

# Public perceptions of sentencing in Scotland

## Qualitative research exploring causing death by driving offences

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Qualitative research prepared for the consideration of the Scottish Sentencing Council. The views expressed are those of the authors and do not necessarily represent those of the Council.

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## Key findings

The aim of this research study was to explore public perceptions of the sentencing of causing death by driving offences in Scotland, including the perceptions of families of victims. Until now, no in depth qualitative work has considered Scottish attitudes towards sentencing in this context. In total 30 people took part in a focus group or interview in March and April 2019. Eighteen people took part in three public focus groups. They were aged between 23 to 77 years. Eight interviews were conducted with 12 family members of victims (parents, siblings and a cousin) from across Scotland.

- While participants were aware of some offences, overall participants did not have a clear understanding of the full range of causing death by driving offences. For example, the distinction between dangerous and careless driving was not always well understood by participants. Participants tended to associate careless driving with a lack of intent whereas dangerous driving was associated with more deliberate intent.
- Participants were aware of some of the factors currently taken into account during sentencing including the culpability of the offender, the harm caused and whether the offender showed any sign of remorse. However, overall there was a lack of awareness in terms of the full extent of factors which the court takes into account during sentencing.
- Proportionality was considered to be of great importance. There was a view that sentences should be scaled according to the culpability of the offender (e.g. the more reckless the driving was, the higher the sentence should be). Offences considered most serious, by both members of the public and family members of victims, were those where people were behaving in a way they knew was against the law: driving dangerously, driving whilst under the influence of alcohol or drugs or driving whilst disqualified. Careless driving was generally perceived as less serious than the other offences.

Participants thought that certain factors should carry more weight than other factors namely: the seriousness of the offence, the harm caused, the impact on the victim and the risk of re-offending. There was no consensus as to whether a guilty plea is currently, and should be, taken into consideration when sentencing.

- There was no consensus as to whether, and how, multiple fatalities should impact on sentencing. Some participants thought the sentence should be longer to take into account each life lost. Others thought the sentence should not be higher as the circumstances that caused the incident could

be the same for one or multiple people and the sentence should be based on the circumstances.

- There were participants who thought prison should be a sentencing option for all types of causing death by driving offences while others thought that a custodial sentence should only be given for the most serious offences. Participants thought a custodial sentence should be long enough to mark the seriousness of the crime and act as a deterrent but not be so long as to prevent rehabilitation and reform of the offender.
- A prison sentence was not always deemed appropriate, and there were views that a community-based sentence would be more likely to result in rehabilitation.
- In addition to a prison sentence or community-based sentence, participants thought offenders should have a period of disqualification from driving, be made to re-sit and pass their driving test and be issued a fine. Family members said they would appreciate an apology from the offender.
- Participants thought disqualification from driving should be longer. There was a view that running disqualification and a custodial sentence concurrently was ineffective and diminished the sentence. Some participants thought people should be disqualified from driving for life to prevent them from reoffending.

Overall, participants felt that causing death by driving offences were not taken as seriously as they should be and in particular that their expectations of sentencing were not met by the reality of what happened. This led to a sense that the system was “too lenient” and did not reflect the harm caused, both in terms of the victim’s life and the loss to the family of the victim. Charge-reductions; lowering a sentence because of a guilty plea; releasing offenders before their full prison sentence is served; and, sentences invariably falling far short of the statutory maxima were all cited as examples of this sense of leniency.

- Although the need for flexibility in sentencing to take into account the individual circumstances of the case and previous convictions was recognised, current sentencing was perceived as inconsistent. Greater transparency was sought to understand sentencing decision-making. Participants wanted sentencing to be proportionate to the facts and circumstances of the case and thought sentencing guidelines could help achieve greater consistency and transparency in sentencing.
- Although participants were very interested in the attitude of the offender (and expressions of genuine remorse), there was reluctance among many participants to take the offender’s personal and family circumstances into



account as mitigation for their actions. Some were of the view that only “hard facts” should be considered under mitigating factors as it is difficult to assess the sincerity of emotions such as remorse. However, some people’s views altered once they were presented with the details of a real case.

- Family members of victims would like to see improvements in communication around the reasons for sentencing decisions and the range of support available to them. They would also welcome the opportunity of receiving an apology from the offender. Victim statements were perceived as a good method to give voice to the victim and for the judge to understand the impact of their loss on the family. There were participants who valued the support they received from services such as the Victim Notification Scheme however, some family members felt uninformed about the support that may be available.
- When asked if their views on sentencing for causing death by driving offences had changed after reviewing a scenario based on a real case, there were participants who said their opinions stayed the same and that sentences were “too lenient” while others said they revised their views noting the many factors to consider when sentence such cases.

# 1 Introduction

## 1.1 Background

### 1.1.1 Attitudes to sentencing

Sentencing policy and practice is of central importance not only to the administration of justice, but also to public confidence in the administration of justice, and more broadly, trust in state institutions, not least in the judiciary. Responses to general public opinion surveys tend to suggest that people feel that sentencing is too lenient. However, research in other western countries exploring public attitudes in-depth, reveals a more complex picture. First, the sense of leniency is, at least in significant part, a function of knowledge. People tend to think that sentencing is far more lenient than it actually is. Second, when people are given the responsibility of mock-sentencing an anonymised case, people's responses tend to be much closer to those of actual sentencing practices than they had expected and far more nuanced than top-of-the head opinion poll surveys would suggest. Third, people tend to greatly over-estimate the seriousness of crime.<sup>1</sup> While these (and other findings) are well established in other comparable countries, relatively little is known about Scottish penal attitudes.<sup>2</sup> Moreover, these findings may be more nuanced in specific and difficult cases including, for example, causing death and serious injury by driving offences.

### 1.1.2 Causing death by driving offences policy

This research was funded by the Scottish Sentencing Council (SSC). The SSC was established in 2015, under the Criminal Justice and Licensing (Scotland) Act 2010.<sup>3</sup> Its function is that of an independent advisory body and its main remit is to provide guidance on sentencing to the Scottish courts. In its 2018-21 Business Plan,<sup>4</sup> the SSC expressed its intention to produce a series of offence-specific

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<sup>1</sup> Hough, Mike, Bradford, Ben, Jackson, Jonathan and Roberts, Julian R. (2013) Attitudes to sentencing and trust in justice: exploring trends from the crime survey for England and Wales. Ministry of Justice analytical series, Ministry of Justice, London, UK.

<sup>2</sup> See for example, A. Freiberg and K. Gelb (2008) Penal Populism, Sentencing Councils and Sentencing Policy Federation Press; N. Hutton (2005) 'Beyond Populist Punitiveness?' Punishment & Society Vol7 (3) pp.1462-4745; N. Hutton and C. Tata (2010) 'A Sentencing Exception?' Federal Sentencing Reporter Vol.22 pp272-278; J. Roberts and M, Hough (eds) (2002) Changing Attitudes to Punishment Willan; Scottish Government (2017) Scottish Crime and Justice Survey 2016/17; C Tata and N. Hutton (2003) 'Beyond the Technology of Quick Fixes' Federal Sentencing Reporter vol.16 pp 67-75; C. Wilson (2012) The Public and the Justice System: attitudes, drivers and behaviour Scottish Government

<sup>3</sup> Sections 1-13.

