



Law Society  
of Scotland

# Consultation Response

Cycling and Walking Investment Strategy safety  
review: proposals for new cycling offences

5 November 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the UK Government's consultation: Cycling and Walking Investment Strategy safety review: proposals for new cycling offences (Consultation).

We largely support the proposals outlined in the consultation to introduce new cycling offences.

There was a Supplementary Report provided by the Department of Transport on 31 August 2018 in relation to the consultation (Supplementary Report). That provided an analysis of the adequacy of Scottish criminal common law in relation to deaths or serious injury caused by cyclists<sup>1</sup>. We refer to this Supplementary Report in the course of our response. At the outset, we would indicate that it is very helpful for the analysis of the Scottish criminal offences for this Supplementary Report to have been produced bringing in the Scottish specific context to the UK consultation.

The committee has the following comments to put forward for consideration.

## General

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We agree that there are clear social and economic benefits from increasing the number of people who are cycling. Cheaper transport and better health are identified in the consultation and are self-evidently the most significant reasons for the promotion of cycling as an activity for the public's health. Part of the attraction of cycling for members of the public is the freedom that it allows users and that unlike driving it is largely unregulated. It does not require any mandatory test of the knowledge of the road safety law or of

<sup>1</sup> Hugh J. Olson Advocate

cycling proficiency. However, what requires to be promoted is responsible cycling. We support the view of “making our roads safe for all users”.

This applies on two levels. Firstly, cyclists should be encouraged to take sensible precautions to allow them to cycle safely. The use of helmets, high visibility clothing and properly maintained equipment are obvious examples of ways in which cyclists can avoid accidents and sustaining serious injuries themselves and to others with whom they may become involved. Secondly, cyclists should respect the Highway Code and show respect and consideration for other road users.

There is no question that while many cyclists adhere to the Highway Code, some do not. There may be a lack of awareness that there are offences, including those which might be termed more serious, set out in sections 28, 29 and 30 of the Road Traffic Act 1988 (1988 Act) which apply to cyclists.

We would suggest running alongside the UK Government’s consultation that there is a need to highlight the offences and the conduct for which cyclists may be prosecuted. This might mean some type of public information campaign might be helpful when the UK and Scottish Government are supporting healthy living and increased cycling. The Scottish Government has set out its policies on cycling in the Cycling Action Plan for Scotland<sup>2</sup> which has as a key vision that 10% of all journeys made in Scotland will be made by bike by 2020. This may well present a forum for effective communication.

We suggest that this ignorance of offending conduct largely results from the fact that in Scotland at least, these offences, except the most serious kind, are very rarely prosecuted. The police and thereafter COPFS may well deal with such conduct by way of diversion, direct measures, fiscal fines, fixed penalty, Reports<sup>3</sup>(for children)<sup>4</sup> and warning letters; all of which are competent measures. That means that it is difficult to ascertain the scale of the problems being caused by cyclists not adhering to the requirements of the 1988 Act.

We refer to the Freedom of Information (FoI) request dated 22 February 2012<sup>5</sup> to COPFS which requested the number of successful prosecutions for offences such as cycling on the pavement, observing traffic lights and pedestrian crossings, cycling without lighting and cyclists under the influence of drink or drugs.

2 <https://www2.gov.scot/Publications/2010/06/25103912/0> Scottish Government 2010

3 Cases can be referred to the Scottish Children’s Reporter <https://www.scra.gov.uk/>

4 Children and young people are not technically exempt from the legal requirements. However, the Criminal Justice and Licensing (Scotland) Act 2010, Section 52 establishes that no-one aged under 12 can be prosecuted for an offence.

5 <http://www.copfs.gov.uk/foi/responses-we-have-made-to-foi-requests/42-responses2012/353-prosecutions-against-pedal-cyclists>

Other offences may be committed by cyclists as well as other road users such as traveling down a street the wrong way, but these figures were not provided.

Considering what may amount to the most significant or serious cycling offences, it is useful to understand that these seems a very small-scale problem that the consultation is seeking to address. Please see Table below collated from the FoI request:

Table 1- Number of Cases prosecuted in Scotland

Offence type	Year 2006-2007	Year 2007-2008	Year 2008-2009	Year 2009-2010	Year 2010-2011
<b>Section 28 of the 1988 Act (Dangerous<sup>6</sup> cycling)</b>	13	10	10	14	5
<b>Section 29 of the 1988 Act (Careless<sup>7</sup> cycling)</b>	8	9	15	10	8
<b>Section 30 of the 1988 Act (riding while unfit)</b>	32	27	20	23	23

Many Scottish criminal defence solicitors may never have encountered a prosecution in relation to cycling offences as a result of the use of alternative measures and the low numbers prosecutions. That may well suggest that it might be unnecessary to introduce an additional range of offences.

