move into another level of seriousness depending on the nature of the racing)
- Option 4 (include racing in Level B, noting that application of the guideline as presently drafted provides the option for moving a driving case from Level B to A: a particularly bad racing case could be regarded as possessing a combination of Level B features)

Please provide any reasons for your response.

Starting points and sentencing ranges

Starting points

63. The sentencing ranges within the guideline do not include starting points (that is, a suggested sentence within a range from which to start from before adjusting for seriousness and any aggravating or mitigating factors). We have not taken a final view on whether offence guidelines should contain starting points and it may be necessary to consider the matter afresh for each offence guideline. There are arguments both for and against the inclusion of starting points within ranges. On one hand, those who have consulted the England and Wales guidelines may be familiar with starting points. They might provide helpful guidance and it is possible that without them courts might tend towards the middle of sentencing ranges as starting points, particularly where a range is wide, with a consequent risk of inadvertent changes in sentences. On the other hand, a starting point may introduce an element of inflexibility or arbitrariness to the sentencing exercise, discouraging sentencers from considering the full circumstances of the case by prompting them to select a sentence within a range and then work 'up' or 'down' from that point. We consider that such an approach may be inconsistent with the principles and

purposes of sentencing guideline by reducing scope for sentences to be individually tailored to the facts of the case.

Sentencing ranges

64. The draft guideline is intended to reflect current practice. For this reason, the sentencing ranges set out in the guideline do not employ the maximum possible sentences as set out in legislation, although these are undernoted at the range tables for reasons of transparency. Nor does the guideline include the full range of possible sentences²¹.

65. For example: in the draft guideline for death by dangerous driving cases, the highest point of the sentencing range for level A offences, the most serious, is 12 years' imprisonment. This is the longest term of imprisonment we are aware of that has been imposed for a death by dangerous driving offence in recent years.²²

66. It is, however, somewhat lower than the statutory maximum, which has recently been increased from 14 years' imprisonment to imprisonment for life for the offences of causing death by dangerous driving or careless driving under the influence of alcohol or drugs.²³ As already mentioned above, the Sentencing Council for England and Wales is presently consulting on potential amendments to its motoring offences guidelines, including those for causing death by driving.²⁴

²¹ Some of the sentencing ranges in the guideline refer to "level 1" and "level 2" community payback orders. Under section 227I of the Criminal Procedure (Scotland) Act 1995, an unpaid work or other activity requirement which requires the work or activity to be undertaken for a number of hours totalling no more than 100 is a "level 1 unpaid work or other activity requirement". An unpaid work or other activity requirement which requires the work or activity to be undertaken for a number of hours totalling more than 100 is a "level 2 unpaid work or other activity requirement".

²² Darren Ferris was sentenced in 2016 to 9 years 6 months' imprisonment, discounted from 12 years: <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-35323038>, and Thomas Wainwright was sentenced in 2017 to 12 years after trial: <https://www.heraldscotland.com/news/15212116.12-years-jail-arrogant-drink-driver-killed-vet/>. More recently Shaun Rimmer was sentenced to 8 years' imprisonment, discounted from 12 years: <https://www.judiciary.scot/home/sentences-judgments/sentences-and-opinions/2022/03/03/hma-v-shuan-rimmer>

²³ [Police, Crime, Sentencing and Courts Act 2022, section 86](#)

²⁴ [Sentencing Council for England and Wales Business Plan 2020-21](#), p.21

67. While inclusion of the statutory maximum in a sentencing range may be attractive, the Council's guidelines are not intended to cover every possible eventuality.²⁵ Inclusion of the maximum available sentence does not seem to us to reflect actual sentencing practice. Under the previous sentencing regime the longest custodial sentences imposed for these offences did not approach 14 years; the most common headline sentences for death by dangerous driving sentences are between two and six years. In addition, inclusion of the maximum available sentence may not give sentencers sufficient guidance as to the appropriate sentence, which could limit its usefulness in terms of their decision and in terms of the objectives of consistency and predictability. Furthermore, it might raise inaccurate and unhelpful expectations among victims, families, and the media.

