



Law Society  
of Scotland

# Consultation Response

Statutory offences of causing death by driving  
A Scottish Sentencing Council consultation

November 2022



## Introduction

---

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Sentencing Council's Public Consultation: Statutory offences of causing death by driving. The committee has the following comments to put forward for consideration.

## General comments on the proposals

We welcome the first specific guideline in relation to the statutory offences of causing death by driving. In our view, the draft guidelines present an accessible guide not only for the use of court practitioners and sentencers but also for the public, the press and families of those whose death was caused as a result of a driving offence.

We are of the view that the style, structure and content will increase public understanding of the complex legal issues involved in death by driving cases. The draft guidelines will also assist practitioners and those involved in sentencing.

We are encouraged to note that prior to drafting the guidelines, the Scottish Sentencing Council examined sentences imposed by Scottish courts and took information from the Judiciary to ensure that the sentences contained within the guideline corresponded with current practice.

We note that the consultation document at paragraph 18 refers to research in relation to public perceptions on sentencing of death by driving cases<sup>1</sup> which found that there was a perception that sentences were "too lenient" leading to a call for greater clarity and transparency in the sentencing process. This position continues to be reflected in recent press coverage<sup>2</sup> of death by driving cases and serves to reinforce the need for clear information, an explanation of reasons for passing the elected sentence and consistency to ensure public confidence in the process.

<sup>1</sup> [Normal dot \(Rev02 January 2009\) \(scottishsentencingcouncil.org.uk\)](#)

<sup>2</sup> [Father's anger as lorry death driver avoids prison - BBC News](#), [HMA v Garry Tierney \(judiciary.scot\)](#) and [HMA v David Day \(judiciary.scot\)](#)

We note that comparisons will be drawn between the Sentencing Council guidelines for road traffic offences committed in England and Wales<sup>3</sup>. We acknowledge that these guidelines have been in force since August 2008 and have recently been consulted upon for review<sup>4</sup>. We note that the Scottish Sentencing Council has devised a single guideline to address the range of causing death by driving offences as opposed to separate guidance for each offence as in England and Wales. Further, the offences appear in order of seriousness rather than in the order they appear in the statute<sup>5</sup> which, in our view, flows logically. The approach follows that of the sentencing process guideline using a three-step process to enable the court to decide on the headline sentence before turning to the process guideline to reach the final sentence. We note that the draft guideline does not include sentence starting points and acknowledge that this is to reflect current sentencing practice in Scotland. In contrast the English guidelines offer both a range and a starting point based on a first-time offender pleading not guilty.

We note that the suggested sentence ranges in the draft guidelines are lower than those for equivalent offences in England and Wales. Given that the Road Traffic Act 1998 is a UK statute, questions will likely be raised as to why Scotland has not adopted the same sentence ranges to promote consistency. The Consultation does not explain why the selected ranges are different and seemingly more lenient than those in England and Wales other than to say that some sentences such as suspended sentences are not available in Scotland. In any event, we are of the view that it would not be appropriate to “transplant” the English guidelines wholesale into Scottish sentencing policy, particularly as Scotland has attempted to move away from the use of custodial sentences. For example, in the presumption against sentences of less than 12 months<sup>6</sup> in the sentencing of young people up to the age of 25<sup>7</sup>. We note however the law and practice in Scotland has traditionally promoted and continues to promote judicial independence and the exercise of professional judgement to reach an appropriate sentence in each case.

<sup>3</sup> [Causing Death by Driving: Definitive guideline – Sentencing \(sentencingcouncil.org.uk\)](https://www.sentencingcouncil.org.uk/consultations/2018/causing-death-by-driving-definitive-guideline)

<sup>4</sup> [Motoring offences: Consultation – Sentencing \(sentencingcouncil.org.uk\)](https://www.sentencingcouncil.org.uk/consultations/2018/motoring-offences)

<sup>5</sup> [Road Traffic Act 1988 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1998/30)

<sup>6</sup> [The Presumption Against Short Periods of Imprisonment \(Scotland\) Order 2019 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2019/1000)

<sup>7</sup> [sentencing-young-people-guideline-for-publication.pdf \(scottishsentencingcouncil.org.uk\)](https://www.scottishsentencingcouncil.org.uk/media/1000/sentencing-young-people-guideline-for-publication.pdf)

## Consultation questions

---

**Question 1 - 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.**

Agree – In our view it is sensible to produce a suite of guidelines that follow the same structure and approach to the process. Steps 1-3 of the sentencing process guideline are clear and accessible. This guideline fills in the offence specific detail and flows logically.

