

Statutory offences of causing death by driving

Draft impact assessment

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Introduction

1. This document fulfils the Scottish Sentencing Council's statutory duty¹ to provide an assessment of the costs and benefits to which the implementation of the 'Statutory offences of causing death by driving' guideline is likely to give rise and an assessment of the likely impact of the guideline on the criminal justice system in general. As the core approach for each offence is similar, this assessment considers the impacts holistically. Where there are offence specific impacts identified, these are noted in the text.
2. The guideline will cover offenders who are sentenced on or after the coming into force date of the guideline, and who have been convicted of one of the following offences under the Road Traffic Act 1988:
 - Causing death by dangerous driving (Section 1 offences)
 - Causing death by careless driving when under influence of drink or drugs (Section 3A offences)
 - Causing death by careless, or inconsiderate, driving (Section 2B offences)
 - Causing death by driving: unlicensed, uninsured, or disqualified drivers (Section 3ZB and Section 3ZC offences)

Rationale and aims of the new guideline

3. The Criminal Justice and Licensing (Scotland) Act 2010 contains provision enabling the Council to prepare guidelines with regards to the sentencing of particular offences.²
4. The Council believes that a guideline on sentencing for the statutory offences of causing death by driving will:
 - Increase public knowledge and confidence in sentencing. As death by driving cases are of particular public concern and can be among the most serious and complex which come before the courts for sentence this is an area in which increased public understanding would be of particular value. Previous research conducted on behalf of the Council suggests a current gap between public impressions of sentencing and sentencing practice for these offences.
 - Increase public understanding of the factors involved in the assessment of seriousness for offences of causing death by driving.
 - Assist judges and lawyers in the criminal courts, particularly through codification of the assessment of culpability in offences involving causing death by careless driving.
 - Assist judges, lawyers, and the public through codification of sentencing of a relatively uncommon, but very serious, offence.

¹ Under [section 4 of the Criminal Justice and Licensing \(Scotland\) Act 2010](#).

² Under [section 3\(3\)\(c\) of the Criminal Justice and Licensing \(Scotland\) Act 2010](#).

- Reflect accurately the sentencing practice and disposal options for Scotland, removing any reliance on the equivalent guideline created for England and Wales.
- Promote consistency in the sentencing of these offences.

Current sentencing practice

Number of offences³

5. As noted above, the offences covered by the guideline are extremely serious, but relatively uncommon. Over the previous ten full financial years from 2011/12 to 2020/21 there were 103 Section 1 – causing death by dangerous driving offences - disposed of by the courts, at a rate of between 7 and 16 a year. Over the same timeframe, 190 Section 2B – causing death by careless, or inconsiderate, driving offences - were disposed of, at a rate of between 9 and 31 offences per year. Section 3A - causing death by careless driving when under influence of drink or drugs offences - and Section 3ZA and Section 3ZB - causing death by driving: unlicensed, uninsured, or disqualified drivers - were disposed of fewer than 10 times across the entire ten year period.
6. In contrast, the total number of cases disposed of across *all* offences over the previous ten years is 893,826⁴⁵.

Offender demographics

7. While the small number of offences disposed of over the ten year period makes demographic breakdowns somewhat unreliable, a couple of key differences between offenders convicted of death by driving offences and the general offending population can be identified. Firstly, those convicted of Section 1 offences are more likely to be male than the general offending population (over 95% compared to 83%). In contrast, a larger percentage of those convicted of Section 2B offences were female than the overall offending population (roughly 25% compared to 17%). Secondly, the age profile of offenders convicted of causing death by driving offences differs from the general offending population. Those convicted of Section 1 offences are more likely to be

³ Data presented here on offences of causing death by driving, including data on offender demographics, were provided by the Scottish Courts and Tribunals Service and are based on case level data and classified by date of disposal. As such, there may be minor differences between the figures given here and those presented in the most recent Criminal Proceedings dataset. The decision to use the SCTS data was based upon the availability of more detailed demographic information which enables the Council to better fulfil its duty to consider the impact of any guidelines.

