



Statutory offences of causing death by driving

**Scottish Sentencing Council report on public
consultation exercise**

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Chair's foreword



I am pleased to introduce this report about the public consultation on the Scottish Sentencing Council's draft sentencing guideline covering the statutory offences of causing death by driving. This is an important development for the Council and sentencing in Scotland: subject to its approval by the High Court, this will be Scotland's first ever offence guideline. It is the first time that the Council has set out guidance to help courts select a specific type and level of sentence.

We decided that our first offence guideline should cover death by driving offences as these can be amongst the most serious, complex, and sensitive cases dealt with by our courts. Although relatively uncommon, they are of significant public concern and have a devastating effect on the families of victims.

While nothing can make up for the tragic loss of life involved, we believe that a sentencing guideline will provide clarity for bereaved families and others affected by death by driving cases. It will assist judges in the difficult task of deciding on a sentence and help to increase public understanding and awareness of the law and sentencing practice in relation to death by driving offences. In particular, it will help to explain the distinction between dangerous and careless driving, and why there can be a large difference between the harm caused – someone's death – and the level of culpability, or blame, of the offender, especially in careless driving offences. As our research has shown, these issues are not always well understood.

To ensure that the guideline will achieve these aims, and reflecting our evidence-based approach to guideline development, we engaged with a wide range of individuals and organisations during the drafting process. This included the judiciary, the legal profession, criminal justice bodies, and other key stakeholders. Alongside this, we carried out analysis of sentences imposed by Scottish courts for death by driving offences over a period of years.

We also commissioned a number of research projects, including a report which explores the views of family members of victims of death by driving offences, and a national survey of public attitudes to sentencing. The latter involved 1,000 members of the public and included a death by dangerous driving scenario. Notably, most respondents to this scenario selected sentences that were more lenient than probable sentence practice. This indicates that public attitudes to sentencing are more nuanced when explored in detail, and more in line with the sentences courts actually impose.

Public engagement is vital in ensuring our guidelines are fit for purpose and we try to reach as wide and diverse an audience as possible in developing them. Every response to our consultation on the draft guideline has been very carefully considered as part of an independent consultation analysis.

As a direct result of issues raised or suggestions made by respondents, and having also taken into account the full range of research and engagement carried out prior to the consultation, we have decided to strengthen the guideline in key respects.

The final version we will submit to the High Court makes it clear that aggressive driving and racing fall into the highest level of seriousness for death by dangerous driving offences. Additionally, the aggravating factors (factors which make an offence more serious for the purposes of sentencing) listed in the guideline have been expanded and some sentencing ranges have been increased for offences of causing death by careless, or inconsiderate, driving and causing death by driving while unlicensed, uninsured, or disqualified.

Importantly, the guideline will also give a clearer and fuller explanation of how sentences for these offences are reached and the factors courts must consider. This helps to explain other issues, beyond guidelines, that courts are required by law to consider.

It is important to emphasise that the guideline will not prevent a court from imposing a sentence outwith any of the sentencing ranges it contains, or from imposing the maximum sentence provided by law, should the court consider it appropriate. However, guidelines cannot cover every possible eventuality. We consider that cases which are so serious as to justify a sentence outwith the guideline's maximum ranges will be rare enough that they do not need to be detailed within it.

By its nature, this introduction can only give a very high-level summary of the complex issues addressed in both the guideline and this report. I encourage you to read the report in full, as it sets out the rationale for all of the decisions we have reached about the final content of the guideline ahead of its submission to the High Court for approval.

I am very grateful to all the members of the Council, past and present, who contributed to this work, particularly those who served on the committee overseeing the development of the guideline. I also want to thank those who took the time to consider the consultation and offer views, and indeed everyone who has contributed to the development of the guideline. Your interest in the work of the Council is greatly appreciated and we could not fulfil our important functions without it.

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

Introduction

1. The [Scottish Sentencing Council](https://www.scottishsentencingcouncil.org.uk/about-us/aims-and-accountability/)¹ launched a public consultation on a draft of its – and, subject to approval by the High Court, Scotland’s – first offence guideline, “Statutory offences of causing death by driving”, on 30 August 2022, with views invited by 22 November 2022.
2. 58 responses were received from 49 individuals and nine organisations. The responses from organisations, along with those from individuals who gave their consent for this, have been published on the Council’s website.² An analysis³, conducted independently, examines each of the questions posed by the consultation and the responses made to these, and summarises the key points and themes.
3. The views expressed by respondents and the findings from the analysis have been taken into account in the Council’s final decisions about the content of the “Statutory offences of causing death by driving” guideline, which will be submitted to the High Court of Justiciary⁴ later this year.
4. The guideline covers the following offences under the [Road Traffic Act 1988](https://www.legislation.gov.uk/ukpga/1988/52)⁵:
 - causing death by dangerous driving (section 1)
 - causing death by careless driving when under influence of drink or drugs (section 3A)
 - causing death by careless, or inconsiderate, driving (section 2B)
 - causing death by driving: unlicensed, uninsured, or disqualified drivers (sections 3ZB and 3ZC)
5. This report sets out the Council’s views on some of the most common matters raised in the public consultation exercise and explains how the guideline submitted to the High Court will differ as a result. Should the guideline be approved (either as submitted or with changes), it will be published on the Council’s website shortly afterwards.

¹ <https://www.scottishsentencingcouncil.org.uk/about-us/aims-and-accountability/>

² <https://consultations.scottishsentencingcouncil.org.uk/ssc/death-by-driving-offences/>

³ <https://www.scottishsentencingcouncil.org.uk/media/2387/statutory-offences-of-causing-death-by-driving-consultation-independent-analysis.pdf>

⁴ All sentencing guidelines must be approved by the High Court before they can take effect: <https://www.legislation.gov.uk/asp/2010/13/section/5>

⁵ <https://www.legislation.gov.uk/ukpga/1988/52/contents>. 3ZB and 3ZC offences are dealt with in the same section of the guideline due to certain similarities between them. These are discussed in more detail at paragraphs 122-123 of this report, and in the footnote to paragraph 123.

6. We have deliberately focused on addressing those matters which appear to be of most interest to respondents. While not all points raised are covered in this report, all of the responses received have been considered.
7. In finalising the guideline for submission to the High Court, we have also taken into account the full range of engagement, evidence gathering, and research activity carried out during the [first three stages](#)⁶ of the guideline's development.
8. As well as gathering and analysing detailed statistical data on sentences imposed in Scottish cases of causing death by driving, we commissioned the following independent research projects to inform our approach to the guideline:
 - a [literature review](#)⁷ examining the available evidence on sentencing in death by driving cases, including in other jurisdictions
 - a [nationally representative survey](#)⁸, involving 1,000 participants, exploring public knowledge and attitudes towards sentencing in Scotland, which included scenarios involving causing death by careless, or inconsiderate, driving and causing death by dangerous driving
 - a [research study](#)⁹ which explored public perceptions of the sentencing of causing death by driving offences in Scotland, including the perceptions of families of victims
9. We supplemented this work by considering [sentencing statements](#)¹⁰ and High Court opinions in appeals against sentence in respect of death by driving cases.

⁶ <https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/how-sentencing-guidelines-are-developed/>

⁷ *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: <https://www.scottishsentencingcouncil.org.uk/media/1900/20181001-literature-review-dbd-final.pdf>

⁸ *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: <https://www.scottishsentencingcouncil.org.uk/media/2383/20190902-public-perceptions-of-sentencing-report.pdf>

⁹ *Public perceptions of sentencing in Scotland - Qualitative research exploring causing death by driving offences* (February 2021), prepared for Scottish Sentencing Council by Susan Reid, Hannah Biggs, Kaushi Attygalle, Konstantina Vosnaki (ScotCen), Dr Rachel McPherson (University of Glasgow) and Professor Cyrus Tata (University of Strathclyde): <https://www.scottishsentencingcouncil.org.uk/media/2088/20210216-perceptions-of-sentencing-for-causing-death-by-driving-final.pdf>

¹⁰ A judge may decide to publish a statement after passing sentence on an offender in cases where there is particular public interest; where a case has legal significance; or where providing the reasons for the decision might assist public understanding. Sentencing statements are published on the Judiciary of Scotland website: <https://www.judiciary.scot/home/sentences-judgments/sentences-and-opinions>

10. A particularly important aspect of our early development work on the guideline was engagement with the judiciary. We sought the views of judges about current sentencing practice and the key challenges when sentencing death by driving cases. This included testing an early draft of the guideline with sentencers to ensure that it would be fit for purpose and compatible with our existing general guidelines, "[Principles and purposes of sentencing](#)"¹¹ and "[The sentencing process](#)"¹².
11. In addition, we have taken into account discussions with sentencing advisory bodies and colleagues from other jurisdictions to learn first-hand about their guidelines or guidance for sentencers¹³. This has been especially useful in informing our decisions about the overall style and structure of our first offence guideline.
12. The original consultation paper, associated documents, responses, and analysis can be accessed at <https://consultations.scottishsentencingcouncil.org.uk/ssc/death-by-driving-offences/>.