<sup>4</sup> Scottish Sentencing Council, 2018. Business Plan 2018-21. Available at:

<https://www.scottishsentencingcouncil.org.uk/media/1926/scottish-sentencing-council-business-plan-2018-21.pdf> [Accessed 8 May 2019]

guidelines, including one pertaining to causing death by driving offences. The Council recognised that such offences raise particular concern amongst members of the public given that they involve loss of life, but that these cases are especially complex. This complexity can, in part, be related to the assessments of culpability. In driving offences, the culpability of the offender can often be relatively low in relation to the harm caused and in comparison to other crimes which involve a loss of life.

The SSC's interest in offences of causing death by driving also comes against the backdrop of an announcement by the UK Government of its intention to increase in penalties for drivers who cause death by dangerous driving or driving under the influence of alcohol or drugs<sup>5</sup>. This change would increase the maximum penalty from 14 years imprisonment to one of life imprisonment. Furthermore, a new offence of causing serious injury by careless driving may also set to be created. This follows from its public consultation on the penalties relating to death and serious injury caused by driving. The consultation received over 9,000 submissions with 90 per cent of respondents supporting the need for this new offence and 70 per cent supporting the increase in sentence associated with causing death by dangerous driving.<sup>6</sup>

### 1.1.3 Public attitudes to causing death by driving offences

The first stage of the SSC's commitment to exploring sentencing for causing death by driving offences was to commission Professor Cyrus Tata and Dr Rachel McPherson to conduct a review of the international literature on the legal landscape of death caused by driving cases, including the relevant data and research in both Scotland and other jurisdictions.<sup>7</sup> This review discussed research to date noting the particular focus which has existed on the issue of culpability: the relationship between relatively low levels of culpability and the high level of harm caused (which can lead to acute dilemmas at sentencing); the offender's culpability in relation to their personal characteristics; and how culpability may be reduced by mitigating factors. The framework developed by the Sentencing Council of England and Wales<sup>8</sup> was considered in particular detail given that it is often explicitly referred to by the Scottish courts in their decision

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<sup>5</sup> These offences are matters reserved to the UK Government.

<sup>6</sup> Ministry of Justice, 2017. Response to the consultation on driving offences and penalties relating to causing death or serious injury. Available at: <https://consult.justice.gov.uk/digital-communications/driving-offences-causing-death-or-serious-injury/results/consultation-response-on-driving-offences-print.pdf> [Accessed 8 May 2019]

<sup>7</sup> McPherson, R. and Tata, C., 2018. Causing death by driving offences: Literature Review. Available at: <https://www.scottishsentencingcouncil.org.uk/media/1900/20181001-literature-review-dbd-final.pdf> [Accessed 8 May 2019]

<sup>8</sup> Sentencing Council, 2008. Death by Driving: Definition Guideline. [pdf] Available at: <https://www.sentencingcouncil.org.uk/publications/item/causing-death-by-driving-definitive-guideline/> [Accessed 8 May 2019]

making and also in view of its methodology for decision-making in these complex cases.

The guidelines of the Sentencing Council of England and Wales were informed, in part, by research conducted by Hough et al, into attitudes to the sentencing of offences involving causing death by driving.<sup>9</sup> The first empirical work of this type had previously been conducted in Canada in 1983<sup>10</sup> and showed, amongst other things, that the public was focused on consequences more than culpability in their assessment of offenders' sentencing. The findings from this study were confirmed later in a small empirical study looking at the U.S.<sup>11</sup> and then later British work carried out by Applegate et al, which similarly suggested that the level of harm caused and the offender's criminal record were the two issues most related to the level of punitiveness exhibited by members of the public.<sup>12</sup> As Hough et al noted in 2008, the relatively limited and small-scale research which had taken place up until that point confirmed that the public generally subscribed to a harm based model, rather than one which considers offender culpability.<sup>13</sup> However, the more probing and larger scale research suggested an emphasis on proportionality with culpability playing a greater role than suggested by previous and more limited research conducted elsewhere. Until now, no work has considered Scottish attitudes towards sentencing in this context. This work will contribute to an important, but small, existing body of work on public attitudes towards sentencing in causing death by driving offences but with specific focus on Scotland, where the approach to sentencing has been historically "rather less formulaic than the English sentencing guidelines."<sup>14</sup>

#### 1.1.4 Death by driving offences

In Scotland, 'homicide' is the umbrella term which encapsulates the separate offences<sup>15</sup> of murder and culpable homicide. Through this distinction, a range of circumstances in which a death can be caused is represented. Since the introduction of the Road Traffic Act 1960, causing death by means of a motor

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<sup>9</sup> Hough, M, Roberts, J.V. and Jacobson, Jessica (2008) Attitudes to the sentencing of offences involving death by driving. Project Report. Sentencing Advisory Panel, London, UK 5. [pdf] Available at: <http://eprints.bbk.ac.uk/3799/1/3799.pdf> [Accessed 8 May 2019]

<sup>10</sup> Doob, A. and Roberts, J.V. 1983. Sentencing: An Analysis of the Public's View. Ottawa: Department of Justice Canada.

<sup>11</sup> Dejoy, D. and Klippel, J. 1984. Attributing Responsibility for Alcohol-Related Near-Miss Accidents. *Journal of Safety Research*, 15: 107-115.

<sup>12</sup> Applegate, B., Cullen, F., Link, B., Richards, P. and Lanza-Kaduce, L. 1996. Determinants of Public Punitiveness toward drunk driving: A Factorial Survey Approach. *Justice Quarterly*, 13: 57-79

<sup>13</sup> Roberts et al. (2008) Pg 6

<sup>14</sup> *Milligan v HM Advocate* [2015] HCJAC 84, Lord Menzies at 5. See also McPherson and Tata 2018 at 2.5.

<sup>15</sup> For a discussion about the extent to which these offences are separate, see Ferguson, P., and Mc Diarmid, C., 2014. *Scots Criminal Law: A Critical Analysis*. Edinburgh: Edinburgh University Press. at 9.21.

vehicle has been treated separately under statutory law, and is now specifically provided for by the UK-wide Road Traffic Act 1988. Despite this, potential still exists for prosecutions to be brought under the common law,<sup>16</sup> but the view in Scotland, supported by *Purcell*,<sup>17</sup> seems to be that any prosecution under common law, even in the most serious of cases, can only be for culpable homicide and not murder, unless there was a wilful act intended to kill or cause physical injury. A vehicle can, of course, be used as a weapon.<sup>18</sup>

The maximum sentence which can be imposed for a causing death by driving offence has been prescribed by Parliament. For causing death by dangerous driving, the most serious of the offences contained within the 1988 Act, this is currently 14 years' imprisonment, with a minimum disqualification period of two years and a compulsory re-test.