⁴ Criminal Proceedings in Scotland 2020-21, Scottish Government, <https://www.gov.scot/publications/criminal-proceedings-scotland-2020-21/>

⁵ Figures for death by driving offences are given at a charge level (i.e. each offence charged is counted and thus an offender with multiple charges will be counted multiple times) while figures for all offences are given at case level (i.e. offenders are counted only once per case, regardless of the number of offences involved) and are thus not strictly comparable. However, because of the nature of the offending involved in death by driving offences it is likely that most, if not all, offences are single charge. Any differences between charge and case level data is likely to be very slight as a result.

aged between 18 and 30 than the general offending population, while those convicted of Section 2B offences are noticeably more likely to be over 60 than the general offending population. For Section 2B offences, the over 60 age group is, in fact, the second largest group, accounting for 21% of offenders, compared to only 3% of the general offending population.

8. Secondly, the Scottish Index of Multiple Deprivation quintile classification of offenders' home address – where available – suggests a differing pattern between those convicted of death by driving offences and the general offending population. For Section 1 offences, offenders are less likely to come from the most deprived quintile (24% compared to 39%) and more likely to come from the fourth and fifth least deprived quintiles (25% and 14% respectively, compared to 12% and 8%) than the general offending population. Similarly, for Section 2B offences, offenders are less likely to come from the most deprived quintile (22% compared to 39%) and more likely to come from the fourth and fifth least deprived quintiles (18% and 14%, compared to 12% and 8%).
9. Insufficient data are available to allow for analysis of offenders' ethnic group.

Disposals

10. For Section 1 offences, the vast majority of disposals take the form of a period of imprisonment (or detention in a young offenders institution), with 98 of the 103 disposals over the previous ten financial years consisting of imprisonment. The remaining disposals were for community based sentences.
11. For these disposals, the mean average duration was 1,721⁶ days (a little over 4.7 years). The majority of disposals of imprisonment for Section 1 offences fell into the 2-4 years (41) and 4-6 years (32) brackets. Only 7 disposals were for less than two years' imprisonment, while 13 were for 6-8 years' imprisonment and only 5 were for more than 8 years' imprisonment.
12. For Section 2B offences, the majority of disposals were by way of community payback orders (CPOs), with 120 CPOs out of 190 disposals. The next most common disposal was a fine (27), followed by a period of imprisonment (including detention in a young offenders institution) (25), and restriction of liberty orders (RLOs) (18).
13. In those cases where a disposal of imprisonment was given for Section 2B offences, the mean average duration was for 572⁷ days (slightly more than 1.5 years). The majority (13) of these disposals fell into the 6-12 months' imprisonment bracket, with the remainder falling mostly into the 1-2 years' imprisonment bracket (7) and the rest into the 2-4 years' imprisonment bracket (3).
14. Data on the duration and requirements of CPOs are not currently available.

⁶ Because of the way sentencing data are recorded it is likely that a number of the sentences included in this figure involved a reduction for a plea of guilty. Where possible, the headline figure is used, but the true average headline sentence would be likely to be somewhat higher than the sentences above. This difference is likely to be greater for S1 offences than S2B offences, due to how court data is held.

⁷ Excludes periods of detention in a YOI.

15. Because of the small number of disposals for Section 3A, 3ZA and 3ZB offences, no further analysis is included for these offences.

Key assumptions

16. In assessing the impact of any new guideline, the Council considers how, if at all, it will affect sentencing, the business of the courts, the operation of the wider criminal justice system and society in general. Such assessments are based upon research and analysis conducted during the creation of the guideline, consultation with external stakeholders, including judges, and, where appropriate, relevant experiences in other jurisdictions. While these offences have been subject to sentencing guidelines in England and Wales, we are not aware of any specific work assessing the impact of guidelines on the sentencing of offences of causing death by driving⁸. Some work has been undertaken by the Sentencing Council for England and Wales on the general impact of their guidelines on sentence severity and sentence consistency.⁹ These general reports have been considered when setting key assumptions for this assessment.
17. This assessment also requires strong assumptions to be made regarding sentencers' behaviour in response to the new guideline as it is not possible to predict how it will impact sentencing across all possible scenarios. Where possible, these assumptions will be based upon previous evidence and experiences but this evidence base is limited. As a result, assumptions regarding the impact of the guideline must have a large degree of uncertainty about them.
18. This impact assessment does not attempt to include any future changes to sentencing behaviours that are not a result of the implementation of this guideline (e.g. historic trends in sentencing, changes to the presumption against short sentences, or the impacts of other guidelines unless specifically considered with reference to interaction with this guideline).
19. It is assumed that the 'Statutory offences of causing death by driving' guideline will influence judicial approaches to sentencing and increase consistency.
20. It is assumed that the guideline will not generally result in an overall change in sentencing severity.