¹¹ <https://www.scottishsentencingcouncil.org.uk/media/1964/guideline-principles-and-purposes-of-sentencing.pdf>

¹² <https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf>

¹³ 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.

Response to public consultation exercise

13. In this part, we will discuss the key points raised in relation to each question posed in the consultation paper. We will indicate how the guideline submitted to the High Court for approval will differ as a result of these, and what other action may be taken.
14. A brief summary of the key points raised by respondents is provided, but we suggest that you refer to the consultation analysis¹⁴ (or its executive summary¹⁵) for further context.
15. Before the discussion of each question, we will cover a number of issues raised by respondents that are outwith the Council's remit and then summarise the key changes made to the guideline as a direct result of the consultation.

Issues outwith the Council's remit

16. We are very grateful to all respondents who took the time to provide views on the draft guideline, and each response has been fully considered.
17. However, the consultation analysis reveals that responses from a number of individuals raised issues or suggested changes that are either outwith the Council's remit or the scope of the guideline, or would require legislative change, such as, among other things:
 - increased maximum sentencing powers, or minimum sentences, for the offences covered by the guideline
 - mandatory disqualification from driving for life for all death by driving offences
 - no reductions in sentences for early guilty pleas
 - ensuring the families of victims are informed of sentencing decisions

Increased minimum and maximum sentences/disqualification periods

18. The question of minimum and maximum sentences is distinct from the issue of the sentencing ranges set out in the draft guideline. Many respondents suggested changes to the ranges, and these will be considered later in this report. However, the setting of minimum and maximum sentences for any type of offence is not within the Council's remit. Minimum and maximum sentences are defined in primary legislation and are therefore the responsibility of the Scottish and UK Parliaments. The Council has no

¹⁴ <https://www.scottishsentencingcouncil.org.uk/media/2387/statutory-offences-of-causing-death-by-driving-consultation-independent-analysis.pdf>

¹⁵ <https://www.scottishsentencingcouncil.org.uk/media/2387/statutory-offences-of-causing-death-by-driving-consultation-independent-analysis.pdf#page=4>

power to change them, and our guidelines must reflect what they are. The same applies in respect of minimum and maximum periods of disqualification from driving (although the law only provides for minimum disqualification periods).

Reductions in sentence for guilty pleas

19. The suggestion that there should not be any reductions in sentence for guilty pleas in death by driving cases also cannot be taken forward by the Council. This is a matter of law: [section 196 of the Criminal Procedure \(Scotland\) Act 1995](#)¹⁶ provides that where a person has pled guilty to an offence, a court in sentencing that person shall take into account the stage in proceedings at which the person indicated their intention to plead guilty, and the circumstances in which that indication was given. The effect of this is that where a guilty plea is accepted, a court will normally apply a discount to, or reduce, the sentence it would have imposed had the offender been found guilty after trial¹⁷.

Informing victims' families of sentencing decisions

20. Ensuring that families of victims are informed of sentencing decisions does not form a direct part of the sentencing exercise and is therefore outwith the scope of the guideline. This is a separate issue from one raised by some respondents about the need for sentencers to explain their decisions clearly for the benefit of family members.
21. It is important to note that both our "[Principles and purposes of sentencing](#)" and "[The sentencing process](#)" guidelines say that the court should set out the reasons for its decision as clearly and openly as circumstances permit. Both also make it clear that the impact on the victim is central to the sentencing exercise, with "[Principles and purposes of sentencing](#)" stating that this also includes the impact on others affected by the case.
22. Family members are generally entitled to be present in court when a sentence is imposed, as are members of the public, meaning that they can hear the judge impose the sentence and explain the reasons for it. Where family members are not present in court, they may be able to request information about the final decision of the court in a trial or any appeal arising from a trial, and any reasons for it¹⁸.

¹⁶ <https://www.legislation.gov.uk/ukpga/1995/46/section/196>

¹⁷ The Council is developing a separate guideline on sentence discounting when a person pleads guilty.

¹⁸ See section 6(2)(b) of the Victims and Witnesses (Scotland) Act 2014:

<https://www.legislation.gov.uk/asp/2014/1/section/6>. The Scottish Courts and Tribunals Service has published information about how victims can request any reasons given by a judge for the sentence imposed here: <https://www.scotcourts.gov.uk/coming-to-court/victims-of-crime>. This includes a [guide](#) on how to access the information and a [request form](#) which should be completed and sent to the court in which the case was heard.

23. Although this is not something we can cover in the guideline, we recognise the need to provide the right help, information, and support to victims of crime and their families and that the Council can play an important part in this to the extent that our remit allows. Respecting the rights of victims and being responsive to their needs plays a key part in ensuring our justice system is fair and accessible for all.
24. For this reason, we decided to create a new information page on our website, which lists certain rights and services available to victims of crime and their families. This brings together a wide range of information from across the justice system in one place. We hope it will be an accessible and useful resource for victims and their families. It can be viewed here: [information for victims](#)¹⁹.
25. We will also raise this and other issues arising from the consultation with key stakeholders as part of our discussions with them ahead of the guideline coming into effect, if it is approved by the High Court.
26. We have highlighted issues outwith our remit at the beginning of this report because a number of responses from individuals touched on them to a greater or lesser degree across different questions in the consultation.

Summary of key changes to the guideline

27. Public engagement is vital in ensuring our guidelines are fit for purpose. Responses to the consultation from individuals and organisations alike have been of considerable help to the Council and we have changed the guideline in some respects as a direct result of issues raised or suggestions made by respondents. This has helped us make sure that the final guideline is accessible, clear, and robust and that it will be useful to the courts and others involved in or affected by death by driving cases.
28. The “You Said, We Did” table on the following page summarises the key changes we have made to the guideline as a result of views expressed by respondents. These changes, and others not included in the table, will be explored in detail in the next section of this report, which discusses each consultation question in turn.

¹⁹ <https://www.scottishsentencingcouncil.org.uk/about-sentencing/information-for-victims/>

You Said	We Did
Greater clarity was needed around the sentencing process and other applicable guidelines, in particular to help victims' families understand sentence discounts	The "How to use this guideline" section has been extensively rewritten to reflect all steps in the sentencing process and a link to all other approved guidelines has been added
Further guidance was needed as to what is meant by "aggressive driving"	Persistent tailgating has been given as an example of what is meant by "aggressive driving"
Aggressive driving should be seen to be at least as serious as racing	Aggressive driving is now mentioned in the highest level of seriousness for causing death by dangerous driving
Undisclosed health conditions should be considered as aggravating factors	Impairment as a result of driving when knowingly suffering from a medical or physical condition has been added as a feature of seriousness for causing death by dangerous driving offences
The terms "significant risk" and "substantial risk" lack clarity and could be seen as largely interchangeable and open to interpretation	The term "very significant risk" is now used instead of "substantial risk"
Greater clarity should be provided about the difference between disregarding road signals and disregarding road signs	The distinction between road signals and signs has been removed and a single feature of seriousness including both has been added
There was a significant disparity between the sentencing ranges for the lower end of causing death by dangerous driving and the upper end of causing death by careless, or inconsiderate, driving	The sentencing ranges for causing death by careless, or inconsiderate, driving have been increased as follows: <ol style="list-style-type: none"> 1. Range for Level A seriousness now says "2 years' custody" instead of 18 months 2. Range for Level C seriousness increased to "Fine of up to £10,000 – level 2 community payback order" from "Fine of up to £2500 - level 1 community payback order"
The guideline should include reference to vulnerable road users	"Victim was a vulnerable road user (for example, a pedestrian, cyclist, horse rider, or motorcyclist)" has been added as an aggravating factor for all offences
Various aggravating or mitigating factors should be added or removed	Changes to the aggravating and mitigating factors for each offence are outlined later in this report

Discussion of consultation questions

Overview of the guideline

29. This section covers questions 1 – 5 in the consultation.

Structure

Question 1 asked respondents if they agreed or disagreed that the general structure of the guideline, providing guidance in line with steps 1 to 3 of the sentencing process guideline, is appropriate.

30. Although the majority of respondents (38 out of 54 who answered question 1) – including all organisational respondents – agreed that the general structure of the guideline is appropriate, we concluded, after taking into account comments made in response to other questions, that it could be clearer.
31. Although the guideline as consulted on ends at step 3 for each offence, it actually covers up to step 4, determination of the headline sentence (it said, at paragraphs 11, 20, 27, and 35, “At the end of this process, the court will have determined the headline sentence”).
32. Having considered the responses, we also came to the view that the guideline should state what should happen *after* determination of the headline sentence. We felt that while this may be evident to sentencers, it may not be clear to lay readers, and that it was important to address this given that one of the aims of the guideline is to help public understanding of how sentences are reached. This issue was raised in responses to other questions in the consultation (on the guideline’s relationship with other guidelines and the purposes of sentencing) where it was suggested that:
- it may cause confusion to some people affected by death by driving offences if the possibility of a reduction in sentence for a guilty plea is not mentioned in the guideline²⁰
 - the overall purpose of the guideline is unclear because it does not cover all the steps in the sentencing process or explain why this is so

Our decision

33. We decided that the introduction to the guideline – the “How to use this guideline” section – should be rewritten to address these issues, but without unnecessary

²⁰ As previously noted, the Council is developing a separate guideline on sentence discounting when a person pleads guilty, which may help to increase transparency and understanding around this issue.

repetition of material from our sentencing process guideline, in line with our preferred approach in this regard.