68. When the maximum period of imprisonment was 14 years, we explored with sentencers what sort of circumstances might result in that being imposed. It was suggested to us that examples of the types of case that would come close to justifying imposition of the maximum period might be ones where the offender had a previous death by driving conviction or where the offence involved lengthy, sustained periods of bad driving producing multiple catastrophic results.

69. In respect of the first example, we are not aware of any section 1 cases in recent years in which the offender had a previous death by dangerous driving conviction.²⁶ This situation is not specifically covered by the draft guideline. As already indicated, the Council's guidelines are not intended to cover every eventuality.

70. In respect of the second example, we are of the opinion that these would be more likely to be prosecuted as murder, or possibly culpable homicide. For example, the recent case

²⁵ Under section 6 of the Criminal Justice and Licensing (Scotland) Act 2010, courts are required to have regard to any applicable sentencing guidelines and if deciding not to follow them, must state the reasons for that decision.

²⁶ The case of *HMA v McCourt* 2014 JC 94, however, was an unsuccessful Crown appeal against sentence which involved an offender convicted under section 2B, who was sentenced at first instance to a community payback order with a requirement for 300 hours of unpaid work alongside a 5 year disqualification and re-test. The offender had a previous conviction for causing death by reckless driving obtained in 1986, which had resulted in 12 months' imprisonment and a 10 year disqualification period.

of *HMA v Wright*,²⁷ in which the accused was convicted of murder and attempted murder by driving a vehicle at the victims, and was sentenced to life imprisonment with a punishment part in excess of the statutory maximum for causing death by dangerous driving. Another example is *HMA v Hannah*²⁸, in which the accused was indicted on a charge of culpable homicide with an alternative section 1 Road Traffic Act 1988 charge. The accused was under the influence of drugs and alcohol, drove at speed, whilst using a mobile telephone, mounted the footpath and eventually collided with a group of three pedestrians (an adult and two children). He then drove off and abandoned the car. There were other collisions with a building and a car during the incident. One of the pedestrians, an 11 year old girl, died of head injuries. After a plea of guilty to the section 1 charge was refused, the accused pleaded guilty to culpable homicide and was sentenced to 13 years and 4 months' imprisonment discounted to 10 years.

71. Including the statutory maximum within the guideline would likely require amendments to the ranges employed. It would be possible to include more than three levels of seriousness but this might mean the introduction of a range that would apply in very few cases and risk raising expectations, particularly for families of victims. It would also require the definition of a situation in which a sentence of imprisonment for life might appropriately be imposed.

72. Another alternative would be to introduce wider ranges. This, if employing the maximum available sentence, would for example result in an upper range of seven years' to life imprisonment for death by dangerous driving cases, and a high level community-based sentence to five years' custody for death by careless driving offences. These may be so wide as to be unhelpful to the sentencer or the public. As ranges become wider the case becomes stronger for the inclusion of starting points or some other form of guidance to courts as to how they should fix a starting point within a range.

²⁷ A sentencing statement which was made in this case is available at: <https://www.judiciary.scot/home/sentences-judgments/sentences-and-opinions/2021/02/11/hma-v-dean-wright>

²⁸ <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-33107851>

73. Or the Council could adjust some or all of the guideline's sentencing ranges upwards to take account of the recent increase in the statutory maximum for certain offences. The guideline was, in the main, drafted before the increase in maximum penalties came into force, and the Council has given careful consideration to whether it should be amended. It takes the view, however, that to do so at this stage would be to anticipate the outcome of the consultation process. The Council's view is that the guideline as drafted accurately reflects current sentencing practice, and that it adequately represents the seriousness of the vast majority of cases. However, one purpose of this consultation is to invite views on whether the sentencing ranges are appropriate, and the Council will take those views into account when finalising the guideline.

74. Importantly, it is also worth bearing in mind that guidelines are not binding on courts: a court could conclude that an individual case was sufficiently serious to justify a decision not to follow the guideline, and to impose a sentence in excess of that at the top end of the range in the guideline. We consider that the types of case which are so serious as to justify a sentence outwith the guideline's maximum range are sufficiently rare that they need not be detailed within the guideline and that a decision not to follow the guideline might be appropriate in those circumstances.