There is greater difference in sentencing in the context of causing death by careless or inconsiderate driving. Where this is caused by drink or drug intoxication (section 3A), the maximum penalty is 14 years' imprisonment, with a minimum disqualification period of two years with a compulsory extended re-test required.

For causing death by careless or inconsiderate driving under section 2B, the maximum penalty is five years' imprisonment, with a minimum disqualification period of 12 months and discretion as to the issue of a re-test.

For causing death by driving whilst unlicensed or uninsured (section 3ZB) the maximum penalty is two years' imprisonment with a minimum disqualification period of 12 months and discretion as to the issue of a re-test. For causing death by driving whilst disqualified (section 3ZC) the maximum penalty is 10 years' imprisonment with a minimum disqualification period of two years with a compulsory extended re-test required. For causing serious injury by driving whilst disqualified (section 3ZD) the maximum penalty is four years' imprisonment with a minimum disqualification period of two years with a compulsory extended re-test required.

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<sup>16</sup> As in *Brodie v HM Advocate*, 1992 S.C.C.R. 487 and *McDowall v HM Advocate*, 1998 J.C. 194, both discussed by Ferguson and McDiarmid., 2014. (n13) at 9.24.1.

<sup>17</sup> *HM Advocate v Purcell*, 2008 J.C. 131. *Purcell* confirmed that the wicked recklessness required for murder requires both indifference to the consequences and an act which indicates the accused's intention to cause physical injury. However, this does not sit easily with the outcome in *Petto v HM Advocate* [2009] HCJAC 43 where a murder conviction was returned in the absence of an obvious intention to cause injury. For an extended discussion of the tension between these understandings see McDiarmid, C., 2012. "Something wicked comes this way": the mens rea of murder in Scots Law. *Juridical Review* 283.

<sup>18</sup> As was the situation in the high profile case of *HM Advocate v Webster*, 2011 unreported. For discussion of the facts of this see, *Webster v HM Advocate*[2013] HCJAC 161. The fact that a vehicle can be used as a weapon to assault a victim was recognised in *Purcell* (at para 5).

## 1.2 Methodology

### 1.2.1 Research aims

The aim of this research study was to explore, in depth, public perceptions of the sentencing of causing death by driving offences in Scotland, including the perceptions of families of victims.

### 1.2.2 Recruitment

To explore public perceptions of the sentencing of causing death by driving offences, three focus groups with members of the general public and eight interviews with families of victims were conducted.

#### **Focus groups with members of the public**

Participants for focus groups were recruited by following up a sample of people who participated in the Scottish Social Attitudes Survey in 2017 and who gave their consent to be re-contacted about new research conducted by ScotGen. In consultation with the Scottish Sentencing Council, areas of Scotland were selected for the focus groups to take place and a sample was drawn from these areas. The sample was checked to ensure diversity in terms of gender, age and socio-economic activity.

The selected sample was contacted initially by email to invite them to take part in a focus group. Participants were given the opportunity to express interest for more information. A researcher followed up the sample by email and/or telephone to provide more information about the research. Those interested in participating in a focus groups were asked to provide their availability to participate. Everyone who expressed an interest in participating was provided with an information sheet and privacy notice which outlined details of the research. The information sheet outlined the purpose of the research, who was conducting the research, who the funder was, what participating in the research would involve, how the information participants provided would be used and how participants' personal details would be kept confidential. The privacy notice provided outlined in more details how personal data is stored and used and participants' rights concerning the data they provide.

Once there was sufficient interest in participating in a focus group in one of the selected geographical areas, a date and location for a focus group was set and communicated to those interested in participating. If the required number of participants for a focus group (n=8) was not achieved by this method, two approaches were used: first, the research team went back to the sample to try and recruit additional participants; second, once the sample was exhausted, a recruitment agency (Taylor McKenzie) was commissioned to aid recruitment.

Before each focus group began, participants were given another copy of the information sheet and privacy notice and the facilitator talked through the main points covered in the information sheet and gave participants the opportunity to ask questions before deciding whether to take part. Those wishing to participate were asked to complete a consent form. Only those aged 17 and over were asked to participate.

### **Death by dangerous driving - interviews with families of victims**

Interviews with families of victims were recruited in collaboration with partner organisations. Victim support organisations were contacted by email in the first instance to gauge interest in participating in the research. The organisations were provided with a digital copy of the information sheet and privacy notice to distribute to the families of victims who they had supported. Families of victims who were interested in participating in an interview were asked to either contact ScotCen directly using the contact details provided in the information sheet or register their interest via the support organisation. With consent from individuals, contact details were passed on to ScotCen to arrange a date, time and location for an interview to take place. In recognition of the sensitive nature of the topic, those interested in finding out more about the research were offered the opportunity to meet the research team to ask questions and enable them to make an informed decision on whether to participate.

All interviews took place face-to-face. The interviews were conducted with between one and three members of the family at one time and participants were given the choice to have someone else present at the interview for support.<sup>19</sup> Before the interview began, each participant was given a hard copy of the information sheet and privacy notice and the interviewer talked through the main points covered in the information sheet. Participants were given the opportunity to ask questions before completing a consent form. Everyone was reminded that participation was voluntary and they could withdraw at any time without giving a reason.

#### **1.2.3 Conducting the research**

All focus group and interview discussion guides were developed in consultation with the Scottish Sentencing Council. The majority of the content covered in both the focus groups with members of the public and in-depth interviews with family members of victims was the same. All discussion guides explored participant awareness of the situations covered by the offence, their knowledge and views

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<sup>19</sup> For interviews with 2 or 3 members of the same family, one interview was conducted with all members of the family taking part being interviewed together.

of current sentencing of offences, their knowledge and views of what factors are taken into account when sentencing and their perceived purpose of sentencing.

In addition to the questions asked across all focus groups and interviews, focus groups with members of the public included a scenario for participants to work through and give a sentence for an offence. The purpose of the scenario was to explore whether participants' views regarding sentencing would change when presented with details of a real incident. Interviews with families of victims did not include a scenario to discuss as there was concern that it could cause unnecessary distress, particularly if the scenario held any resemblance to the case of their own family member. Instead families of victims were asked about any experience they had had with victim statements during the criminal justice process.

The focus groups with members of the public took place in a quiet and private space in a central location within the target areas. Each focus group lasted an hour and a half and was conducted by ScotCen researchers and ScotCen's specialist fieldwork manager. Interviews with families of victims took place in a quiet and private space that was comfortable for participants, such as their home. All interviews were conducted by ScotCen's specialist fieldwork manager. Interviews lasted approximately one hour.