34. The introduction will, accordingly, refer to all eight steps in the sentencing process, making it clear that the court must consider any effect on the sentence of the offender pleading guilty (which can result in a reduction in the sentence), or time already spent in custody before sentence. It will also:
- include a link to the [approved guidelines](#)²¹ section of the Council’s website to make readers aware of any other guidelines that may apply to a case
 - provide information about the effect of a guideline using wording taken directly from [section 6 of the Criminal Justice and Licensing \(Scotland\) Act 2010](#)²² – this makes it clear that a court can decide not to follow a guideline but must state the reasons for such a decision
 - include the heading for step 4 in the sentencing process (“Determine the headline sentence”) in a similar manner to the headings for steps 1, 2, and 3 for each offence

Style

Question 2 asked respondents if they agreed or disagreed that the style of the guideline, employing narrative and tables, is helpful.

35. The majority of respondents overall (43 out of 54 who answered question 2) – including, again, all organisational respondents – agreed that the style of the guideline, employing narrative and tables, was helpful. Comments included that it is clear, concise, informative, and simple to understand.
36. We considered two main issues raised in responses to this question. It was suggested that:
- the guideline would be simpler if the categories “Consequences”, “Record and circumstances of driver” etc. in the tables of aggravating and mitigating factors were removed as they add no valuable information
 - the style of the guideline is multi-dimensional in nature, which may make it less, rather than more, clear why an offence ends up in a particular category – specifically, the presence of additional Level C factors in a case with a Level A factor could conceivably be seen to call into question whether it is a Level A offence

²¹ <https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/approved-guidelines/>

²² <https://www.legislation.gov.uk/asp/2010/13/section/6>

37. We also considered a suggestion that the guideline should contain, possibly in an appendix, additional information on why parts of the sentencing process have or have not been included, in order to fully achieve its aim of improving transparency and understanding.

Our decision

38. After considering these suggestions, we decided that no changes to the guideline should be made. We feel that the category headings in the aggravating and mitigating factors tables – and, for that matter, in the levels of seriousness tables – are useful. They provide a way for sentencers to compare related factors or features, which may be of some help in reaching a sentencing decision. They also indicate the general categories that features or factors not mentioned in the guideline – as the lists of these are not exhaustive – may fall into. The additional context they provide may also be helpful for public understanding of what the court is taking into consideration.
39. It is worth noting that some of the cells in the tables are intentionally empty. This is to avoid any suggestion that unrelated features or factors are comparable. While not specifically raised as an issue during consultation, we looked at other ways to set out the information to avoid this. We considered various different layouts. Each option would have resulted in a loss of the accessible and useful comparative element of the tables in the draft as consulted on, so we decided not to change them.
40. We also think that paragraph 6 of the draft as consulted on provides sufficient guidance in relation to how the court should determine seriousness where a Level A feature and multiple Level C (or Level B) features are present. It says that:
- “Where features of seriousness are present from more than one level, 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.”
41. In respect of the suggested inclusion of additional information, possibly by way of an appendix, about aspects of the sentencing process, we think that the revised “How to use this guideline” section will fully address this and help to increase transparency and understanding. We feel this is the most straightforward approach.

Relationship with other guidelines

Question 3 asked respondents if they agreed or disagreed that the draft guideline makes the relationship between it and other applicable guidelines clear.

Question 4 asked respondents if there is anything that could be done to make the relationship between the guideline and other applicable guidelines clearer.

42. Around two-thirds of respondents who answered question 3 (32 out of 51) agreed that the guideline makes the relationship between it and other applicable guidelines clear, while just under half who answered question 4 (27 out of 49) suggested that more could be done to make the relationship clearer.
43. Most of the points raised in response to these questions, such as clarification around the relationship with our sentencing process guideline, have been addressed in the revised introduction to the guideline discussed in relation to question 1 above.
44. Several organisations suggested that the relationship with the “Sentencing young people” guideline should be made clearer. One said that it might lead to a perception of undue leniency if the offender was a young person and nothing is said in the guideline about how they are to be sentenced differently. Others suggested that the guideline should contain a direct link to the “Sentencing young people” guideline.
45. It was also suggested that an appendix should be added setting out some worked examples of how other guidelines might impact on the effect of the guideline and lead to a different sentence from what the guideline by itself might indicate as being appropriate.

Our decision

46. We considered the points raised but decided against making a change to the guideline in order to explain its relationship with the “Sentencing young people” guideline. We are generally against repeating the content of guidelines within other guidelines. Referring to the “Sentencing young people” guideline would perhaps set an unhelpful precedent for all future offence guidelines.
47. Additionally, references to the “Principles and purposes of sentencing” and “The sentencing process” guidelines are necessary and appropriate as they apply to all death by driving cases: the “Sentencing young people” guideline will only apply to some. That being said, as previously noted we have decided to add a link to the approved guidelines section on our website, which we think is a sufficient signpost to all other guidelines that may be relevant.
48. We also felt that it would not be appropriate to include worked examples of how this guideline might interact with other guidelines. We do not think that the guideline would be a suitable place to set out such examples. Even if their intended purpose was purely explanatory, they might create confusion. Examples would have to set out specific scenarios with a fairly narrow scope, whereas the guideline is intended to provide guidance covering a wide range of circumstances without being too specific or

restrictive. How the examples were interpreted could conflict with interpretation of the guideline.

49. However, we think that there is merit in providing further explanatory information about the different types of guideline we prepare and the relationship between them, as well as the wider range of issues, beyond guidelines, that courts are required by law to consider when sentencing, such as whether to reduce the sentence as a result of the offender pleading guilty or any time the offender has spent in custody for the offence before being sentenced. We have therefore created a new information page on our website about this, which can be viewed here: [about sentencing guidelines](#)²³.

Order of offences

Question 5 asked respondents if they considered 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.

50. Most respondents (36 out of 53) said that the offences should be listed within the guideline by order of seriousness.
51. One respondent argued in favour of adopting the order in the Road Traffic Act 1988 because it is difficult to differentiate which among some of the offences is the most serious, so following the order in the Act could avoid unintended consequences.
52. Another respondent suggested that the order of seriousness should follow the terms of [The Road Traffic \(Northern Ireland\) Order 1995](#)²⁴, by adding “grievous bodily injury” to all causing death by driving offences in Scotland (which they recognised could only be done if the Scottish Parliament had power over the Road Traffic Act 1988). As this would be a matter for primary legislation, it is not something that the Council can take forward.

Our decision

53. Although we understand the suggestion that following the order in the Act could avoid any unintended consequences, there is also a statutory basis for ordering the offences by seriousness in the form of the maximum sentences available for each.
54. Our view is therefore that the offences should continue, generally, to be listed by order of seriousness; or, to put it another way, that they should be listed in descending order

²³ <https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/about-sentencing-guidelines/>

²⁴ <https://www.legislation.gov.uk/nisi/1995/2994/contents>

of the maximum sentence provided by law, with the infrequently-prosecuted offences under sections 3ZB and 3ZC at the end of the guideline. This seems to us to be both logical and intuitive.

Sentencing purposes and the assessment of seriousness

55. This section covers questions 6 – 11 in the consultation.

Purposes of sentencing

Question 6 asked respondents if they agreed or disagreed that the draft guideline should not emphasise any particular purpose or purposes of sentencing.

56. Although around two-thirds of respondents (30 out of 51) disagreed that the guideline should not emphasise any particular purpose or purposes of sentencing, most of them did not actually suggest that a particular purpose or purposes should be listed. Instead, most suggested either that the guideline should give a brief overview of the purposes of sentencing or simply that sentencers should explain the purpose of the sentence so that it is clear to others what they expect it to achieve.
57. In respect of the second suggestion, as previously noted, both the “Principles and purposes of sentencing” and “The sentencing process” guidelines say that the court should set out the reasons for its decision as clearly and openly as circumstances permit. It is not explicitly stated that this should include mention of the purpose or purposes of the sentence, but this is clearly implied. We intend to liaise with other bodies regarding training, resourcing, and promotion of the guideline as appropriate, and this is perhaps one of the points we could address as part of that.
58. Some individual respondents did suggest that specific purposes of sentencing, such as protection of the public or punishment, should be emphasised.