75. For death by careless driving cases, the guideline specifies an upper limit of an 18 month custodial sentence for the more serious Level A offences, while the statutory maximum for this offence is five years' imprisonment. The circumstances involved in causing death by careless driving can vary widely and can typically involve a very high level of harm but comparatively low culpability, making the sentencing exercise particularly challenging.

76. We have sought within the guideline to reflect practice in relation to sentencing of these cases and have found that very few result in a custodial sentence at all.²⁹ We are not aware of any recent cases in which the statutory maximum has been approached. This, we expect, reflects the generally low culpability involved in these cases. While the gap

²⁹ Data requested from SCTS under section 10 of the Criminal Justice and Licensing (Scotland) Act 2010 suggests that there have been only four custodial sentences imposed for causing death by careless driving offences out of 52 total offences in the last three years.

between the upper end of the range within the guideline and the statutory maximum appears wide, we would expect that circumstances which should attract a penalty beyond the range set out in the guideline would be likely to be prosecuted either as death by dangerous driving instead, or with an alternative death by dangerous driving charge (meaning that the person in question could be convicted of either causing death by careless driving or causing death by dangerous driving).

77. Cases involving section 3ZA, 3ZB and 3A offences are so few that there are not enough data available to establish current practice. However, on the basis that section 3ZB and section 3ZC offences are likely to attract sentences similar to those for careless driving, the ranges reflect those set for that offence. Causing death by careless driving when under influence of drink or drugs will generally involve lesser culpability than death by dangerous driving offences (because of the standard of driving involved) and the sentencing ranges reflect this. We would note that these cases are more commonly prosecuted as section 1 offences because of the standard of driving involved. We welcome views on the ranges for these offences.

78. While the offences both in the Scottish and in the English and Welsh jurisdictions are the same, the sentencing options available to courts, as already noted, are not.

79. Finally, the guideline as drafted does not include guidance on appropriate periods of disqualification, beyond noting that this must take account of the duration of any sentence of imprisonment. Nor does it include reference to the drink driver rehabilitation scheme.³⁰ This is an additional disposal which could be imposed over and above the main sentence for certain offences, but the information available to the Council suggests that it has not been imposed by courts when dealing with offences of the type covered by this guideline. We would be grateful for your views on the approach taken by the guideline in this area.

³⁰ Under sections 34A, 34B, and 34C of the Road Traffic Offenders Act 1988, this scheme is available to courts when offenders have been disqualified from driving for 12 months or more on conviction for certain offences, including some contraventions of s3A of the Road Traffic Act 1988 (causing death by careless driving when under influence of drink). Successful completion of an approved course will lead to the period of disqualification being reduced by not less than three months and not more than one-quarter.

QUESTIONS

Q12) Do you agree or disagree with the non-inclusion of starting points within the sentencing ranges?

- Agree
- Disagree

Please provide any reasons for your response.

Q13) Do you agree or disagree that the ranges set out within the guideline should reflect current sentencing practice?

- Agree
- Disagree

Please provide any reasons for your response.

Q14) Do you agree or disagree that the sentencing ranges specified within the guideline are appropriate for each offence?

	<i>Agree</i>	<i>Disagree</i>
<i>Causing death by dangerous driving (pages 4-7)</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Causing death by careless driving when under influence of drink or drugs (pages 8-12)</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Causing death by careless, or inconsiderate, driving (pages 13-16)</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Causing death by driving: unlicensed, uninsured, or disqualified drivers (pages 17-20)</i>	<input type="checkbox"/>	<input type="checkbox"/>

Please provide any reasons for your response.

Q15) Do you agree or disagree with the non-inclusion of guidance on disqualification periods, the young driver scheme, or the drink driver rehabilitation scheme?

	<i>Agree</i>	<i>Disagree</i>
<i>Disqualification periods</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Young driver scheme</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Drink driver rehabilitation scheme</i>	<input type="checkbox"/>	<input type="checkbox"/>

Please provide any reasons for your response. If you selected 'disagree', please indicate what guidance should be included within the guideline.

Aggravating and mitigating factors

80. Common or particularly relevant aggravating and mitigating factors are provided at step 3 in respect of each offence within the guideline. We welcome views on the lists generally and on some specific issues, discussed below.