With the consent of participants, all focus groups and interviews were audio recorded using an encrypted digital recorder and transcribed for ease of analysis. All interviews and focus groups took place in March and April 2019. It is important to note that the extension of the presumption against short sentences (PASS)<sup>20</sup> took place after the fieldwork period.

Ethical approval for the qualitative research with both members of the public and family members of victims was granted by the NatCen Research Ethics Committee in December 2018.

#### **1.2.4 Analysis**

All transcripts were imported into and coded using NVivo 10, a software package for qualitative data analysis. This system of coding facilitates the organisation and analysis of qualitative transcripts and provides a tool to explore the range and diversity of views expressed by participants. Firstly, the key topics and issues which emerged from the research objectives and the data were identified through

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<sup>20</sup> In June MSPs voted for a presumption against the use of prison sentences of 12 months or less. It is believed that short custodial sentences disrupt factors such as family relationships, employment and housing that can help prevent reoffending. The presumption does not ban courts from imposing prison sentences of 12 months or less but aims to increase the use of methods such as Community Payback Orders (CPOs) in the hope of addressing offending and rehabilitation.



familiarisation with transcripts by members of the project team. A draft analytical framework was drawn up by the project team and piloted. The analytical framework was refined after discussions within the research team. Each transcript was then coded, so that all the data on a particular theme could be viewed together.

Through reviewing the coded data, the full range of views and attitudes described by participants were systematically mapped, and the accounts of different participants, or groups of participants, compared.

## Terminology

This research explores the public perceptions of sentencing and as such, the terminology used may not always be accurate or in line with current legal terms. It is not good practice to amend quotes from participants to make them technically correct. However, to avoid misunderstanding, explanatory text or footnotes have been added.

## 1.3 Participant demographics

In total 30 people took part in a focus group or interview to share their views on perceptions of sentencing for causing death by driving offences in March and April 2019.

Eighteen people took part in three public focus groups to discuss causing death by driving offences. Those who took part in the public focus groups included an equal mix of males (n=9) and females (n=9). Participants were aged between 23 to 77 years and came from three different geographical areas, both urban and rural. Table 1 below shows the breakdown of participants by gender, age, and area.

**Table 1: Gender, age and location of focus group participants**

Gender		Age range			
Male	Female	17-34	35-49	50-64	65+
9	9	5	3	4	6

Eight interviews were conducted with 12 family members of victims. Of the eight interviews conducted, three were paired interviews and one consisted of three family members. Family members interviewed mostly included parents of victims (n=9). Table 2 below provides a breakdown of family members interviewed by gender, age range and relationship to victim.

**Table 2: Gender, age and relationship to victim of interview participants**

Gender		Age range		Relationship to victim		
Male	Female	30-59	60+	Parent	Sibling	Cousin
3	9	3	9	9	2	1

## 2 Awareness and understanding of what constitutes a causing death by driving offence

The relevant offences which pertain to causing death by driving are found in Part I of the Road Traffic Act 1988. The broad offences are:

1. Causing death by dangerous driving<sup>21</sup>
2. Causing death by careless or inconsiderate driving<sup>22</sup>

More specifically, the Act now provides for a range of circumstances in which causing death by careless or inconsiderate driving might occur: driving whilst unlicensed or uninsured,<sup>23</sup> driving whilst disqualified,<sup>24</sup> or driving under the influence of drink or drugs.<sup>25</sup>

This chapter explores participants' awareness of the range of different incidents covered under causing death by driving offences, their understanding of these offences and their reaction to each of the different offences.

### 2.1.1 Understanding of causing death by driving offences

All focus group and interview participants were asked what kind of driving incidents they think of when hearing the phrase 'causing death by driving offences'.

A range of different behaviours thought to constitute a causing death by driving offence were mentioned. The most common offences mentioned were causing death by driving under the influence of alcohol or drugs, dangerous driving and speeding.

Both members of the public and family members of victims also mentioned other behaviours which involved people being killed in driving incidents when they heard the phrase 'causing death by driving offences'. These fell into two categories: first, incidents that are not considered driving offences. These included suicide by driving and accidents which were viewed as not being caused by the driver's carelessness, such as a pedestrian walking out in front of a car. Second, incidents that do not constitute a separate, standalone offence but fall

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<sup>21</sup> Road Traffic Act 1988, s 1.

<sup>22</sup> Road Traffic Act 1988, s 2B.

<sup>23</sup> S 3ZB, as introduced by the Road Safety Act 2006.

<sup>24</sup> S 3ZC, as introduced by the Criminal Justice and Courts Act 2015.

<sup>25</sup> S 3A, as introduced by the Road Traffic Act 1991.

under other existing offences (such as hit and run, causing death by driving while on the phone, and causing death by speeding).

One view expressed was that the types of causing death by driving offences should be widened to include 'accidental' offences. They questioned whether 'accidents' were covered by the criminal law as it stands.

"I think I might put in *another* one for sort o' saying like 'accidental'. Is there an 'accidental' one just now? I feel that it jumps quite high. I feel in my own case that it was a total, total accident, you know? [*sigh*] He just didn't see him, and it was just that second. It was a winter's night, you know?...I just feel that that man really didn't do any of them really." (Family member of victim, female)

This is an interesting misperception of the law. The criminal law in this area does cover incidents which could be described as 'accidental' - in the sense that there may be no specific intention to kill. The Court of Criminal Appeal has confirmed that a driver cannot simply be guilty because they have been involved in a fatal accident.<sup>26</sup> Instead, it must be shown that the driver has done something more than simply put their vehicle on the road. It must be proved that there was some contribution to the death, (some failure on the driver's part - albeit unintended), but that this does not need to be the principal cause of death.<sup>27</sup>

At the very least, in order for a death caused by driving to be criminalised, it must involve carelessness on the part of the driver. Actions carried out negligently or carelessly do not normally invoke criminal sanctions, but in the context of causing death by careless driving, carelessness is recognised as the required mental state or, 'mens rea'. Within the 1988 Act specifically, the meaning of carelessness is defined as driving which "falls below what would be expected of a competent and careful driver." (s 3ZA) Assessment of this shall take into account the "circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused in addition to any inconvenience caused by the driving." (s. 3ZA(3))

Carelessness has generally been interpreted to mean a lesser form of recklessness, which is the required mental state for the offence of causing death by dangerous driving. Under Scots Law, recklessness has been traditionally defined as involving an "utter disregard for the consequences" (Transco PLC v HM Advocate, 2004 J.C. 29). Section 2A of the 1988 Act specifically provides that driving is dangerous if it falls below what would be expected of a competent and

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<sup>26</sup> *R v Hughes* [2013] UKSC 56

<sup>27</sup> McPherson and Tata (2018) pp4-5

careful driver and is dangerous. In assessing this, regard will be paid to the circumstances and what was within the knowledge of the accused at the time.