Our decision

59. Having taken account of the views expressed, we concluded that the guideline should not emphasise any particular purpose or purposes of sentencing. In some cases, a particular purpose, such as punishment, may be at the forefront of the sentencer’s mind; however, to highlight it or any other purpose(s) would give it or them undue weight across the generality of death by driving cases – the circumstances of which can vary widely – covered by the guideline, and risk reducing judicial discretion.
60. We also decided against simply listing all of the purposes in this guideline. We did this in the “Sentencing young people” guideline, but in that case it was to provide necessary

context around the fact that one particular purpose – rehabilitation – was emphasised as a primary consideration. Listing the other purposes in that guideline was intended to make it clear that rehabilitation was not necessarily the *only* purpose of sentencing a young person. The same consideration does not apply in respect of the death by driving guideline.

61. Listing all purposes in this guideline would be an unnecessary repetition of the “Principles and purposes of sentencing” guideline, adding length without introducing any new guidance that is not already set out elsewhere. In our view, the hyperlink to the “Principles and purposes of sentencing” guideline at paragraph 1 is therefore sufficient.

Assessing seriousness

Question 7 asked respondents if they agreed or disagreed that the approach to the assessment of seriousness set out at step 1 for each of the offences covered by the guidelines is appropriate.

Question 8 asked respondents if there are any changes that should be made to the features of seriousness listed at step 1 of each offence.

62. Responses were evenly split on questions 7 and 8. Just over half of respondents to question 7 (29 out of 50) agreed that the approach to the assessment of seriousness set out at step 1 for each of the offences covered by the guideline is appropriate. Similarly, just over half of respondents to question 8 (30 out of 52) thought that changes should be made to the features of seriousness listed at step 1 for each offence.
63. The most significant suggested change to the guideline was that there should only be two levels of seriousness, A and B, for causing death by dangerous driving, causing death by dangerous driving when under the influence of drink or drugs, and causing death by careless, or inconsiderate, driving offences. One respondent was not convinced that the behaviour outlined in Level C is any less culpable than that in Level B while another said that all examples listed in Level C are offences in their own right and therefore should be treated as aggravating factors. An individual respondent expressed concern about what they saw as an attempt to create a “completely artificial distinction” between Levels A and B.
64. A number of specific suggestions for changes to the features of seriousness at step 1 for each offence were made in response to question 8 (most, if not all, were in fact only made in relation to causing death by dangerous driving offences as the other offences

have fewer, and more general, features listed). These are set out at paragraphs 4.24 to 4.28 of the analysis, but, in brief, were as follows:

- further guidance as to what is meant by “aggressive driving” such as tailgating should be added
- aggressive driving should be seen to be at least as serious as racing and at Level A
- further detail could be provided to distinguish between aggressive driving at Levels A and B, e.g. Level A aggressive driving could include “aggression towards a vulnerable road user (cyclist, pedestrian, etc.)” and “aggression with a large vehicle (van, pickup, works vehicles, etc.)”
- various features listed at Level B for section 1 offences should be moved to Level A instead: “Driving that created a substantial risk of danger to others”, “Aggressive driving”, “Grossly excessive speed...”, “Driving while avoidably distracted...”, “Ignoring warnings from others...”
- various features listed at Level C for section 1 offences should be moved to Level B instead: “Single dangerous manoeuvre...”; “Excessive speed...”
- having a notifiable medical condition or disability should be highlighted
- for causing death by careless, or inconsiderate, driving offences, the absence of examples of behaviour leaves a gap in the guidance, particularly in relation to Level A seriousness

65. Two of the proposed changes, those in respect of (i) the features relating to risk of danger to others and (ii) road signals and signs, are discussed below in relation to questions 9 and 10. The suggestion concerning aggression towards a vulnerable road user/aggression with a large vehicle is discussed below in relation to question 16.

Our decision

66. We decided that the current approach to the levels of seriousness should be retained. Reducing to two levels would limit the ability of sentencers to differentiate between cases. It would also mean wider sentencing ranges which – with or without starting points – might increase the potential for inconsistency or unintended increases in sentencing levels.

67. There may be a fine distinction between some of the features in Levels B and C but this is perhaps an inherent characteristic of death by driving offences.

68. In respect of changes to the features of seriousness, we decided to strengthen the guideline by:

- changing “Aggressive driving” to “Aggressive driving (for example, persistent tailgating)”

- changing “Prolonged and deliberate course of bad driving, with a disregard for the danger being caused to others” to “Prolonged and deliberate course of bad or aggressive driving, with a disregard for the danger being caused to others”
- adding “Impairment as a result of driving when knowingly suffering from a medical or physical condition, including a failure to follow medical advice or take prescribed medication” as a feature of seriousness at Level B for causing death by dangerous driving offences

69. In respect of the third bullet point, we feel that this will address, and encompass, a number of suggestions for additional health-related aggravating factors made in response to question 20 in the consultation. It will also cover the issue of an undisclosed medical condition, which would only be relevant if it had impaired the standard of driving. This is part of the reason why we did not accept the suggestion that it should be listed in the levels of seriousness or as an aggravating factor in its own right, the other being that failure to notify the DVLA of a condition that might affect the ability to drive safely would be charged as a separate offence.
70. After careful consideration, we decided against adopting any of the suggestions that various features listed at Level B for causing death by dangerous driving should be moved to Level A; or that any Level C features should be moved to Level B. In our view, such changes would be likely to restrict judicial discretion and lead to unintended increases in sentencing levels.
71. One further change we decided to make was to add “Knowingly driving a vehicle which is in a dangerous state” as a feature of seriousness under Level C for causing death by dangerous driving, replacing “Knowingly driving a dangerous vehicle” (which was at Level A) and “Knowingly driving a defective vehicle” (which was at Level C). On reflection, we felt that there was no useful or meaningful distinction between “dangerous” and “defective” to be made and that it would therefore be better to have a single feature that follows the wording of [section 2A\(2\) of the Road Traffic Act 1988](#)²⁵. On the basis of current sentencing practice for death by driving cases involving vehicles in a dangerous condition, we felt that this feature belongs in Level C.

Standard of driving

Question 9 asked respondents if they agreed or disagreed 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.

²⁵ <https://www.legislation.gov.uk/ukpga/1988/52/section/2A>. Section 2A(2) says “A person is also to be regarded as driving dangerously... if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous”.

Question 10 asked respondents if they agreed or disagreed 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.

72. Just over half of the respondents to question 9 (30 out of 52) disagreed that the difference between the quality of driving under Level B seriousness and Level C seriousness for causing death by dangerous driving offences is sufficiently clear. Most organisations (six out of eight) disagreed and organisations were more likely than individuals to disagree.
73. At question 10, just over two-thirds of all respondents (34 out of 50) agreed 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. The views of organisations were split, with four agreeing and three disagreeing.
74. As well as these issues we also considered the following suggestions:
- there should be greater clarity about the difference between “disregarding road signals (for example, traffic lights)” in Level B and “disregarding road signs (for example, a ‘Give Way’ sign)” in Level C
 - the addition of a glossary explaining the difference in meaning between key terms and an appendix containing specific examples of Level B and Level C offences that have been upheld by the appellate court
 - the difference between “excessive speed” and “grossly excessive speed” should be explained

Our decision

75. We considered the comments and suggestions made in response to questions 9 and 10 and decided on the following changes:
- the Level B feature of seriousness for causing death by dangerous driving offences “Driving that created a substantial risk of danger to others” should be changed to “Driving that created a very significant risk of danger to others”
 - the distinction between disregarding road signals at Level B and disregarding road signs at Level C should be removed as traffic lights, STOP signs, and Give Way signs are mandatory and not advisory, so there is no meaningful distinction to be made between them from the point of view of seriousness
76. In respect of road signals/signs, we decided that the Level B feature should be changed to “Repeated disregard of road signals or signs (for example, traffic lights or a ‘Give Way’ sign)”. We considered whether a single instance of disregarding a road

signal or sign should be listed at Level C but decided against this as it is, in our view, more likely to be a feature in cases of causing death by careless, or inconsiderate, driving. This is not to say that it would never be a feature in a causing death by dangerous driving case, and the guideline would not prevent it being considered as such. Our concern is that it may not be sufficient in and of itself to be considered dangerous driving and that it might lead to cases where it was a main feature being perceived as more serious than they previously might have been.

77. We decided against adding a glossary to the guideline – a [jargon buster](#)²⁶ on our website explains key terms and we feel that this is sufficient, although we will consider whether there are any terms relating to this specific guideline that should be added to it. We also feel that an appendix containing specific examples of Level B and Level C offences that have been upheld by the appellate court would be impractical and difficult to maintain, but we are exploring the possibility of adding a searchable library of appeal opinions to our website.
78. We also do not think that the terms “excessive speed” and “grossly excessive speed” require further explanation in the guideline as the circumstances in which either term may apply can vary so much that a general definition is all that can or should be given. Determining whether speed was excessive or grossly excessive – and what particular speeds might be classified as such – will depend on the specific circumstances of each case, and in particular:
- the weather and road conditions (for example, whether it was raining or the road was icy)
 - the location of the offence (for example, whether the road was near a school or full of parked cars)
 - the nature of the vehicle being driven (for example, excessive or grossly excessive speed is likely to be different for a car compared to a heavy goods vehicle)

Racing

Question 11 asked respondents which of the options presented at paragraph 60 of the consultation in relation to the categorisation of racing in death by dangerous driving offences they considered the most appropriate.