We appreciate that there is a delicate balance between the light touch approach to legislation that reflects the freedom that attracts members of the public to cycling and ensuring that the legal system can react to

<sup>6</sup> Dangerous cycling is defined as cycling in a manner liable to cause either injury to a person or serious damage to property. In determining whether a person has cycled dangerously, a Sheriff must consider whether it would have been obvious to a competent and careful cyclist that cycling in such a manner that fell far below the standard that would be expected of such a cyclist.

<sup>7</sup> A person may be guilty of careless or inconsiderate cycling if the cycle on a road without due care and attention, or without reasonable consideration for other persons.

the challenge when a serious or fatal incident occurs as a result of either dangerous or careless cycling. That alone would not justify the creation of new offences. Based on the lack of knowledge discussed above, there may seem to be from the public perspective a lack of clarity and understanding as to when any circumstances may result in a prosecution for cycling. There will then follow a lack of any understanding as to the likely outcome (and indeed expectation) as far as relevant sentence is concerned. These factors do support the motivation behind the UK Government undertaking this UK wide review of this topic.

We mentioned the unique Scottish criminal perspective above with the Supplementary Report. We would refer to the role of Crown Office and Procurator Fiscal Service (COPFS):

We consider that it is important to stress the role of the Scottish prosecution service, COPFS in relation to prosecution.

There are significant differences between the law in England and Wales and Scotland as recognised at paragraph 6.1 of the Supplementary Report relating to the prosecution of offences that result in death or serious injury. Cycling is not exempt from causing such offences. There seems no immediate need<sup>8</sup> for reform as our existing Scottish common law offences seem adequate to allow prosecution to take place where death or serious injury has resulted as a result of the cyclist's actions and criminal prosecution is justified as discussed below.

It is a matter for COPFS in each case subject to the facts and circumstances to consider if there is sufficient admissible evidence to support a prosecution if a cyclist causes death or serious injury on account of their cycling. COPFS is the sole prosecution authority in Scotland and prosecutes in the public interest as outlined by the Lord Advocate James Wolffe QC who confirmed that it is:

“An effective, rigorous and fair prosecution service, acting independently in the public interest, is, accordingly, a central component in a criminal justice system which aims to deal fairly with persons who are suspected and accused of crime, to respond effectively and proportionately to secure justice for the victims of crime, and to punish people who are convicted of crime<sup>9</sup>”. (The underlining is our emphasis)

In considering the public interest, prosecutors will take a number of factors into account, including the interests of the victim, the accused and the wider community. This can involve competing interests and will vary with every case. As a result, assessment of the public interest involves careful consideration of all factors.

<sup>8</sup> Paragraph 6.3 of the Supplementary Report

<sup>9</sup> <http://www.copfs.gov.uk/images/Documents/Lord%20Advocates%20Apex%20Scotland%20Lecture.pdf> The Apex Scotland Annual Lecture by the Lord Advocate, James Wolffe QC on 5 September 2017.

COPFS has the discretion as to whether to prosecute and indeed what charges to bring. It is possible for common law offences of culpable homicide or culpable and reckless conduct to be used to prosecute cyclists who cause death or serious injury to others. But we concur with the response from the Faculty of Advocates<sup>10</sup> in considering that our experience has tended to show that prosecutions where relevant in relation to motor vehicles will be prosecuted by the relevant statutory rather than common law offence where death or serious injury results. Whether that comes about as a result of evidential problems is not known. Similar considerations would apply if new cycling offences are created.

We would therefore question if there is really any gap in the legislation that requires the creation of new offences as far as cycling is concerned. We accept that there may be merit in making the public aware that actions could result in a criminal prosecution.

There is value in consistency of approach where possible across the English, Welsh and Scottish jurisdictions regarding what conduct justifies prosecution. Prosecutions are of course subject to the normal rules regarding causation and evidence and procedure such as corroboration and the admission.

We of course support the need “to make our roads safe for all users”. The decision whether to make new offences seems to be a question for UK Government transport policy.

## The need for a change in the law

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### **Question 1: Our consultation proposes that there should be an offence of causing death by dangerous cycling. Do you agree with this proposal?**

We refer to our response above. On balance, we can see the benefit of clarity in relation to the law. There should be consistency regarding the operation of road traffic law in relation to all countries.