### 2.1.2 Views on the range of different causing death by driving offences

Participants of focus groups and interviews were then read the list of offences that are covered by the Road and Traffic Act 1988 and asked what they thought of the range of offences listed. Families of victims reported a greater level of awareness of all five different offences compared with the general public.

However where participants were able to engage in discussions (e.g. in interviews with two or more family members or in a focus group), it became clear that there was a lack of understanding of the differences between the offences. For example, the distinction between dangerous and careless driving was not always well understood by participants. Behaviours such as driving while on the phone were categorised by some as dangerous driving and by others as careless driving.

“But again...I revert back to what I said previously, unless mobile phone use comes into some of these other charges I don't see that one there. So I don't know where...if that's [in] a separate Act or whether that comes into dangerous driving.” (Family member of victim, female)

“Or does it come under careless?” (Family member of victim, male)

There were also attempts to come up with their own definition to explain the differences between careless and dangerous driving. Participants tended to associate careless driving with a lack of intent whereas dangerous driving was associated with more deliberate intent.

“Well dangerous driving to me is someone who ultimately goes out to drive dangerously. So they're speeding or...drink or drugs, and they know that they're doing it in my mind. Careless driving could be a mistake, it's not...they've not deliberately gone out to carelessly drive. Does that make sense?” (Focus group participant, female)

That participants focused on the question of whether or not a driver *intends* to kill is perhaps an important misperception of the law covering death by driving offences. In simple terms, Scots criminal law differentiates causing death by driving offences from homicide (murder and culpable homicide) on the basis of a lack of deliberate intent to kill. This distinction which participants sought to draw on the basis of intentionality ('gone out deliberately' as opposed to 'a mistake') is not how the law distinguishes dangerous from careless driving. Section 2A of the 1988 Act provides that driving is 'dangerous' if it falls below what would be expected of a competent and careful driver and is dangerous. A driver who

'deliberately goes out' to drive in a dangerous or careless way may be guilty of murder or culpable homicide.

Another view was that in some cases of causing death by driving offences more than one offence was being committed. Either by definition (such as driving while uninsured which on its own cannot cause death) or in relation to specifics of the case (such as dangerous driving and driving while under the influence).

“Actually driving uninsured is like, that's obviously stupid...but you'd have to be a *careless* driver at the same time for doing it, 'cause you can't cause an accident by driving uninsured, unless you can't drive!...I think if your car isn't insured, and you're a driver, that's obviously a big mistake, but if you're still a driver. So unless you're driving in a car when you're *not* a driver and you're uninsured, you probably wouldn't cause an accident.”  
(Focus group participant, female)

### 3 Perceptions of current sentencing for causing death by driving offences

This chapter explores participants' understanding of the type and length of sentences for causing death by driving offences, their awareness of the range of sentencing options, and what they thought sentencing ought to be. Details of the current statutory regime for maximum sentence for causing death by driving offences in Scotland is contained in Section 1.1.4 above.

#### 3.1 Perceived seriousness of the range of causing death by driving offences

Once focus group and interview participants had been shown the list of the five causing death by driving offences<sup>28</sup> as set out in Part I of the Road Traffic Act 1988, they were asked whether they thought all causing death by driving offences were equally serious. There was a wide range of different views expressed about the relative seriousness of the different offences.

There was a view, both amongst members of the public and family members of victims, that as all such offences involve the death of at least one person, all causing death by driving offences are equally serious.

“Causing death is all equal, isn't it? Somebody's lost their life at the end o' the day.” (Family member of victim, female)

“If somebody who decides to drive, no matter what their reason or why they're doing it, if they kill somebody while they're driving, they're equally culpable...If you kill somebody by driving carelessly, drunk, no insurance, whatever, you still kill somebody at the end of the day.” (Focus group participant, female)

Furthermore, there were participants that thought that by choosing to drive in the way they did, (for example speeding), or under the circumstances they did (such as driving while under the influence of alcohol or drugs or driving while disqualified), the driver was culpable for the death(s) caused by their driving. This culpability was viewed as reason enough to make each offence equally serious. For some there was a view that driving while under the influence of alcohol and drugs was more serious than dangerous driving offences.

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<sup>28</sup> 1. Causing death by dangerous driving; 2. Causing death by careless driving while under the influence of drink or drugs; 3. Causing death by careless driving; 4. Causing death by driving while uninsured; 5. Causing death by driving while disqualified

“Well, I think you're culpable in *all* o' them, for taking a life, so I think they're all equal. Should be dealt wi' equally. 'cause you've got a choice whether to drive dangerously, driving while under the influence o' drink or drugs, or uninsured or disqualified. You've got a *choice* there.” (Family member of victim, male)

However, not everyone held the view that causing death by driving offences were equally serious. There was a perspective among both members of the general public and family members of victims that causing death by driving offences were more serious where people chose to behave in a way they knew was against the law. The offences most frequently mentioned as more serious were dangerous driving, driving while under the influence of drink or drugs, and driving while disqualified.

“I mean if you're talking about causing death by dangerous driving or while you're under the influence of drink and drugs...To me, it's just like being accused of *murder*. You know what I mean? So, to me, the sentence needs to be, should be the *same*...you know you shouldn't be behind the wheel of the car, and so, to me, causing death that way, I think that's just the same as being accused of sort o' murdering somebody, and I think sentencing should be on the same kinda level.” (Focus group participant, female)

There were a range of different views on where driving while uninsured sat in terms of seriousness. Some thought driving while uninsured was a less serious offence because being uninsured did not necessarily cause the accident. Others thought it was as serious as other offences because it is illegal to drive while uninsured.

“To *me*, not having insurance doesn't cause death by driving. It's the actions that happened that causes the death. It's not the fact that you've got in the car and you don't have *insurance*...Whereas dangerous driving, or if you're drunk or taking drugs, you know you shouldn't be behind the wheel of that car, so I mean that's an offence as soon as you get in that car, but I just feel that the “being uninsured”, that's not what causes the death.” (Focus group participant, female)

The blameworthiness of the offender in terms of whether and how they chose to drive was seen as a critical factor for participants. It was used by some to determine which offences they believed were more or less serious. The idea of blameworthiness led some to the view that careless driving was less serious than the other offences.



“I would say the least [serious] one there is three, causing death by careless driving...because the other ones, dangerous driving you shouldn't be doing, you should'nae drive while you're drunk, you should'nae be in the car as [other participant] said if you're uninsured or disqualified. So I think the careless one is probably the least [serious].”  
(Focus group participant, male)

There were bereaved family members who felt that their experiences of loss changed their outlook in fundamental ways. One family member who lost a child said that, even though they understood that each offence must be looked at on a case-by-case basis and that there can be extenuating circumstances, having experienced the death of a family member made them realise the significance of the harm caused.