79. The analysis reveals that option 1 – include racing in Level A only – was preferred by the largest proportion of respondents (just over two-fifths; 21 out of 48). Four organisations preferred option 1. Option 2 (include racing in both Level A and Level B seriousness, with suitable descriptions) and option 3 (include racing in either Level A or

²⁶ <https://www.scottishsentencingcouncil.org.uk/about-sentencing/jargon-buster/>

Level B with an indication that it could move into another level of seriousness depending on the nature of the racing) each got support from one organisation.

80. No organisations indicated a preference for 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).
81. Among individuals, option 4 was the second most preferred choice after option 1.
82. The three organisations that did not support option 1 said it would limit the court's discretion. By way of an example, a distinction was drawn between a case of prolonged, arranged racing along winding roads (which would fall into Level A) and a case of two cars spontaneously racing away from traffic lights (involving lower culpability falling into Level B).

Our decision

83. We decided that racing should remain as a feature of Level A seriousness only. It is indicative of the highest level of culpability and involves a very high level of risk as more than one vehicle is involved.

Starting points and sentencing ranges

84. This section covers questions 12 – 15 in the consultation.

Starting points

Question 12 asked respondents if they agreed or disagreed with the non-inclusion of starting points within the sentencing ranges.

85. Two-thirds of respondents overall (32 out of 50), and five out of seven organisational respondents, disagreed with the non-inclusion of starting points.
86. Reasons given by organisations that agreed with the non-inclusion of starting points included:
 - It is consistent with the approach taken in the sentencing process guideline. A uniformity of approach between the guidelines is beneficial.
 - Starting points may suggest, especially to members of the public and families of victims, that there is a presumption against using the lower end of the sentencing range. This could give the impression that any sentence at the lower end of the range was too lenient.

- Starting points would be “arbitrary” and may reduce the scope for sentences to be individually tailored to the unique facts and circumstances of each case (this point was echoed by one of the individual respondents who commented at this question).
87. Organisations and individuals who supported the inclusion of starting points provided a range of reasons, including that it would:
- encourage the use of sentences from the full range indicated and act as a deterrent to potential offenders
 - assist public understanding
 - address the gap between public expectations and sentencing practices
 - assist sentencers by providing greater direction
 - improve consistency in sentencing practice
 - provide greater clarity for families in terms of managing expectations and understanding the sentences imposed
88. One organisation provided the following arguments in favour of starting points:
- Almost all sentencing guidelines of which it is aware, across a highly diverse collection of jurisdictions, use starting point sentences.
 - Appellate sentencing judgments in a range of common law jurisdictions provide starting point sentences, ensuring greater uniformity and consistency.
 - It is natural to seek a starting point if given a range: typically, starting points define the position within a category range from which to start calculating the provisional sentence.
 - If the guideline does not provide a starting point, most sentencers will likely take the midpoint.
 - There is no evidence from other jurisdictions that a starting point creates an element of rigidity or inflexibility.
 - The consultation document claims that starting points are inconsistent with the “Principles and purposes of sentencing” guideline but does not explain how. Courts can craft an individual sentence by moving up and down from the starting point to accommodate all relevant circumstances.
89. Finally, another respondent said that if there are no starting points sentencers will simply revert to the England and Wales guidelines, while the public will have an expectation that the higher end of the sentencing range is the starting point.

Our decision

90. We gave the arguments for and against inclusion of starting points very careful consideration. In the end, we decided that starting points should *not* be included in the guideline.

91. Each case will involve a unique set of facts and circumstances. What might be a suitable starting point for one case might not be appropriate for another. We do not believe that there is an “average”, or “standard”, sentence for these offences. The court must consider the specific nature and details of the case before it, taking a careful and individualised approach, in accordance with our “Principles and purposes of sentencing” and “The sentencing process” guidelines. This will lead the court to an appropriate range for the seriousness of the offence. The court will be better placed to determine where within that range the starting point sits. Listing starting points would, in our view, reduce the scope for the court to tailor the sentence to the specific circumstances of the case.
92. Starting points might suggest that the court’s role in sentencing is simply to go above or below the starting point, rather than to carry out a proper and independent analysis of all the circumstances before coming to an appropriate starting point of its own.
93. The usefulness of starting points in the relatively narrow ranges in the guideline would also be questionable – we do not believe it would be of value in a range of 4-7 years, for example.
94. We are not persuaded by the suggestion that starting points will assist public understanding or provide greater clarity for families in terms of assisting with predictability about the sentence likely to be imposed. A clear distinction cannot be drawn between starting points and sentencing ranges in this context – both are merely indicative of a possible sentence that may be adjusted once aggravating and mitigating factors and other matters are taken into account.
95. Families and members of the public would not necessarily get a reliable indication of the likely sentence based on a starting point in the guideline: they would not know the aggravating and mitigating factors, or other matters the court may have to consider which might affect the eventual sentence.
96. The High Court also does not generally set out starting points in its opinions about sentence appeals in Scotland.
97. We are also not persuaded by the argument that a lack of starting points will lead to inconsistency. The fact that other jurisdictions use starting points in guideline regimes does not suggest that guidelines without starting points will necessarily lead to inconsistency. We do not consider that there is any evidence of systematic inconsistency in current sentencing practice for death by driving offences in Scotland. We therefore do not believe that the introduction of this guideline without starting points will introduce inconsistency, particularly as the sentencing ranges it sets out reflect current sentencing practice.

98. In the end, our view is that the guideline should help sentencers assess the seriousness of the specific case they are dealing with in order to reach a starting point that they consider appropriate to its circumstances, rather than that it should prescribe starting points. This would, in effect, invert our sentencing process guideline by telling courts where they should start from without going through the necessary steps to reach that point.
99. Should the guideline be approved without starting points being included, we will of course monitor this aspect in particular to determine whether, and if so how, it affects sentencing practice.

Sentencing ranges

Question 13 asked respondents if they agreed or disagreed that the ranges set out within the guideline should reflect current sentencing practice.

Question 14 asked respondents if they agreed or disagreed that the sentencing ranges specified within the guideline are appropriate for each offence.

100. Two-thirds of all respondents to question 13 (34 out of 51) disagreed that the ranges set out within the guideline should reflect current sentencing practice, although most organisational respondents (five out of eight, consisting of both judicial organisations and all three legal organisations) agreed that the ranges should reflect current sentencing practice.
101. Those who agreed that the guideline should reflect current practice felt that no particular issues had been identified with current practice and that the proposed ranges seemed entirely fair and proportionate. It was suggested that all guidelines largely reflect practice, modified where there is a demonstrable need for a different approach.
102. In contrast, the analysis notes (at paragraph 5.18) that organisations and individuals who disagreed thought that “sentencing of death by driving cases was too lenient, too inconsistent, and/or out of step with public opinion”.
103. Other respondents who disagreed at question 13 pointed to the recent increases in the statutory maximum sentences for offences of causing death by dangerous driving and causing death by careless driving when under the influence of alcohol or drugs, and argued for these to be reflected in the guideline.
104. Responses to question 14 were of a broadly similar nature. Overall, the majority of respondents disagreed with the ranges specified for each of the offences, but for each

of the offences, most organisations agreed that the specified sentencing ranges were appropriate while most individuals disagreed.

105. Table 5.3 at page 39 of the analysis gives a full breakdown of responses in respect of each offence. You may wish to refer to the discussion of these that follows at paragraphs 5.21 to 5.39 of the analysis.
106. The overarching theme in the responses of those who disagreed at question 14 with the ranges specified for some or all of the offences was that sentences should be longer, with – as the analysis notes – “most favouring greater or automatic use of (lengthy) custodial sentences regardless of the circumstances of individual cases”. There were also calls for the statutory maximum sentences to be reflected in the ranges.

Our decision

107. We took careful account of the range of views expressed in response to questions 13 and 14 before reaching the conclusion that the sentencing ranges in the guideline should remain unchanged apart from in two respects, which are discussed at paragraphs 124-125 below.
108. We note that our proposal to reflect current sentencing practice was supported by most organisational respondents, but we recognise the strength of feeling expressed by most individual respondents who argued for longer sentences.
109. However, as the analysis notes, the relatively small number of responses means that the results of the consultation exercise should be treated with caution. It is not possible to conclude that the individual responses are genuinely reflective of public opinion in all respects.
110. By comparison, our public perceptions of sentencing survey in 2019 involved 1,000 participants and demonstrated that public attitudes to the sentencing of death by driving offences are more nuanced when explored in detail. For example, in a death by dangerous driving scenario, most respondents felt that the offender should receive a prison sentence. However, only around a fifth of respondents were in line with probable sentencing practice, with the majority being more lenient, thinking either a shorter prison sentence or a non-custodial sentence would be appropriate²⁷.