⁸ At the time of publication, the Sentencing Council of England and Wales is consulting on revised guidelines which include the offences considered here. Their consultation includes a resource assessment of the possible impacts of the revised guidelines for England and Wales. However, this only considers impacts going forwards and does not assess the impact of previous guidelines.

⁹ <https://www.sentencingcouncil.org.uk/publications/item/investigating-the-sentencing-councils-impact-in-three-key-areas/>

Impacts on the criminal justice system as a result of implementing the new guideline

Changes to sentencing

Approaches to sentencing

21. The 'Statutory offences of causing death by driving' guideline will promote consistency in approaches to sentencing.
22. The guideline sets out a factor based approach to the assessment of seriousness, with particular reference to assessing culpability of the offender. Work with judicial stakeholders has identified assessing the relative culpability of offenders in cases involving careless driving to be of particular challenge and it is anticipated that the guideline will be of particular value for members of the judiciary in these cases.
23. In addition, the guideline codifies the factors which are considered by the Council to be aggravations or mitigations versus those which speak to the seriousness of the offence. While the Council does not expect any change in sentencing outcomes as a result of this codification, it will ensure that courts consider these factors at the same stage across all cases, potentially resulting in clearer sentencing decisions and improved public understanding.
24. It is possible that any change in approaches to sentencing for these offences may result in a change to some sentencing outcomes in individual cases but it is assumed that the overall effect on sentencing outcomes in general will be neutral.

Potential changes to sentencing practice

25. It may be the case that sentencers interpret the guideline in a different fashion than that intended by the Council, which could result in the guideline having unexpected consequences for sentencing practice which cannot be predicted. The Council has taken steps to mitigate this risk by engaging with members of the judiciary to estimate any likely changes in practice.
26. Engagement with members of the judiciary has suggested that a significant proportion of sentencers have consulted the current Causing Death by Driving: definitive guideline¹⁰ for England and Wales when considering sentencing in causing death by driving cases. This use of the England and Wales guidelines tended to be as a reference or *aide memoire* for assessing seriousness, not for determination of sentence. As such, any differences in sentencing ranges between the Council's draft guideline and those in force in England and Wales are not anticipated to change sentencing practice in Scotland.

¹⁰ <https://www.sentencingcouncil.org.uk/wp-content/uploads/Causing-death-by-driving-definitive-guideline-Web.pdf>

27. The proposed draft guideline does differ from the current England and Wales Causing Death by Driving: definitive guideline in one aspect regarding the assessment of seriousness for Section 1 offences. The Council's draft guideline places racing in level one when assessing seriousness (the highest level), while the England and Wales definitive guideline includes racing in level two (one step lower in severity than the draft guideline). The Council feels the level one categorisation of racing better reflects Scottish practice and this is supported by the Council's work with the wider judiciary. It is therefore possible that this will result in a small number of cases involving racing (but no other level one factors) being treated more severely than would have previously been the case. However, the number of Scottish cases involving racing is very small – significantly less than one per year – and the Council does not expect any significant change to practice as a result.
28. The proposed draft guideline does diverge from what are proposed as the new guidelines for England and Wales, as published by the Sentencing Council of England and Wales on 07 July 2022.¹¹ However, the proposed guidelines from England and Wales have not been considered as part of this impact assessment, as they are not presently in force and have never been considered as part of judicial decision-making in Scotland.
29. The proposed draft guideline for Section 2B offences has 18 months' imprisonment as the uppermost sentencing range of level A offences. As noted above, three cases in the last ten years have received sentences of at least 2 years' imprisonment and the mean average period of imprisonment for this offence was slightly over 18 months. However, this is an artefact of the ten year period under consideration, as sentencing for this offence has been moving towards shorter or non-custodial sentences over this period. For example, the most recent sentence of at least 2 years was given in 2017/18. The other two sentences within this bracket were given in 2014/15. As such, the Council feels that the ranges given in the draft guideline appropriately reflect current practice.