**Question 2 - 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.**

Agree – We are of the view that the combination of narrative and tables is clear and should be of assistance to its intended audience. We note that the Sentencing Council: Causing Death by Driving: Definitive Guideline<sup>8</sup> contains much more narrative and repeats each of the steps of the sentencing process. It is, in our view quite a demanding read. We consider that the Scottish Guideline could contain, in an appendix perhaps, some additional information setting out the reasons for the inclusion or omission of certain points if it is to fully achieve its aim of improving transparency and understanding. The educational function of the guideline is important.

<sup>8</sup> [Causing Death by Driving: Definitive guideline – Sentencing \(sentencingcouncil.org.uk\)](https://www.sentencingcouncil.org.uk/cause-death-by-driving/)

**Question 3 - 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.**

Agree – We note that the section entitled “How to use this guideline” makes this relationship clear. The draft provides links to Principles and Purposes of Sentencing<sup>9</sup> and The Sentencing Process<sup>10</sup>. In our view, it might also be useful to include a link to the Approved Guidelines section of the Scottish Sentencing Council’s website<sup>11</sup> so that readers could be aware of the Sentencing Young People Guideline and any other relevant guidelines that may be approved in due course.

**Question 4 - 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.**

No – Please refer to our answer at question 3 above.

**Question 5 - 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.**

<sup>9</sup> [guideline-principles-and-purposes-of-sentencing.pdf \(scottishsentencingcouncil.org.uk\)](#)

<sup>10</sup> [the-sentencing-process-guideline-d.pdf \(scottishsentencingcouncil.org.uk\)](#)

<sup>11</sup> [Scottish Sentencing Council, guidelines](#)

We consider that there are merits in listing the offences either in the order they appear in the Road Traffic Act or in order of seriousness. The consultation explains that The Council has opted to list them in order of seriousness which in our view flows logically. We are however of the view, that it would be helpful to explain this in the Guideline itself to aid public understanding of this decision.

**Question 6 - 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.**

Agree – In our view, there is no need to emphasise the purpose or purposes of sentencing death by driving cases as this is covered succinctly in the Purposes and Principles section of the Sentencing Guideline. An interested reader would see the links to the other Guidelines in the section headed “How to Use this Guideline”. In passing sentence and giving reasons, the court is likely also to refer to relevant principles or purposes when required.

**Question 7 - 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.**

Agree - The approach follows that in the Sentencing Process Guide. It is concise and clear. It gives interested members of the public an overview of the approach taken without going into excessive prescriptive detail or narrative.

**Question 8 - 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.**

No – We note that Step 1 in paragraph 4 of the guideline makes it clear that the list is not exhaustive. The draft guideline covers most of the same features of seriousness as the Sentencing Council: Causing Death by Driving: Definitive Guideline but more succinctly. The headline points are covered well and allow the sentencer scope to apply their own experience and professional judgment in deciding into which category each case falls.

**Question 9 - 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.**

Disagree - We are of the view that the terms “substantial risk’ (Level B) and ‘significant risk’ (Level C) lack clarity. We note that the distinction between them is not explained in the draft guideline as it currently stands. We query whether the public would necessarily understand whether a substantial risk was worse than a significant one and, if so, why?. We consider that terms such as “excessive” and “grossly excessive” seem clear enough.

We would also question that with regard to the section relating to disregarding road signals/road signs: is it being suggested that disregarding a traffic light is more serious than disregarding a Give Way sign when the result is a fatality? Is there a clear distinction to be drawn? We would welcome clarity in that regard.