²⁷ See the discussion of this at paragraphs 18-24 of the consultation paper:

https://consultations.scottishsentencingcouncil.org.uk/ssc/death-by-driving-offences/user_uploads/causing-death-by-driving-guideline---consultation-paper.pdf

111. Other research commissioned by the Council has shown that there is a lack of public understanding and awareness of the law and sentencing practice in relation to death by driving offences. In particular, the difference between dangerous and careless driving, and the levels of culpability, or blame, involved, is not always well understood²⁸.
112. Different maximum sentences are set out in law for these offences due to the differing levels of seriousness. The guideline must reflect these differences.
113. Circumstances can also vary widely between cases. There may be a large difference between the harm caused – someone’s death – and the level of culpability of the offender, particularly in careless or inconsiderate driving offences, where the offence may have resulted from a momentary lapse in attention or single error of judgement by a person who has never been in trouble with the law before.
114. Recommending the uniform imposition of custody for all offences covered by the guideline would not result in fair and proportionate sentences and would be contrary to our “Principles and purposes of sentencing” guideline.
115. We have based the sentencing ranges in the guideline on a very careful and detailed analysis of sentences imposed by Scottish courts for death by driving offences over a number of years. This included seeking the views of sentencers, and examining the sentences with regard to sentencing practice more generally. Of particular relevance was the High Court’s practice when sentencing other offences which result in a fatality, such as murder and culpable homicide.
116. We have not encountered any evidence of systematic inconsistency or undue leniency in the sentencing of death by driving offences. The sentencing ranges we have agreed on reflect the upper limits of sentences which have actually been imposed by Scottish courts for each offence covered by the guideline.
117. As a number of respondents noted, the maximum sentences for two of the offences covered by the guideline – causing death by dangerous driving and causing death by careless driving when under the influence of drink or drugs – have recently been raised as a result of section 86 of the [Police, Crime, Sentencing and Courts Act 2022](#)²⁹.
118. The new maximum sentences are noted in the guideline although they are not included in the sentencing ranges for these two offences. It is important to note that the

²⁸ See para 2.1.2 of “Public perceptions of sentencing in Scotland - Qualitative research exploring causing death by driving offences” (<https://www.scottishsentencingcouncil.org.uk/media/2088/20210216-perceptions-of-sentencing-for-causing-death-by-driving-final.pdf>)

²⁹ <https://www.legislation.gov.uk/ukpga/2022/32/section/86/enacted>

guideline would *not* prevent a court from imposing the maximum sentence where it considers this to be the most appropriate sentence, or from imposing a sentence in excess of that at the top end of the sentencing range.

119. The reason we have taken this approach is that, in our view, the maximum sentences are likely to be considered only for cases that are so serious as to be out of the norm. Our guidelines are not intended to cover every possible eventuality. We consider that cases which are so serious as to justify a sentence outwith the maximum ranges will be rare enough that they do not need to be detailed within the guideline. It may also be open to the Crown to prosecute drivers in such cases for murder or culpable homicide, depending on the circumstances. If we included the maximum sentences in sentencing ranges it would likely increase sentences for cases at each level of seriousness. We do not think is a necessary or proportionate step.
120. Additionally, including the maximum available sentence within ranges may not give judges sufficient guidance as to the appropriate sentence, which could limit the guideline's usefulness, especially in terms of consistency and predictability.
121. It also would not reflect actual sentencing practice. The longest custodial sentences imposed for these offences do not approach life imprisonment. For example:
- the highest point of the sentencing range for the most serious of these offences in the guideline 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
 - the most common headline sentences for death by dangerous driving offences are between two and six years
122. Cases of causing death by careless driving when under the influence of drink or drugs, or causing death by driving while unlicensed, uninsured, or disqualified are so rare that there are insufficient data about them to establish current practice. The ranges for the most serious offences involving driving under the influence of drink or drugs reflect those for death by dangerous driving: although the standard of driving will generally be lower, the level of intoxication increases the level of blame.
123. In cases of driving while unlicensed, uninsured, or disqualified, the level of blame results, primarily, from the fact that the offence occurred when the offender was not allowed to drive. Our view is that such offences are likely to attract sentences similar to those for causing death by careless driving so the ranges broadly reflect those set for that offence³⁰. In practice, we expect that where the standard of driving is so bad that a

³⁰ Our approach in respect of ss3ZB and 3ZC was informed by the judgment of the UK Supreme Court in [R v Hughes \[2013\] UKSC 56](#), in which the court ruled that the standard for s3ZB requires "some element of fault, whether amounting to careless/inconsiderate driving or not, and which contributes in some more than minimal

sentence above the highest ranges in the guideline would be warranted, such cases would likely be prosecuted as causing death by dangerous driving instead (or alongside a death by dangerous driving charge).

124. In respect of the changes we decided to make, we agreed with a respondent who suggested that there was a disparity between the lower end of the range for causing death by dangerous driving and the upper end of the range for causing death by careless, or inconsiderate, driving. We therefore decided that for offences of causing death by careless, or inconsiderate, driving:
- the range for Level A seriousness should be changed from “Level 2 community payback order – 18 months’ imprisonment” to “Level 2 community payback order – 2 years’ custody”
 - the range for Level C seriousness should be changed from “Fine of up to £2,500 – level 1 community payback order” to “Fine of up to £10,000 – level 2 community payback order”
125. As a result of this, we also decided to increase the Level A range for causing death by driving while unlicensed, uninsured, or disqualified from “Level 2 community payback order – 18 months’ imprisonment” to “Level 2 community payback order – 2 years’ custody”. This is so that it aligns with the range for causing death by careless, or inconsiderate, driving for the reasons noted at paragraphs 122-123.
126. It should be noted that very few cases of causing death by careless, or inconsiderate, driving result in a custodial sentence at all and we are not aware of any recent cases in which the statutory maximum has been approached³¹. We expect that circumstances which would attract a penalty beyond the range set out in the guideline would likely be prosecuted either as causing death by dangerous driving instead, or with an alternative death by dangerous driving charge (meaning that the driver could be convicted of either causing death by careless driving or causing death by dangerous driving).
127. While these are the only changes to the sentencing ranges, it is important to note that, as is set out elsewhere in this report, the guideline has been strengthened in other key respects:
- aggressive driving is now included, and racing has been retained, in the highest level of seriousness, meaning they are likely to attract a more severe sentence

way to the death”. The reasoning in *Hughes* was adopted in the Scottish case of [Stewart v HMA \[2017\] HCJAC 90](#).

³¹ As we noted in the consultation paper, data obtained from SCTS under section 10 of the Criminal Justice and Licensing (Scotland) Act 2010 suggested that there had been only four custodial sentences imposed for causing death by careless driving offences out of 52 total offences in a three year period.

- two aggravating factors have been added – the victim being a vulnerable road user and the offence being committed during police pursuit – which make an offence more serious, meaning that a judge can increase a sentence when they apply
- driving while inexperienced has been removed as a mitigating factor for all but causing death by careless, or inconsiderate, driving offences – this means, for example, that under the guideline a death by dangerous driving offence would not generally have its seriousness reduced because of driver inexperience

Disqualification periods, young driver scheme, drink driver rehabilitation scheme

Question 15 asked respondents if they agreed or disagreed with the non-inclusion of guidance on disqualification periods, the young driver scheme, or the drink driver rehabilitation scheme.

128. Two-thirds of respondents (33 of 51) felt that guidance on disqualification periods should be included. Views were divided in respect of the inclusion of guidance on the young driver scheme (just under half – 24 out of 50 – were in favour of guidance) and drink driver rehabilitation scheme (25 were in favour of guidance and 25 against it).
129. A majority of organisations supported the inclusion of guidance on disqualification periods, while a majority of organisations were not in favour of including guidance on the other two disposals.
130. The analysis notes at paragraphs 5.41 and 5.42 that respondents (particularly individuals) often provided views on the disposal itself rather than on the inclusion of guidance on its use; and that the nature of the responses suggests that some people may have misunderstood or misread the question.

Our decision

131. While we understand the desire of some respondents for further guidance on disqualification periods, having considered this further we have concluded that, apart from in one respect, there is sufficient information on disqualification periods in the guideline.
132. For each offence, the guideline gives the minimum period of disqualification set down in law. No maximum disqualification periods are set down in law and we have decided not to give any in the guideline. It is up to the sentencing judge to determine the length of the disqualification period based on the circumstances of the case before the court.

133. Where we have decided to give further information is in respect of disqualification periods where imprisonment is imposed. For offences of causing death by dangerous driving and causing death by careless driving when under the influence of drink or drugs, we have added footnotes explaining that when a life sentence is imposed, the period of disqualification which the court would otherwise have imposed must be extended by a period equal to the punishment part of the life sentence (the punishment part is the minimum time the person will spend in prison before the Parole Board for Scotland can consider them for release into the community).
134. We believe that adding more information than this would over-complicate the guideline due to the level of technical detail required.
135. We also reached the view that as both the young driver scheme and the drink driver rehabilitation scheme are rarely, if ever, used for death by driving offences, there is no need to include guidance on them. Doing so would similarly over-complicate the guideline without providing much practical benefit.