“Prior to losing a child in that situation I might have said that there are some that are lesser than others, but the reality is it's not...It's so difficult again because you know it is a case by case in so many ways because you think that could be somebody who's disqualified that's got a sick child and they need to get that child to the hospital and they take the chance to go...But in a generic general sense absolutely I would say all of these are equally as bad.” (Family member of victim, female)

## 3.2 General views on sentencing for causing death by driving offences

### 3.2.1 Whether a prison sentence is always appropriate

There was general agreement that a prison sentence should be available as a sentencing option for the full range of causing death by driving offences. However, there was no consensus as to whether a prison sentence should be given to all offenders found guilty of a causing death by driving offence, or if it was only appropriate for some cases.

“I think the general public would say *all* of them. *All* of them. Careless or dangerous...I think I will go along with that as well. And this is *death*, and I think that some of the victims' families are unlikely to come out and say, 'Well, actually, he really didn't mean to do it. It was just carelessness on his part'. I don't think they would accept that at all. There would be an outcry from the press, from the public, and from the victims' families.”  
(Family member of victim, male)

Among some participants who thought that imprisonment should be an option in all causing death by driving offence cases, there was also a view that a prison sentence could not be too long as people needed hope to help them reform.

“The thing about sentencing is that they do need to have punishment. However, they do need to have *hope*...if this guy who thinks, ‘I’m *never* going to get out – ever. *Ever*. Ever.’, it must have a terrible effect upon him...There has to be some sort of hope.” (Family member of victim, male)

There were also participants who thought a custodial sentence should only be given for what they believed to be the most serious offences: causing death by dangerous driving, by careless driving while under the influence of drink or drugs, and causing death by driving while disqualified. There was a view that, in these circumstances drivers had shown disregard for the lives of others. There were participants who also thought there should always be a prison sentence where a driver showed no remorse.

“Well the death by dangerous driving I think there should always be a prison sentence for that...And if they’re under the influence of anything that should always be a prison sentence. Well I think...driving while disqualified as well because they know they’re breaking the law.” (Family member of victim, female)

However, for circumstances where there was a momentary lapse in concentration, there was a view that other sentences such as a community-based sentence and disqualification from driving should be available.

“If it’s thoughtless, reckless driving, and the person who is doing it is aware that it is thoughtless, reckless driving, then that has to be a prison sentence. It has to be. Although I’m not happy saying it, I still feel that if it’s just a momentary lapse – because I don’t believe in accidents – if it’s a momentary lapse, and it does cause death, it causes horrendous aftermaths for everybody who’s left, but I think there are cases where there might not be a [prison] sentence in those cases...There would only be community service and disqualification.” (Family member of victim, female)

A common perspective was that causing death by careless driving may not always require a prison sentence in view of the lower level of fault. Examples cited included : being distracted by a sick child; taking one’s eye off the road for a second or two; unexpectedly falling ill at the wheel; pedestrians walking out in front of a car without looking; or other drivers not responding quickly enough.

“Careless driving could happen to *anybody*, but, if you’re disqualified, you’re going against it. Uninsured – going against it. Drink or drugs – it’s your own fault. Dangerous driving – you’re putting other people at risk. Whereas ‘careless’ is hard to argue. *Anybody* could be careless on the road at any time.” (Focus group participant, male)

“Maybe if someone was like rushing somewhere in an emergency or something, to take somebody to hospital or something, and there was an accident...*then* maybe we'd feel that there was a *reason*. There was somebody helping someone after an *accident* even or something, and so then it would feel there would be sort o' mitigating circumstances but that would be about the only time I think.” (Family member of victim, female)

However, an exception identified was if someone was driving with a known medical condition that could affect their ability to drive, participants thought there should be a prison sentence. This highlights once again that the culpability of the driver is viewed as increasing the seriousness of the act itself.

Finally, participants did not think an offender should be imprisoned if the state had allowed people to continue driving when they should not be. Participants noted that as people age they are asked to self-complete forms to indicate their suitability to continue driving rather than being retested.

“Causing death by *careless* driving. There was an incident...an elderly man drove a car through a plate glass window in to a café and killed three people. He didn't get a custodial sentence. He was 89, and he just shouldn't have been driving. They should be looking more and reassessing people when they reach 65 or 70 because you just fill out a form and send it back. I'm a diabetic, and I've never actually had to have an examination. I just fill a form in and send it back. So maybe the authorities should be looking at preventative measures way back when!” (Focus group participant, female)

### 3.2.2 Non-custodial options

Prison was not always perceived to be a good sentencing option in all cases. There was a view that sending someone to prison would not bring the deceased person back and would not necessarily rehabilitate the driver and prevent them from committing any future offences. It was suggested that taking away someone's driving licence for life would have a bigger impact than prison and would prevent someone from causing future harm.

“I just think there is always circumstances where you don't put that blanket of imprisonment because I don't think that necessarily is good often for the person. It's back to rehabilitation, isn't it? And I think there's often better ways of rehabilitating somebody, and that's why for me it's about take away the licence, just take it away from the rest of their life because that way they live for the rest of their life with not being able to do something that they could and to me that's always their reminder.” (Family member of victim, female)

Another option mentioned was a community-based sentence, perhaps combined with a driving ban and a fine.

“Well, like in my own personal case. I didn’t really want that man to go to prison ‘cause I felt it was a total accident...I didn’t want him going to prison wi’ his family and that, but maybe a bit community service wouldn’t have done him any harm...On top of his fine...Actually, I feel he should have been disqualified for longer.” (Family member of victim, female)

There were participants who thought disqualification from driving should take place after any prison sentence had been served. A common view among participants was that a prison sentence and disqualification from driving would usually run concurrently. Participants thought a disqualification sentence running at the same time someone was in prison was ineffective and diminished the sentence. There was a lack of awareness that under the Criminal Justice and Courts Act 2015, when there is a custodial sentence, the length of time someone is disqualified from driving is extended by half the custodial sentence to compensate for the time the offender has been in prison.<sup>29</sup>

“If you’ve got a 10-year prison sentence and you’ve got a 10-year ban...They should’nae be running concurrently, they should be when he’s come out of prison.” (Family member of victim, male)

There was a view among both family members and members of the public that a sincere apology from the perpetrator would be appreciated by the family. There was also a view among family members that there was a preference for offenders apologising to the family of the victim for the harm they had caused and also being given a sentence that might be far more helpful to bereaved families than penalties, such as a lifetime driving ban rather than a longer custodial sentence.

“And we feel if that lassie would o’ come to us, we know she didn’t set out that day to kill our daughter, but she *did*. If she’d o’ come to us and said, ‘Sorry’, that would o’ made a big, big difference.” (Family member of victim, male)

“I think sometimes people even coming and saying that they’re sorry, or even expressing a bit o’ *guilt*, but I think the justice system allow people to think that, because they’re so lenient on them, that they haven’t done anything wrong.” (Family member of victim, female)

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<sup>29</sup> Under Section 30 of the Criminal Justice and Courts Act (2015), for offences committed on or after 13<sup>th</sup> April 2015 where there is both a custodial sentence (or a detention and training order) and a disqualification from driving, the disqualification period must be extended by one half of the imposed custodial term. Thus, the effect is that disqualification continues after release.