Multiple deaths and injury to others

81. Multiple deaths and injury to others are included as aggravating factors in the draft guideline rather than as features of seriousness. This approach reflects our understanding of practice in the Scottish courts and the approach set out in the England and Wales guideline.

82. In the Ipsos MORI research,³¹ members of the public were asked about multiple fatalities as part of their consideration of sentencing scenarios (discussed at paragraphs [18-24] above).³² In relation to the death by dangerous driving scenario, half (50%) were of the view that if three people had been killed in the collision, rather than one, the sentence

³¹ [Public perceptions of sentencing, National survey report](#), (September 2019) prepared for the Scottish Sentencing Council by Carolyn Black, Rachel Warren, and Rachel Ormston of Ipsos MORI Scotland and Professor Cyrus Tata of the University of Strathclyde; [Public perceptions of sentencing in Scotland Qualitative research exploring causing death by driving offences](#), (February 2021), prepared for the Scottish Sentencing Council by Susan Reid, Hannah Biggs, Kaushi Attygalle, Konstantina Vosnaki (ScotCen) Dr Rachel McPherson (University of Glasgow) and Professor Cyrus Tata (Strathclyde Centre for Law, Crime & Justice, Law, School, University of Strathclyde)

³² Scottish Sentencing Council (September 2019), p. 28

given should be tougher – more than twice the number who expressed this view in relation to the death by careless driving scenario (24%). In further in-depth focus group research conducted on our behalf, there was no consensus as to whether, and how, multiple fatalities should impact on sentencing. Some participants thought the sentence should be longer to take into account each life lost. Others thought the sentence should not be higher as the circumstances that caused the incident could be the same for one or multiple people and the sentence should be based on the circumstances.³³ We expect that inclusion of guidance within the guideline will therefore assist with public awareness of practice in this regard.

83. Given that the assessment of seriousness as set out in the sentencing process guideline includes an evaluation of the level of harm caused, including multiple fatalities as an aggravating factor rather than as part of the initial assessment of seriousness may be unexpected. However, as the offence itself is similar to one of strict liability (with the harm involved extremely high already and the assessment of seriousness being based on culpability), there is an argument that including multiple fatalities as a feature of seriousness might give it disproportionate weight, resulting in inappropriate cases being assessed as of the highest seriousness and attracting disproportionately high sentences.

84. For example, it is not inconceivable that a case involving a comparatively 'low' level of culpability (such as a momentary lapse of judgement) could result in either multiple deaths or additional injury to persons other than the offender. It is suggested that this sort of case is not one which should be categorised as in the most serious category and attracting a sentence within the highest range. It further appears from our research that practice is generally to treat these matters as aggravating factors. Accordingly, the draft guideline reflects this position.

Previous convictions

85. Relevant previous convictions are included as an aggravating factor. Previous road traffic offences would normally fall to be taken into account but previous convictions

³³ Scottish Sentencing Council (February 2021), pp.34-35

demonstrating a disregard for the life and safety of others, or for the law in general³⁴, may also be considered to be relevant depending on the circumstances of the case. The guideline as currently drafted states that relevant previous convictions are not limited to road traffic offence convictions but does not provide further detailed guidance in this respect. We are, however, considering whether additional guidance may be helpful for the benefit of public awareness.

The offender's actions at the scene

86. The guideline as currently drafted includes the offender's provision of assistance at the scene of the incident as a mitigating factor for causing death by dangerous and death by careless driving offences. However, we welcome views on this matter. For some, it may be thought that these actions are what would be expected of anyone in such circumstances and should therefore not be considered mitigatory. An alternative view might be that there is no onus on a person to provide assistance and that a sentence should, therefore, in some way acknowledge positive action in this regard.

87. The Council is not of the view that a failure to render assistance should be included as an aggravating factor, not least because of the possibility that injury or psychological distress resulting from the circumstances of the incident might have left the offender incapable of providing such assistance (there may be physiological and psychological explanations for an offender who 'freezes' in the aftermath of a car accident, for example).