Aggravating and mitigating factors

136. This section covers questions 16 – 20 in the consultation.

Appropriateness of aggravating and mitigating factors

Question 16 asked respondents if they agreed or disagreed that the aggravating and mitigating factors listed in the table at step 3 for each offence are appropriate.

137. Due to the scope of question 16 in the consultation – covering all of the aggravating and mitigating factors for each of the offences in the guideline – we do not propose to narrate the changes suggested by respondents here. You may wish to refer to the detailed breakdown of responses to this question given at paragraphs 6.2 to 6.37 of the analysis.
138. There were two minor errors in respect of mitigating factors in the draft guideline as consulted on³²:
- “Involuntary intoxication due to alcohol or drugs” was listed as a mitigating factor for offences of causing death by careless driving when under the influence of drink or drugs and for offences of causing death by careless, or inconsiderate, driving. It should only have been listed for the former.

³² There was also a minor typographical error in the draft guideline as consulted on pages 4, 8, 13, and 17, where it referred to the Road Traffic Act 1998 instead of 1988.

- “The actions of the victim or a third party contributed significantly to the likelihood of a collision occurring and/or death resulting” was also listed as a mitigating factor for offences of causing death by careless driving when under the influence of drink or drugs and for offences of causing death by careless, or inconsiderate, driving. As was noted in the consultation paper (page 37), the wording for causing death by careless, or inconsiderate, driving offences should have been, “The actions of the victim or someone else contributed to the commission of the offence”.

Our decision

139. We carefully considered the suggested changes to the aggravating and mitigating factors for each offence. We agreed to add the following aggravating factor to each offence:
- Victim was a vulnerable road user (for example, a pedestrian, cyclist, horse rider, or motorcyclist)
140. Addressing vulnerable road users in the guideline was suggested by an individual respondent in relation to the assessment of seriousness and by an organisational respondent in response to question 26 in the consultation, which sought any other comments in relation to any matter arising from the consultation. Neither specifically suggested that it should be included as an aggravating factor, but this is where we feel it is most appropriate. The features of seriousness in the guideline generally focus on the standard of driving. The victim being a vulnerable road user is an aggravation of this.
141. Including vulnerable road users in the guideline also reflects the [hierarchy of road users as outlined in the Highway Code](#)³³, which was noted by the organisational respondent.
142. A related issue we considered was whether the driving of larger vehicles, such as HGVs, should be treated as an aggravating factor. We gave this careful thought but in the end decided against including it in the guideline. We felt that it created a risk of unduly holding drivers of larger vehicles to a higher standard of driving, and that the features of seriousness outlined in the guideline are sufficient to cover the possibility that driving a particular vehicle in a particular way may have consequences.
143. A further aggravating factor we have decided to add for causing death by dangerous driving is “Offence committed while being pursued by the police”. Although this was not suggested by any respondent, we felt that where a police chase is ongoing many of the factors which are indicative of a particular level of seriousness are likely to be present – excessive speed, disregard of road signals and signs, a prolonged and deliberate

³³ <https://www.gov.uk/guidance/the-highway-code/introduction#ruleh1>

course of bad or aggressive driving, and so on. The fact that these are taking place in the specific context of an attempt to out-run the police is a clear aggravation, and the guideline should reflect this.

144. We decided to make the following changes to the mitigating factors for each offence:

Causing death by dangerous driving

- We have removed “Driving while inexperienced”
- We have added “Voluntary surrender of licence (where applicable)”

Causing death by careless driving when under the influence of drink or drugs

- We have removed:
 - “Driving while inexperienced”
 - “Driving in an emergency, whether in a designated emergency vehicle or otherwise”
 - “Involuntary intoxication due to alcohol or drugs”
- We have added “Voluntary surrender of licence (where applicable)”

Causing death by careless, or inconsiderate, driving

- We have removed “Involuntary intoxication due to alcohol or drugs” as this was included in error
- We have changed “The actions of the victim or a third party contributed significantly to the likelihood of a collision occurring and/or death resulting” to what it was intended to be – “The actions of the victim or someone else contributed to the commission of the offence” (see paragraph 138 above)
- We have added “Voluntary surrender of licence (where applicable)”

Causing death by driving: unlicensed, uninsured, or disqualified drivers

- We have removed:
 - “Previous good driving record”
 - “Driving while inexperienced”
- We have added:
 - “Actions of others” (with same wording as used for causing death by careless, or inconsiderate, driving offences)
 - “Voluntary surrender of licence (where applicable)”

145. One suggested change that we carefully considered before deciding not to make is worth mentioning. A respondent proposed that “More than one person killed” should not be considered as an aggravating factor. In this respondent’s view, more than one death entails greater harm. It should be considered as part of the assessment of seriousness and listed in the highest level of seriousness in the guideline.

146. We recognise that this is a particularly sensitive and fraught issue but decided against a change. For each offence, the guideline says:

“...the level of harm, which is that death has been caused, has been fixed by statute. The seriousness of the offence is, therefore, largely determined by the level of culpability of the offender.”

147. In cases which may involve broadly the same features, and a very similar standard of driving, a different number of deaths could result due to other circumstances, such as the number of passengers in one of the vehicles involved in a collision. Including multiple fatalities as a feature of seriousness might result in a case being assessed at a higher level of seriousness than one where the culpability of the driver was of a similar nature, and receiving a disproportionately higher sentence. For this reason, we think that more than one death should remain as a factor which aggravates the offence rather than being a determinant of seriousness. This means that it will be considered at step 3 in the sentencing process, rather than step 1, and the court can increase the sentence as a result, including by selecting a sentence in a higher range if it considers this to be appropriate.

Previous convictions, remorse, relationship between offender and victim(s)

Question 17 asked respondents if they agreed or disagreed that the guideline should provide further guidance on the following aggravating and mitigating factors: previous convictions, remorse, and the relationship between the offender and victim(s).

148. There was a similar breakdown in the responses to this question as there was in respect of question 15 in the consultation. Most respondents (37 out of 51) agreed that further guidance should be provided on how previous convictions should be considered, with views being more mixed on further guidance for the other two factors. Just over half (27 out of 49) respondents agreed there should be further guidance on remorse, and 26 out of 50 agreed there should be further guidance on the offender’s relationship to the victim(s).

149. Again, the analysis notes that it was common for respondents (individuals in particular) to provide views on the factor itself rather than on the inclusion of guidance on its use.

Our decision

150. Having considered, in particular, the varying views of organisations on this question, we reached the view that it was not necessary to provide further guidance on any of the three factors. We think that the information provided in the guideline is sufficient. Each

of the factors is listed in general terms to allow sentencers the discretion to determine their relevance and appropriate weight with regard to the particular circumstances of the cases before them.

Actions of others

Question 18 asked respondents if they agreed or disagreed with the approach to listing contributory actions of others as mitigating factors.

151. Note: see the discussion of the actions of others in relation to question 16 above.

152. Two-thirds of respondents overall (33 out of 49) agreed with the approach to listing contributory actions of others as mitigating factors in the draft guideline. All organisations who answered the closed question agreed. One organisation did not answer the closed question or express a clear view – it simply commented that if this factor is to be included, it should appear in the list for each offence.

153. The analysis notes at paragraph 6.62 some of the reasons given by those who disagreed, who were all individuals. These were of a more general nature or involved calls for more severe sentences and so did not raise any points specific to the issue covered by the question.

154. We noted some of the suggestions from those who agreed, both individuals and organisations:

- the factor should be listed for all offences, if at all
- in all offences, the contributory actions of others “within or outside a vehicle” should be considered as mitigating factors
- there needs to be caution due to the potential for victim blaming
- the factor should not be listed for dangerous driving or careless driving when under the influence of drugs or alcohol

Our decision

155. As is noted in relation to the discussion of question 16 above, the only change that we decided to make was to add the actions of others to the list of mitigating factors for causing death by careless driving when under influence of drink or drugs offences. We have used the same wording as is used for causing death by careless, or inconsiderate, driving offences: “The actions of the victim or someone else contributed to the commission of the offence”.

156. In respect of the potential for victim blaming, it is important to highlight that the types of circumstances in which others’ actions may have been contributory might include

where the victim has placed themselves at particular risk (while the circumstances might be highly unusual, there has been a relatively recent case of causing death by careless driving involving a victim who was lying in the road³⁴). The fact that the court will take this into account in sentencing does not mean that the victim or someone else is being blamed for the offence. It will be for the court to decide whether it will affect the sentence.

Voluntary surrender of licence

Question 19 asked respondents if they agreed or disagreed that the voluntary surrender of a licence by an older driver should be listed as a mitigating factor.