Changes to court business

30. As noted above, judges frequently take the current England and Wales definitive guideline into account when considering sentencing for offences involving causing death by driving. As such, the Council does not expect any impacts on first instance court business as a result of the draft guideline.
31. It is possible that, by codifying the factors associated with any assessment of seriousness, the introduction of the guideline *may* increase the number of appeals against sentence, with appeals being lodged due to a court's perceived failure to take the guideline into account. It is not possible to estimate the magnitude, if any, of this change. Conversely, it is also possible that the number of appeals may decrease as a result of increased consistency in approaches to sentencing and increased transparency in how any given sentence was reached.
32. It may be the case that as the number of potentially applicable guidelines increases, courts begin to see an impact on the duration of sentencing hearings as a result of having to consider multiple guidelines before imposing sentence. As noted above, courts frequently consider the current

¹¹ <https://www.sentencingcouncil.org.uk/publications/item/motoring-offences-consultation/>

England and Wales definitive guideline already, and the draft guideline would simply replace this step. As such, any increase in relation to these guideline is expected to be very minimal and limited to the early stages of guideline use. It is anticipated that courts will incorporate the guideline into their sentencing approach quickly and no substantive changes will be observed over the longer term.

Changes to the provision of disposals

33. As noted above, the Council considers the guideline to reflect current Scottish practice in the sentencing of offences involving causing death by driving. This includes the sentencing ranges identified in the draft guideline. As a result, the Council does not anticipate any changes to sentencing outcomes and thus no changes to the provision of disposals by either the Scottish Prison Service or local authorities.

Impacts on equality in the criminal justice system

34. The Council notes that the demographic make-up of those offenders convicted of causing death by driving differs somewhat from the general offending population. As such, the impact of this guideline is likely to be felt disproportionately by those from less deprived areas (for all offences covered by the guideline) and by those aged 21-30 (for S1 offences) and those aged over 60 (for S2B offences). These groups may benefit more than the general offending population by the increased consistency and transparency of sentencing.
35. Additionally, the demographic make-up of offenders convicted of causing death by driving offences means that men will disproportionately benefit from the guideline covering S1 offences, while women will benefit disproportionately from the guideline covering S2B offences.
36. The Council does not feel that these benefits will result in a significant impact on the equal administration of justice in Scotland.
37. Insufficient data are available to address other protected characteristics with regards to this guideline.

Costs and benefits

Costs

38. As mentioned previously, a possibility exists of an increase in appeals, with an attendant increase in resources required to sift and hear these appeals, as well as in legal fees for such actions (both privately and publicly funded) and the resources required by the Scottish Prison Service to service prisoners' needs during their appeals. However, such an increase is not certain to occur and the magnitude is impossible to estimate. Similarly, any decrease would have a commensurate cost saving associated with it but is equally difficult to estimate. This impact is shared with previous guidelines and, as in those guidelines' impact assessments, arises from the same aspect of codification of previously unwritten practice.

39. Although it is not possible to provide a cost estimate at this stage, we anticipate that any additional costs as a result of appeals would be minimal.

Benefits

40. The draft guideline is intended to increase transparency and understanding of how courts reach a sentence in cases involving causing death by driving. As with the Council's previous guidelines, the increased transparency associated with this guideline is expected to provide the wider public with a greater understanding of the sentencing process, with a particular focus on understanding the ways in which seriousness is arrived at in cases where a fatality is necessarily involved but where culpability may, or may not, be very limited.
41. The guideline will also promote consistency in sentencing, contributing to one of the Council's statutory objectives. The guideline is expected to be of particular benefit to sentencers in relation to offences involving careless driving.

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