Remorse

88. Remorse, while included in the sentencing process guideline as a mitigating factor, is also included in this guideline because of its particular relevance to the sentencing exercise in these cases. It is our understanding that the presence and manifestation of genuine remorse are considered integral factors in mitigation by many sentencers, with remorse being seen not only to show the level of the accused's regret, but also to indicate the possibility of desistance from further offending.

³⁴ *Goldie v Tudhope* [1986] S.C.C.R. 414 (HCJ)

89. The views of participants in public perceptions research carried out on our behalf were mixed on the question of remorse. When asked whether remorse would affect the sentence in the death by dangerous driving scenario, half as many respondents (23%) felt that if the offender expressed genuine remorse for their actions they should receive a more lenient sentence compared with those who expressed this view in relation to the death by careless driving offender (46%). This may suggest the public view remorse as being of less relevance as culpability increases.³⁵

90. In the focus group research, participants were aware that remorse is taken into account in sentencing, but when asked their views on whether it should affect the sentence there was no consensus. Some identified challenges in assessing whether remorse is genuine, some thought that a lack of remorse should result in a more severe sentence, and others felt that a timeous guilty plea was indicative of genuine remorse.³⁶

91. The draft guideline does not offer specific guidance on the assessment of remorse. We are, however, considering whether it might be helpful to provide public information on how the courts approach the task of assessing remorse in these cases.

The relationship between the offender and victim(s)

92. The relationship between offender and victim, for example if the deceased was a family member or close friend of the offender, is included as a mitigating factor. In some of these circumstances, there may be a sense that the offender is already suffering from a punishment worse than that which would be achieved by any punitive aspect of a sentence. We understand that this is more likely to be the case in death by careless driving cases, rather than death by dangerous driving cases, perhaps because of the lesser culpability and foreseeability involved. In death by dangerous driving cases, practice indicates that there is more of a societal need to indicate that the behaviour involved is unacceptable, resulting in more punitive sentencing even in the circumstances where the victim and the offender were related.

³⁵ Scottish Sentencing Council (September 2019), p.28

³⁶ Scottish Sentencing Council (February 2021), pp. 39, 20, and 42

Actions of others

93. The guideline includes, for death by careless driving offences, the contribution of others (including the victim) to the commission of the offence as a mitigating factor (see the table at step 3). For death by careless driving when under the influence of drink or drugs, a similar factor is included (again at the table at step 3) but in these cases the other person or person's actions must have "contributed significantly to the likelihood of a collision occurring and/or death resulting" to qualify as mitigatory.

94. The types of circumstances in which others' actions may have been contributory might include a passenger or victim not wearing a seatbelt, or where the victim has placed themselves at particular risk.³⁷ This factor may carry less weight in mitigation in death by dangerous driving cases than in others, in light of the higher level of culpability and the fact that the actions of another might have less relevance to the commission of the offence (as opposed to the resultant death).

95. The Council welcomes views on whether or not this factor should be included in the guideline; and, if so, to what offences it should apply.

Voluntary surrender of a licence

96. The guideline as drafted does not include the voluntary surrender of a licence as a mitigating factor. We understand that this would be most relevant in cases where the driver is an older person and would be grateful for views on whether the guideline should include the voluntary surrender of a licence by an older driver as a mitigating factor. We note that loss of a licence would automatically follow a conviction but consider that there might be some merit in considering the surrender of a licence prior to a conviction. In particular, we consider that it may signify remorse on the offender's behalf.

³⁷ While the circumstances might be highly unusual, there has been a recent case involving a victim who was lying in the road, for example: <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-58175278>

QUESTIONS

Q16) Do you agree or disagree that the aggravating and mitigating factors listed in the table at step 3 for each offence are appropriate?

	<i>Agree</i>	<i>Disagree</i>
<i>Causing death by dangerous driving (pages 4-7)</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Causing death by careless driving when under influence of drink or drugs (pages 8-12)</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Causing death by careless, or inconsiderate, driving (pages 13-16)</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Causing death by driving: unlicensed, uninsured, or disqualified drivers (pages 17-20)</i>	<input type="checkbox"/>	<input type="checkbox"/>

Please provide any reasons for your response.