**Question 10 - 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.**

Agree - Explaining the distinction between substantial and significant could cause difficulties. Some may view significant as being more serious than substantial without further explanation. We suggest opting for the terms either very substantial and substantial or very significant and significant. Substantial is perhaps easier to understand, as in the risk in level B cases was greater or was more obvious to a reasonable and prudent driver and to the general reader. On the other hand, ‘significant risk’ is a phrase used in statute

e.g., Criminal Procedure (Scotland) Act 1995 sec 271 (1)(d)<sup>12</sup> in relation to a “significant risk of prejudice to a fair trial”. In our view, a consistent approach is to be preferred.

**Question 11 - 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.**

We are of the view that a degree of flexibility might be preferable. There might be situations where there was evidence of racing but only over a very short distance, where the other circumstances of the case would point to it being a level B case. We consider that categorising every case of racing as a Level A case seems to go against the aim of creating a guideline that makes a serious attempt to assess each case according to its own unique facts and circumstances.

**Question 12 - 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.**

Agree – We consider that incorporating a starting point into the draft guideline may suggest, especially to members of the public and families of victims that there is a presumption against using the lower end of the

<sup>12</sup> [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1995/271)



sentencing range. This could, as a consequence, give the impression that any sentence on the lower end of the scale was “too soft”.

Including a starting point in the draft guideline may also have the effect of reducing the scope for sentences to be tailored to the unique facts and circumstances of each case.

The draft guideline sets out the statutory maximum sentence for each offence. If the main aim of the guideline is to inform the public, we suggest that it may be helpful to include some further information in the to explain why the upper point in the range for a level A offence may appear to a lay person to be significantly lower than the statutory maximum. This could prevent criticism and perceptions that sentences within the ranges are unduly lenient and note that this specific point is dealt with in the responses given by victims families in the Public Perceptions of Sentencing in Scotland Qualitative Research exploring causing death by driving offences<sup>13</sup>. As a result, we are of the view that the guideline should avoid raising inaccurate and unhelpful expectations among victims, families and the press.

### **Question 13 - 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.**

Agree - The inference can be drawn from the consultation document that the Council considers that current sentencing practice is reasonable and appropriate. If so, it makes sense to have a guideline that reflects current practice, whilst also providing sentencers the scope to reach a headline sentence that is outwith the upper or lower range. As the guideline is designed to inform and educate the public, they should be given a clear indication of what sentencers do in practice as opposed to an indication of the maximum sentences that the Road Traffic Act and other sentencing provisions permits them to dispense.

<sup>13</sup> [Report template long \(scottishsentencingcouncil.org.uk\)](https://www.scottishsentencingcouncil.org.uk) at pages 24 and 25

**Question 14 - Do you agree or disagree that the sentencing ranges specified within the guideline are appropriate for each offence?**

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

**Please provide any reasons for your response.**

We note that the suggested sentence ranges in the draft guidelines are lower than those for equivalent offences in England and Wales. Given that the Road Traffic Act 1998 is a UK statute, questions will likely be raised as to why Scotland has not adopted the same sentence ranges to promote consistency. The Consultation does not explain why the selected ranges are different and seemingly more lenient than those in England and Wales other than to say that some sentences such as suspended sentences are not available in Scotland. In any event, we are of the view that it would not be appropriate to “transplant” the English guidelines wholesale into Scottish sentencing policy, particularly as Scotland has attempted to move away from the use of custodial sentences. For example, in the presumption against sentences of less than 12 months<sup>14</sup> in the sentencing of young people up to the age of 25<sup>15</sup>. We note however the law and practice in Scotland has traditionally promoted and continues to promote judicial independence and the exercise of professional judgement to reach an appropriate sentence in each case.