### **Question 2: Do you think that there should be an offence of causing death by careless or inconsiderate cycling?**

<sup>10</sup><https://www.edinburghnews.scotsman.com/news/transport/fines-for-bad-cycling-in-edinburgh-soar-1-3251571>

We refer to our response above. On balance, we can see the benefit of clarity in relation to the law. There should be consistency regarding the operation of road traffic law in relation to all countries.

**Question 3: The consultation also proposes that there should be an offence of causing serious injury by dangerous cycling. Do you agree with this proposal?**

We refer to our response above. On balance, we can see the benefit of clarity in relation to the law. There should be consistency regarding the operation of road traffic law in relation to all countries.

**Question 4: The Ministry of Justice consulted on bringing forward a new offence of causing serious injury by careless driving. This consultation proposes that there should be an offence of causing serious injury by careless or inconsiderate cycling. Do you agree with this proposal?**

We refer to our response above. On balance, we can see the benefit of clarity in relation to the law. There should be consistency regarding the operation of road traffic law in relation to all countries.

**Question 5: If there were a new offence of dangerous or careless cycling, do you think the sentences should match the sentences for dangerous or careless driving (current driving sentences shown in brackets): a. causing death by dangerous cycling (currently 14 years for driving) b. causing death by careless cycling (5 years for driving) c. causing serious injury by dangerous cycling (5 years for driving)**

No. Some of the more serious dangerous driving cases involve a prolonged course of driving perhaps involving examples of bad driving that occur over a sustained period or distance such as a number of miles. Equally, some persons who are prosecuted for the more serious driving charges have significant previous convictions for committing contraventions of road traffic offences. Neither of these factors is likely to apply in the case of cycling prosecutions.

We would also note that Scotland does not have the sentencing guidelines which apply in England and Wales as highlighted in paragraph 4.1.3 of the Supplementary Report. Though such Guidelines are referred to by Scottish courts they are not mandatory or adopted by the Scottish courts. We note the footnote to the paragraph by reference to the case of *H.M. Advocate v Nache* but that case merely referred to the English guidelines<sup>11</sup>:

<sup>11</sup> Paragraph 31 of [2011] HCJAC 108

“that having regard to the English sentencing council's definitive guidelines on causing death by driving, the respondent's culpability fell within the overlapping margins of less serious cases of causing death by dangerous driving and more serious cases of causing death by careless driving; the Crown's concession that the reason for the dangerous driving was the respondent's being accustomed to driving in Spain reduced the degree of culpability but did not do so to the extent that the imposition of a non-custodial sentence was appropriate”

It would be a matter for each judge to sentence in accordance with the facts and circumstances that they found proved. Appeals would be competent if any sentence was felt to be excessive.

**Question 6: The report from the independent legal expert concluded that there is a gap in the law regarding dangerous or careless cycling. Do you feel that existing laws adequately cover circumstances where a person's cycling harm or injury to others?**

We refer to our response above. There should be consistency regarding the operation of road traffic law in relation to all countries, but we emphasise that the focus of any future legislation should be in cases where either a fatality or a serious injury result.

**Question 7: Do you have any comments on any laws not covered in this consultation which could apply when trying to prosecute for this cycling behaviour?**

We have no comments to make.

**Question 8: Do you have any other comments that you wish to make in relation to how existing laws apply in Scotland?**

As already observed, we do not have any specific information about the level of prosecutions in Scotland in relation to either culpable homicide or culpable and reckless conduct. We have noted the reference in the consultation at paragraph 2.2.6 where there was insufficient admissible evidence to prosecute. What remains clear is that such offences are very rarely prosecuted.

We have reason to believe that the number of prosecutions is very small. Indeed, it may well be that there have been no prosecutions for culpable homicide at all. We can find no reported decisions involving either culpable homicide arising out of the conduct of a cyclist nor can we find any reported decisions of culpable and reckless conduct by a cyclist causing serious injury.

We would agree that in the common law, prosecutions both for culpable homicide and culpable and reckless conduct are competent. It is not inconceivable that a cyclist who causes either death or serious injury as a result of his conduct could be prosecuted because of their actions.

We agree with the statement of the law in paragraph 2.32 of the Consultation but we feel that the test set out in paragraph 2.33 may have been overstated. The final sentence mirrors the questions to the jury posed by Lord Abernethy in the case of *McDowall v HMA*.<sup>12</sup> That case involved a motorist being prosecuted for culpable homicide for causing an accident that resulted in the death of three individuals. This case was prosecuted at a time when the maximum sentence of imprisonment was significantly less than the current maximum of 14 years which was introduced by section 285 of the Criminal Justice Act 2003 that applies equally to Scotland.