Q17) Do you agree or disagree that the guideline should provide further guidance on the following aggravating and mitigating factors?

	<i>Agree</i>	<i>Disagree</i>
<i>Previous convictions</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Remorse</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>The relationship between the offender and victim(s)</i>	<input type="checkbox"/>	<input type="checkbox"/>

Please provide any reasons for your response.

Q18) Do you agree or disagree with the approach to listing contributory actions of others as mitigating factors?

- Agree
- Disagree

Please provide any reasons for your response.

Q19) Do you agree or disagree that the voluntary surrender of a licence by an older driver should be listed as a mitigating factor?

- Agree
- Disagree

Please provide any reasons for your response.

Q20) Should any additional mitigating or aggravating factors be listed?

- Yes
- No

Please provide any reasons for your response. If answering 'Yes', please indicate what additional factors should be listed and for which offences.

Potential impacts of the guideline

97. The Council must carry out an assessment of the likely costs and benefits of guidelines and of their likely effects on the criminal justice system generally. We must publish this at the same time as publishing any draft guidelines. We would be grateful for your views on the potential impacts of this guideline to assist with our projections and further development of the guideline itself.

98. We think that the main benefits of this guideline will be to increase public understanding of how sentencing decisions are made and to assist the courts in reaching sentencing decisions in death by driving cases, thereby aiding consistency. We do not think that the guideline will result in any significant costs.

QUESTIONS

Q21) Do you think the guideline will influence sentencing practice in Scotland?

- Yes
- No

Please provide any reasons for your response.

Q22) Do you agree or disagree that the guideline will lead to an increase in public understanding of how sentencing decisions in death by driving cases are made?

- Agree
- Disagree

Please provide any reasons for your response.

Q23) What benefits do you see arising from the introduction of this guideline, if any?

Q24) What negative effects do you see arising from the introduction of this guideline, if any?

Q25) What costs (financial or otherwise) do you see arising from the introduction of this guideline, if any?

Further comments

The public consultation process is a critical part of developing sentencing guidelines which will assist members of the judiciary and the public. We welcome any further comments on this guideline.

QUESTION

Q26) Would you like to make any other comments in relation to any matter arising from this consultation?

Part 3

Consultation questionnaire

Q1) Do you agree or disagree that the general structure of the guideline, providing guidance in line with steps 1 to 3 of the sentencing process guideline, is appropriate?

- Agree
- Disagree

Please provide any reasons for your response.

Q2) Do you agree or disagree that the style of the guideline, employing narrative and tables, is helpful?

- Agree
- Disagree

Please provide any reasons for your response.

Q3) Do you agree or disagree that the draft guideline makes the relationship between this guideline and other applicable guidelines clear?

- Agree
- Disagree

Please provide any reasons for your response.

Q4) Is there anything that can be done to make the relationship between this guideline and other applicable guidelines clearer?

- Yes
- No

Please provide details along with any reasons for your response.

Q5) Do you consider that the offences should be listed within the guideline by order of seriousness, the order they appear in the Road Traffic Act 1988, or in any other order?

- Seriousness
- Order in the Road Traffic Act 1988
- Other order (please specify below)

Please provide any reasons for your response.

Q6) Do you agree or disagree that the draft guideline should not emphasise any particular purpose or purposes of sentencing?

- Agree
- Disagree

Please provide any reasons for your response.

Q7) Do you agree or disagree that the approach to the assessment of seriousness set out at step 1 for each of the offences covered by the guidelines is appropriate?

- Agree
- Disagree

Please provide any reasons for your response.

Q8) Are there any changes that should be made to the features of seriousness listed at step 1 of each offence?

- Yes
- No

Please provide any reasons for your response.

Q9) Do you agree or disagree that the difference between the quality of driving under level B seriousness and level C seriousness for death by dangerous driving offences is sufficiently clear?

- Agree
- Disagree

Please provide any reasons for your response.

Q10) Do you agree or disagree that the feature of seriousness regarding the quality of driving for Level B offences should instead to refer to “driving that created a very significant risk of danger” to make the distinction more clear?

- Agree
- Disagree

Please provide any reasons for your response.