### 3.2.3 Perceptions of leniency

There were participants who said they did not know enough about sentencing to comment on what they thought about current sentencing practice. Of those who expressed a view, across focus groups with members of the general public and interviews with families of victims, sentencing for causing death by driving offences was seen as “too lenient”.

Participants thought sentences did not reflect the harm caused, both in terms of the victim’s life and the loss to the family of the victim. Among some family members of victims with knowledge of cases where a community-based sentence, a fine and/or disqualification from driving was the sentence given, there was a view that these sentences were “too lenient”.

There were family members who felt that custodial sentences for causing death by driving offences were sometimes shorter than sentences for what were perceived to be less serious offences. It was felt that in terms of sentencing the ranking of offences should be reviewed.

“I think they’re not consistent enough...because for instance, somebody got jailed for longer for killing a bird of prey than what the person who technically killed my son in a driving offence situation got. So a bird of prey was therefore valued a worse death than my son’s death...It’s just like the positioning of all offences across the board seem to need to be rejigged.”  
(Family member of victim, female)

One view was that the reason people were getting shorter custodial sentences was because the prisons are too full to accommodate more people.

“I think lenient, but I think the prison services, the prison themselves, are just so over-full...They’ve got that many in. I mean they’re always saying that the prisons are chock-a-block, that I think a lot o’ folk aren’t getting sentences that they deserve.” (Focus group participant, female)

### Clarity about the prison sentence to be served

Participants, especially bereaved family members, explained that their sense of leniency was associated with a sense of disappointment that, in various ways, what they saw as the promised or expected levels of punishment did not materialise. Participants perceived that the length of prison sentence pronounced in court was rarely fully served in prison; a point which angered and frustrated family members of victims. They did not understand why this was the case<sup>30</sup>.

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<sup>30</sup> What respondents may not have been aware of is that The Prisoners Control of Release (Scotland) Act 2015 introduced conditions which meant that prisoners sentenced to four years or more (known as long-term prisoners) on or after 1st February 2016, no longer have to be

“Why give a 15-year sentence and then give somebody eight and then they get out after four...Some of them don’t show any remorse so they should get the full sentence.” (Family member of victim, male)

Likewise, there was a similar sense of punishment being undermined because “If they plead guilty they get a lesser sentence.” (Focus group participant, female). There was a view that reducing a sentence or releasing people before the full sentence undermines and diminishes the impact of the sentence. One view was that it would be better for bereaved families if there was greater transparency so that sentences passed were lower but the full sentence was served.

“If he gets a custodial sentence, then it’s halved for good behaviour, that somehow takes away the significance of the sentence in the first place I always think.” (Focus group participant, male)

“Well I would make the judge stipulate if he gives...we’ll just say seven years they should be told and they’re going to do seven years instead of this putting them in for seven and then the next thing you hear they’re walking around.” (Family member of victim, female)

### Charge Reduction

Family members of victims also felt that the practice of reducing the severity of the charge in order to secure a conviction was not acceptable. Family members expressed a sense of disappointment at not having a full examination of the facts of the case in court, to be able to fully understand what happened during the incident. They would rather that the case was fully investigated in open court, even if this resulted in a lesser conviction.

“And in our case, if they’d o’ took that girl to court and done her wi’ dangerous driving, and they’d proven that she *hadn’t* been dangerous driving, and all the facts came back, and it was an accident, I would o’ been happier wi’ that, but to reduce the charge to secure a conviction is a disgrace.” (Family member of victim, female)

### Maximum Sentences

The sense of expecting one level of punishment and another being delivered was also expressed in relation to the use of maximum sentences. While family members were aware that a judge could give up to a 14-year custodial sentence,

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conditionally released under supervision at the two thirds point of the sentence. Instead, these prisoners will be granted conditional supervised release in the final six months of their sentence. The previous AER regime may have been available to the offender depending on when the incidents relating to the family members’ cases took place.

they thought a much lower sentence was usually given. Participants did not understand why the longer sentences were not used.<sup>31</sup>

“Far too lenient. The maximum is 14 years and as I’m saying I’ve never yet seen anybody get 14 years...about seven seems to be you know...that was the one that we knew of but I know there are people get less...I mean I don’t understand why.” (Family member of victim, Female)

“I would use the phrase, ‘to get the punishment to fit the crime’...Something whereby the general public is convinced that the...sentence will be a deterrent and is right for the crime that’s been committed I think.” (Family member of victim, male)

That was seen to cause frustration and anger as the circumstances leading to a maximum sentence being given were uncertain. There were participants who wanted to see sentences strengthened and for judges to use the maximum sentence they have at their disposal.

“I feel quite strongly about this, because it *can* be up to 14 years, and they seem to be just putting the ceiling on it at seven to eight years...It’s as if they just follow this guideline that *they* have made – the judges have made – and it becomes seven to eight years, when *we* were told that it could be up to 14 years.” (Family member of victim, female)

“Usually, I think it’s somewhere round about four years [in prison]. Maybe, at the very most, eight years. I think by law it should be *fourteen* years for that, but in all cases that I’ve ever seen or ever heard about, and as bad as *ours* was, I think that’s not the *worst* case I’ve heard, nobody has ever had fourteen years. Nobody’s ever had the maximum sentence, so it always surprises me why they have such a high sentence, and nobody ever, ever gets it. I don’t know what you would have to do in this country for [you] to get the high sentence.” (Family member of victim, female)

### 3.2.4 Perceived inconsistency

Another perspective amongst participants was that sentencing for causing death by driving offences was inconsistent rather than “lenient”. In both the focus groups with members of the general public and interviews with family members there was a view that the sentence given could differ depending on a number of factors including: the judge, the area the offence took place or even the ethnicity of the driver.

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<sup>31</sup> See also McPherson and Tata 2018 at 1.2.

Participants recognised that every case is different, but they wanted to see steps taken to ensure some consistency so that sentencing was less contingent on the individual sentencing judge.

“They're different depending on which judge you go in front of...you read about different cases around the country, and, you know, one goes before one judge who is notorious for giving out hard sentences, and yet the guy that's in the courtroom two doors down, he says, 'Well, it was an accident. You didn't mean it. OK. We've got to do something. You're disqualified for two years, you've gotta pay compensation', what have you. It depends, I think, on the judge on the day.” (Focus group participant, female)

“And it also depends on the judge's personal reading of the person, whether the person shows remorse or not.” (Focus group participant, male)

“I know every case is individual, and the circumstances and everything leading up to it are not [*sic*] the same, but if it is like a simple one of 'stole a car', well, they should get that, and speeding, they should get that...There should be more uniform[ity] in the actual process than what there is...I don't know how you would police it.” (Family member of victim, female)

Participants offered the view, without prompting, that sentencing guidelines could help achieve consistency in sentencing but recognised there still needed to be some flexibility built in to take account of the individual circumstances in each case.