In the case of *McDowall*, Lord Abernethy directed the jury that “the test for culpable homicide in this situation is a high one”. He did not use the words “very high”. In the appeal against conviction, Lord Abernethy’s test was approved by the appeal court. We refer to the Lord Justice-General (Rodger)<sup>13</sup> where he stated:

“what the Jury had to consider was whether at the time of the crash, the appellant was showing a complete disregard of any potential dangers and of what the consequences of his driving might be so far as the public were concerned”.

We also note that in the context of the possibility of a motorist being prosecuted for culpable homicide the editor of Wheatley’s *Road Traffic Law in Scotland* (5<sup>th</sup> Edition) states:

“it is submitted that the standard of driving to be considered in a charge of culpable homicide should none the less be for all practical purposes identical to the standard to be applied in the statutory charge of Section 1 of the Road Traffic Act 1988”.

We agree that this would appear to represent the current state of the law in relation to culpable homicide on the part of motorists. We would suggest that should a prosecution for culpable homicide involving a cyclist take place, similar directions would be given to any jury.

## Road and public place

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<sup>12</sup> 1998 SCCR 344.

<sup>13</sup> page 349 (c) – (d)

**Question 9: This consultation proposes that new offences should apply to public places as well as roads. Do you agree with this proposal?**

Yes. Any new offences should apply to public places as well as to roads.

The freedom that cycling offers users results in many cyclists using bicycles on what might be termed public places as opposed to roads. Cyclists are frequently encountered at locations that would not be regarded as roads but are places to which the public have access. For example, cyclists are frequently seen in public parks. The robustness of mountain bikes also allows cyclists to use them on almost any surface. A fatality or serious injury involving pedestrians is just as likely to take place on a public place as on a road.

The definition of public place has been considered in several cases in Scotland. See for example the cases of *Young v Carmichael*<sup>14</sup> *Alston v O'Brien*<sup>15</sup> and *Thomson v McPhail*<sup>16</sup> which may be relevant when considering this question further.

**Question 10: The current offences of dangerous or careless cycling apply to a road. This consultation proposes that it should also extend to a public place. Do you agree with this proposal?**

Please see our response to Question 9. We would agree for the same reasons as set out there.

**Question 11: Are there any other comments that you wish to make about where the laws should apply?**

We have no further comments to make.

## Penalty points and disqualification

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**Question 12: Drivers may be banned from driving for committing a current cycling offence. Minimum driving disqualification periods currently apply under the Road Traffic Offenders Act 1988. For drivers this is currently 2 years for causing death or serious injury, 1 year for**

<sup>14</sup> 1991 SCCR 332,

<sup>15</sup> 1992 SCCR 238

<sup>16</sup> 1992 SCCR 466

**causing death by careless driving. Do you think this should also apply to any of the new offences proposed in this consultation?**

While disqualification from driving is competent, in our experience, this power is rarely exercised by the courts. However, disqualification from driving may well be an appropriate penalty for cyclists convicted of these serious offences given that the test that would be applied in any prosecution is that the cyclist demonstrated “a complete disregard for any potential danger”.

Given this state of mind, disqualification from driving might be an appropriate and competent disposal. Exactly how that might work in practice would need to be considered. We would stress the need for awareness of the public were this intended to be a penalty.

**Question 13: If not, could you please explain why? If so, do you have any views on how long the minimum disqualification period should be?**

We have no comment to make.

## **Dangerous and careless cycling**

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**Question 14: There is currently an offence of dangerous cycling (with a fine of up to £2,500) and for careless cycling (with a fine up to £1,000). This consultation proposes that the penalties for these offences should remain unchanged. Do you agree with the proposal?**

Yes. We do not consider that there is any need for the penalties for these offences to be increased.

**Question 15: If not, could you please explain why? Are there any other comments you wish to make on the level of penalty?**

We have no comment to make other than these penalties still represent what seems to be a reasonable range of sentencing options for the judge.

## **Drink and drug driving and cycling**

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**Question 16: This consultation proposes that there should not be a new offence of causing death by careless cycling when under the influence of drink or drugs. Do you agree with the proposal?**

Yes.

**Question 17: The current fine for riding a cycle when unfit to ride through drink or drugs is £1,000. Do you think we should consider increasing the fine?**

No.

**Question 18: Do you think we should consider making it an offence to attempt to cycle (as well as actually cycling) when unfit to do through drink or drugs?**

No. We do not consider that it should be made an offence to attempt to cycle when unfit to do so through drink or drugs. The offence of cycling while unfit to ride through drink or drugs is very rarely prosecuted. We do not consider that in these circumstances it is necessary to create a further offence of attempting to cycle in these circumstances.

**Question 19: Are there any further comments you wish to make?**

We have no further comments to make.



**For further information, please contact:**

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