**Question 15 - Do you agree or disagree with the non-inclusion of guidance on disqualification periods, the young driver scheme, or the drink driver rehabilitation scheme?**

	<b>Agree</b>	<b>Disagree</b>
<b>Disqualification periods</b>	<b>X</b>	
<b>Young driver scheme</b>	<b>X</b>	

<sup>14</sup> [The Presumption Against Short Periods of Imprisonment \(Scotland\) Order 2019 \(legislation.gov.uk\)](https://legislation.gov.uk)

<sup>15</sup> [sentencing-young-people-guideline-for-publication.pdf \(scottishsentencingcouncil.org.uk\)](https://www.scottishsentencingcouncil.org.uk/sentencing-young-people-guideline-for-publication.pdf)

<b>Drink driver rehabilitation scheme</b>	<b>X</b>	
---	----------	--

**Please provide any reasons for your response.**

**If you selected 'disagree', please indicate what guidance should be included within the guideline.**

We note the reasoning set out in paragraph 79 of the consultation document. We would suggest that it may be prudent to include wording to the effect that the court should also take account, where relevant, of the Young Driver and Drink Driver Rehabilitation Schemes, as a reminder that they are options to be considered.

**Question 16 - Do you agree or disagree that the aggravating and mitigating factors listed in the table at step 3 for each offence are appropriate?**

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

**Please provide any reasons for your response.**

In the interests of consistency, they could be included in all of the guidelines as a potential mitigating factor or not at all.

**Question 17 - Do you agree or that the guideline should provide further guidance on the following aggravating and mitigating factors?**

	<b>Agree</b>	<b>Disagree</b>

<b>Previous convictions</b>		<b>X</b>
<b>Remorse</b>		<b>X</b>
<b>The relationship between the offender and victim(s)</b>		<b>X</b>

**Please provide any reasons for your response.**

In our view, there is a risk that the inclusion of too much guidance could prevent the court from dealing with each case according to its own facts and circumstances and, further, could prevent sentencers from applying their own professional judgement and expertise.

**Question 18 - 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.**

In our view, if this is to be included then it should appear in the list for each offence.

**Question 19 - 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.**

We note that the list is designed to be non-exhaustive. We are of the view that this could be provided as evidence of remorse without needing to be included in the list of mitigating factors.

**Question 20 - 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.

No.

### **Question 21 - Do you think the guideline will influence sentencing practice in Scotland?**

- Yes
- No

Please provide any reasons for your response.

Yes - We are of the view that guidance in this area would continue to reflect current practice and encourage consistency in sentencing.

### **Question 22 - 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.

Agree - The public may have a greater understanding as a result of the guideline but that will not necessarily prevent families of victims from believing the sentence was too lenient as point of principle, or an offender believing that it was harsh and excessive. See our comments above for suggestions where additional information or explanation could be provided.

### **Question 23 - What benefits do you see arising from the introduction of this guideline, if any?**

We agree with the benefits listed in paragraph 4 of the Draft Impact assessment<sup>16</sup>. In particular it removes reliance on the equivalent Guidelines for England and Wales. As a result, this may reduce the number of defence and Crown appeals on the grounds that the English Guideline was followed too slavishly or conversely, was not applied with sufficient rigor. The guideline should also increase transparency for

<sup>16</sup> [causing-death-by-driving-guideline-draft-impact-assessment.pdf \(scottishsentencingcouncil.org.uk\)](#)

practitioners, accused persons and families of deceased in how courts reach sentencing decisions. We consider that it could also have an important educational effect, promoting understanding among interested members of the public, including students of criminal law and justice, of what can be a complex and for some observers, an obscure process.

**Question 24 - What negative effects do you see arising from the introduction of this guideline, if any?**

We have no comments to make.

**Question 25 - What costs (financial or otherwise) do you see arising from the introduction of this guideline, if any?**

We have no comments to make.

**Question 26 - Would you like to make any other comments in relation to any matter arising from this consultation?**

We have no comments to make.

**For further information, please contact:**

Ann Marie Partridge  
Policy Executive  
Law Society of Scotland  
[AnnMariePartridge@lawscot.org.uk](mailto:AnnMariePartridge@lawscot.org.uk)