Q11) In relation to the categorisation of racing in death by dangerous driving offences, which of the options presented at paragraph 60 of the consultation do you consider the most appropriate?

- Option 1 (include racing in Level A only)
- Option 2 (include racing in both Level A and Level B seriousness, with suitable descriptions)
- Option 3 (include racing in either Level A or Level B with an indication that it could move into another level of seriousness depending on the nature of the racing)
- Option 4 (include racing in Level B, noting that application of the guideline as presently drafted provides the option for moving a driving case from Level B to A: a particularly bad racing case could be regarded as possessing a combination of Level B features)

Please provide any reasons for your response.

Q12) Do you agree or disagree with the non-inclusion of starting points within the sentencing ranges?

- Agree
- Disagree

Please provide any reasons for your response.

Q13) Do you agree or disagree that the ranges set out within the guideline should reflect current sentencing practice?

- Agree
- Disagree

Please provide any reasons for your response.

Q14) Do you agree or disagree that the sentencing ranges specified within the guideline are appropriate for each offence?

	<i>Agree</i>	<i>Disagree</i>
<i>Causing death by dangerous driving (pages 4-7)</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Causing death by careless driving when under influence of drink or drugs (pages 8-12)</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Causing death by careless, or inconsiderate, driving (pages 13-16)</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Causing death by driving: unlicensed, uninsured, or disqualified drivers (pages 17-20)</i>	<input type="checkbox"/>	<input type="checkbox"/>

Please provide any reasons for your response.

Q15) Do you agree or disagree with the non-inclusion of guidance on disqualification periods, the young driver scheme, or the drink driver rehabilitation scheme?

	<i>Agree</i>	<i>Disagree</i>
<i>Disqualification periods</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Young driver scheme</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Drink driver rehabilitation scheme</i>	<input type="checkbox"/>	<input type="checkbox"/>

Please provide any reasons for your response. If you selected 'disagree', please indicate what guidance should be included within the guideline.

Q16) Do you agree or disagree that the aggravating and mitigating factors listed in the table at step 3 for each offence are appropriate?

	<i>Agree</i>	<i>Disagree</i>
<i>Causing death by dangerous driving (pages 4-7)</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Causing death by careless driving when under influence of drink or drugs (pages 8-12)</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Causing death by careless, or inconsiderate, driving (pages 13-16)</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Causing death by driving: unlicensed, uninsured, or disqualified drivers (pages 17-20)</i>	<input type="checkbox"/>	<input type="checkbox"/>

Please provide any reasons for your response.

Q17) Do you agree or that the guideline should provide further guidance on the following aggravating and mitigating factors?

	<i>Agree</i>	<i>Disagree</i>
<i>Previous convictions</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Remorse</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>The relationship between the offender and victim(s)</i>	<input type="checkbox"/>	<input type="checkbox"/>

Please provide any reasons for your response.

Q18) Do you agree or disagree with the approach to listing contributory actions of others as mitigating factors?

- Agree
- Disagree

Please provide any reasons for your response.

Q19) Do you agree or disagree that the voluntary surrender of a licence by an older driver should be listed as a mitigating factor?

- Agree
- Disagree

Please provide any reasons for your response.

Q20) Should any additional mitigating or aggravating factors be listed?

- Yes
- No

Please provide any reasons for your response. If answering 'Yes', please indicate what additional factors should be listed and for which offences.

Q21) Do you think the guideline will influence sentencing practice in Scotland?

- Yes
- No

Please provide any reasons for your response.

Q22) Do you agree or disagree that the guideline will lead to an increase in public understanding of how sentencing decisions in death by driving cases are made?

- Agree
- Disagree

Please provide any reasons for your response

Q23) What benefits do you see arising from the introduction of this guideline, if any?

Q24) What negative effects do you see arising from the introduction of this guideline, if any?

Q25) What costs (financial or otherwise) do you see arising from the introduction of this guideline, if any?

Q26) Would you like to make any other comments in relation to any matter arising from this consultation?

END OF QUESTIONS

Scottish Sentencing Council
Parliament House
Parliament Square
Edinburgh
EH1 1RQ

sentencingcouncil@scotcourts.gov.uk
www.scottishsentencingcouncil.org.uk

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