157. Respondents were divided on the question of whether the voluntary surrender of a licence by an older driver should be listed as a mitigating factor. 26 out of 53 agreed that it should be listed, and 27 disagreed. Organisations were split – of those that answered the closed question, four agreed and three disagreed. One organisation which did not indicate whether it agreed or disagreed with the question, commented that it did not think guidance should be included as the list is intended to be non-exhaustive and surrender of a licence could be provided as evidence of remorse without needing to be listed separately.
158. There were more comments from organisations that disagreed than from those that agreed. It was suggested that it does not mitigate culpability and that for all offences the driver would be disqualified from driving in any event, so voluntary surrender of a licence would not be a sufficiently reliable indicator of remorse to merit being listed in the guideline.
159. One organisation that agreed with it being listed said it should only be considered in cases where the driver would have the ability to reapply for their driving licence at the end of any period of disqualification, otherwise the surrender would serve no practical purpose.
160. Several organisations supported listing the factor provided it applied to all offenders, regardless of age.

Our decision

161. As noted above in relation to question 16, we decided to add “Voluntary surrender of licence (where applicable)” as a mitigating factor for all offences, on the basis that it can be a clear indicator of remorse and even of the driver’s trauma, particularly when

³⁴ <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-58175278>

the licence is surrendered pre-conviction. We decided that it should not be restricted to older drivers for these reasons, although we also noted that the definition of “older driver” would not have been clear in any event.

Additional factors

Question 20 asked respondents if any additional mitigating or aggravating factors should be listed in the guideline.

162. Around a third of respondents (18 out of 50) suggested that additional aggravating or mitigating factors should be listed in the guideline. The main suggested additional factors we considered were:
- two aggravating factors found in the England and Wales guideline: (i) “The offender’s irresponsible behaviour such as failing to stop, falsely claiming that one of the victims was responsible for the collision, or trying to throw the victim off the car by swerving in order to escape”; and (ii) “driving off in an attempt to avoid detection or apprehension”
 - failure to provide a sample (leaving matters to parole evidence from police officers) should be an aggravator for causing death by careless driving while under the influence of drink or drugs
 - the recording of the driving for social media purposes
163. There were also a number of suggestions about various health related factors that should be taken into account, both as aggravating and mitigating factors, and that any undisclosed physical/medical condition should be listed as an aggravating factor for all offences

Our decision

164. We decided against including the additional factors suggested at question 20, noting, in respect of the suggestion to include “driving off in an attempt to avoid detection or apprehension” from the England and Wales guideline that our draft guideline already lists “leaving the scene of the offence with a view to evading detection”.
165. In respect of a failure to provide a sample at the scene, this would be a separate offence³⁵. The recording of the driving for social media purposes might well be considered aggravating but we took the view that the prevalence of dashcams now means that recording driving is very common by default, so this is not an issue that needs to be highlighted.

³⁵ Sentencing for multiple offences is covered at paragraphs 29-34 of the Council’s guideline on the sentencing process: <https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf>

166. However, as noted above in respect of question 8, we did decide that “Impairment as a result of driving when knowingly suffering from a medical or physical condition, including a failure to follow medical advice or take prescribed medication” should be added as a feature of seriousness at Level B for causing death by dangerous driving offences. This addresses some of the health related factors raised by a range of respondents, and also covers the issue of an undisclosed medical condition, which would only be relevant if it had impaired the standard of driving.

Potential impacts of the guideline

167. Questions 21-25 sought views on the likely impact of the guideline, including in relation to potential costs and benefits. Our formal analysis of what these might be will be set out in the final impact assessment on the guideline, which will be published alongside the final guideline if it is approved by the High Court.

Question 21 asked respondents if they thought the guideline would influence sentencing practice in Scotland.

168. Around two-thirds of respondents who answered question 21 (35 out of 52) – including all but one of the organisational respondents – thought that the guideline would influence sentencing practice in Scotland.

169. Many felt that it would bring clarity and encourage greater consistency in relation to the sentencing of death by driving offences. Several noted that Scottish courts have in the past made reference to the English and Welsh guidelines. The introduction of a Scottish guideline was therefore to be welcomed and would be beneficial.

170. One organisation noted that research on the effects of sentencing guidelines in other jurisdictions, including in England and Wales, had found a limited increase in sentencing consistency. This respondent felt that the guideline would improve consistency but its effect might be similarly limited, in part due to the exclusion of starting points.

171. The one organisation that answered “no” to this question said that the guideline would not have a significant impact on sentences if it reflects current sentencing practice, as they believed it should.

172. A minority of the individuals who answered this question felt that the guideline would not change sentencing practice. They generally took the view that courts would continue to be too lenient and prioritise the interests of offenders over victims.

Question 22 asked respondents if they agreed or disagreed that the guideline would increase public understanding of how sentencing decisions in death by driving cases are made.

173. Just over half of respondents who answered question 22 (28 out of 54) agreed that the guideline would increase public understanding of how sentencing decisions in death by driving cases are made.

174. However, a number of qualifications to this were noted:

- any increase in public understanding may be limited and would not necessarily lead to agreement with the sentencing decisions reached
- public understanding also depends on the accurate reporting of cases and sentences by the media – one organisational respondent raised a concern that sentences, particularly in relation to causing death by careless driving, will continue to be sensationalised and therefore misunderstood and criticised
- significant efforts were required in order to raise awareness of the guideline to ensure it was understood and referred to by the public and media

175. Those who did not agree that the guideline would lead to an increase in public understanding made broadly similar points to these.

Question 23 asked respondents what benefits they saw arising from the introduction of the guideline, if any.

Question 24 asked respondents what negative effects they saw arising from the introduction of the guideline, if any.

176. Due to the overlapping nature of the views expressed, questions 23-24 can be grouped together.

177. Organisational respondents gave generally similar responses at questions 23 and 24. They did not identify any negative effects at question 24 (although some gave no response to that question). In respect of benefits, organisational respondents thought the guideline would:

- provide useful guidance for sentencers
- result in greater consistency (and predictability) in sentencing for death by driving offences
- increase openness and transparency in sentencing
- be helpful to legal professionals in advising clients
- remove reliance on the England and Wales guidelines
- increase awareness and understanding of sentencing and sentences for bereaved families and the wider public

- potentially reduce the number of appeals of sentence and increase confidence in the sentencing process

178. The analysis notes that these were broadly similar to the potential benefits outlined in the draft impact assessment on the guideline.

179. Some individual respondents also thought the guideline would bring benefits without having any negative effects. They largely echoed the points raised by organisational respondents, although some highlighted other potential benefits such as safer roads and offenders being held responsible for their actions and receiving more appropriate (or tougher) sentences. It was noted that these potential benefits would depend on the effective implementation of the guideline and its being followed consistently by the courts.

180. Individual respondents who saw no benefits arising from the introduction of the guideline made a number of points, including that the guideline lacked clarity, sentencers would not necessarily follow it, and that the justice system would continue to favour the interests of offenders and sentences would continue to be too lenient.

Question 25 asked respondents what costs (financial or otherwise) they saw arising from the introduction of the guideline, if any.

181. 29 respondents provided comments at this question, although some did not address the issue of costs directly. Of those who did comment on the issues of costs, around half did not anticipate any costs arising from the introduction of the guideline, with a few of these respondents suggesting that there may be cost savings as a result of a reduction in appeals against sentence. The other half suggested a number of potential costs may arise in relation to awareness raising activities, lengthier and more complex court proceedings, and increased use of custodial sentences.

182. Respondents who did not directly address the issue of costs said either that they were unsure about what costs may arise, or restated views about a perceived leniency in sentencing.

Our decision

183. As already indicated, the Council is mindful of its statutory objective to promote greater awareness and understanding of sentencing policy and practice. We will consider further activity and engagement with others to help increase public knowledge about how people are sentenced in this area. We will liaise with other bodies regarding training, resourcing, and promotion of the guideline as appropriate.

184. In relation to the impacts of the guideline, we have considered the range of views provided and, where appropriate, have incorporated these into the final impact assessment for this guideline.

Further comments

185. Question 26 was the last question in the consultation paper. It was an open question, which invited respondents to make any other comments about matters arising from the consultation. A range of points and suggestions were made. Most of these have either been addressed elsewhere in this report (such as in relation to vulnerable road users) or are outwith the Council's remit.

Next steps

Submission of guideline for approval

186. Sentencing guidelines developed by the Council must be approved by the High Court of Justiciary before they apply to decisions about sentencing. The High Court has the power to approve or reject a guideline, or to approve it with changes³⁶.
187. The Council agreed to finalise the “Statutory offences of causing death by driving” guideline in April 2023 and to submit it to the High Court for approval as soon as practical thereafter. It is intended to do so shortly after publication of this report.

Entry into force

188. Should the guideline be approved (either as submitted or with changes), it will likely come into force later in 2023 or early in 2024, though this is a matter for the High Court to determine. We intend to work with the judiciary ahead of this to ensure they are familiar with the guideline and its applicability, as well as carrying out further public education and awareness raising work.
189. Further details about the guideline will be made available on the Council’s website at scottishsentencingcouncil.org.uk in due course.
190. We welcome views from all interested parties on our draft guidelines, business plan, or sentencing in general. If you wish to get in touch with the Council, you can do so at sentencingcouncil@scotcourts.gov.uk.

³⁶ See section 5 of the Criminal Justice and Licensing (Scotland) Act 2010:
<http://www.legislation.gov.uk/asp/2010/13/section/5>

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