“One of the problems I think at the moment is it [sentencing] is all over the place, so there needs to be...I think there should be like a 'scale', if you like, almost: so, if it's between A and B, say something like 'serious injury', and C and D if it's 'careless', and E and F if it's, you know?...so that the public then would see there is kind of some logic behind it, because obviously it depends on the judge, and some judges are known to be more lenient than others, aren't they?” (Family member of victim, female)

“But at the same time, if you make the guidelines too specific, then they can't always take into account the circumstances, and that's possibly why the judge is given that flexibility to allow for that.” (Focus group participant, female)



## 3.3 Views on sentencing for causing death by dangerous driving offences

All research participants were asked what sentence they thought was usually given by a judge for each of the causing death by driving offences. This section outlines what sentence participants thought judges usually give for causing death by dangerous driving offences and what sentence they thought *should* be given. Subsequent sections deal with the other causing death by driving offences. The current maximum sentence which can be imposed for a causing death by driving offence is 14 years' imprisonment, with a minimum disqualification period of two years and a compulsory re-test.

### 3.3.1 Perceptions of typical sentencing practices

For causing death by dangerous driving offences, both members of the general public and families of victims thought a prison sentence was usually given. Participants were not sure what sentence would usually be given for causing death by dangerous driving offences which, for some, was because they did not know what judges take into account when sentencing. Others used their own experiences to inform their view of what a usual sentence might be for a causing death by dangerous driving offence. Suggested lengths of prison sentences ranged from one year up to 12 years. Across all participants, a suggested prison sentence of four to eight years was common.

“I'd have thought that it was prison sentence...I mean I'm not sure sort o' how many *years* or that, but I did think that it was prison sentence.” (Focus group participant, female)

“Well I think it's usually imprisonment...I think it can be up to three years plus or its above three years I think for dangerous.” (Family member of victim, female)

“About the same time as manslaughter, which is about seven or eight years, isn't it?” (Focus group participant, male)

Another view was that there was not a typical sentence for dangerous driving because the sentence given might depend on the circumstances of the offence, the judge's view of the offender, or the competence of the lawyer representing the defendant.

“There's a very wide range, and sometimes you think, 'That sounds a wee bit harsh' and other times you think 'That's terribly lenient'...I think that's part of the problem. It's all over the place...What the *range* is? I would think

it would be anything from two to 12 years. (Family member of victim, female)

Being disqualified or suspended from driving, receiving points on a driving licence and fines were also suggested as sentencing options which may, or may not, sit alongside a custodial sentence.

“Lot of points on the licence. Probably the licence suspended or taken away. A large fine, and I think it depends on the area you live in and the judge you get whether you would serve time in prison or not.” (Focus group participant, female)

### 3.3.2 Views on what sentence should be given

#### Custodial sentence

For some participants, the sentence they thought *would* usually be given by a judge was consistent with that which they thought *should* be given for causing a death by dangerous driving offence. However, other participants thought that prison sentences for causing death by dangerous driving should be longer than the length of sentence that they perceived was usually given by a judge, in part because participants thought the full sentence is rarely served due to the perceived high incidence of early release<sup>32</sup>.

“I think upwards of 10 years because in reality people don’t even serve that sentence, if they’ve good behaviour or whatever it’s reduced. So I think upwards of 10 years.” (Family member of victim, Female)

“I think they should get a life sentence. A life for a life.” (Focus group participant, female)<sup>33</sup>

There was also a view that, because there is potential to cause harm when driving dangerously (albeit without specific intent to do so), a prison sentence should be long enough to mark the seriousness of the action, or, to act as a deterrent. Some argued that in view of the failure to take responsibility, the gravity of dangerous driving should be seen as more akin to murder than it currently is.

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<sup>32</sup> The Prisoners Control of Release (Scotland) Act 2015 introduced conditions which meant that prisoners sentenced to four years or more (known as long-term prisoners) on or after 1st February 2016, no longer have to be conditionally released under supervision at the two thirds point of the sentence. Instead, these prisoners will be granted conditional supervised release in the final six months of their sentence. The previous AER regime may have been available to the offender depending on when the incidents relating to the family members’ cases took place.

<sup>33</sup> Whole life sentences are not available in Scotland. When a judge sentences someone to life imprisonment in Scotland, by law, they must set the minimum time that person will spend in prison before they can be considered for release.

“I think it should be long enough to make it a deterrent...Somewhere between seven and 10 years.” (Focus group participant, male)

“Somehow people when they’re driving look at themselves differently or think of themselves differently. So therefore, even if you’re driving dangerously and you potentially know you’re driving dangerously and you take a life, your automatic reaction is, ‘but I didn’t mean to do that.’ So therefore it wasn’t an intended action to take that life. Whereas...if someone goes out with a knife, or a gun, or even just [with] their bare hands and goes out and intends to murder someone that’s looked upon as a more serious crime. It’s looked upon as a premeditated crime, but there’s part of me nowadays would still kind of argue that people who go out with vehicles and drive in totally irresponsible ways...must be aware of what the outcome of that could potentially be. So...I think to hit them with a hard stick wouldn’t be wrong. So therefore a sentence more akin to like a murder sentence...Well I would think the 15 years that I’ve said is still adequate bearing in mind someone who commits murder can be put away on a sentence of 25 or 27 years and nobody is even going to look at parole until that period of time has passed.” (Family member of victim, female)

Views on the sentence which should be given for dangerous driving differed depending on the circumstances of an offence. There was a perspective that the length of sentence should increase with greater recklessness of driving, and the number of offences they have committed at the same time.

“If it’s a reckless case where it’s dangerous driving, the person is under the influence of drink or drugs, they have been shown to be careless driving before the incident, they’re uninsured, they cannot drive, then I think that the more cases against them, the higher the sentence.” (Family member of victim, female)

There was a view that there should be a range of sentences available for death by dangerous driving offences. This was due to people believing that a range of different factors were important in deciding on a sentence, for example; the circumstances of the driver (e.g. their age, whether they showed remorse), the victim and the harm caused to their family, and the nature of the incident itself.

“It depends on the case. At the very least, two years. If it’s something *completely* accidental – say it’s turning the corner, you hit someone – you need to be totally given a time away to try and think over it. That’s the bare minimum, but, beyond that, it’s case by case I would say.” (Focus group participant, male)

## Disqualified from driving

Currently, in addition to a statutory maximum of 14 years' imprisonment, causing death by dangerous driving mandates a minimum two years' disqualification. In addition to a prison sentence, participants thought those who cause death by dangerous driving should be disqualified from driving. The length of ban that was seen as appropriate ranged from a year to a lifetime ban.

“That’s easy for me for all of them, if you’ve caused a death for me it’s easy, nobody should ever, ever get behind a wheel again.” (Family member of victim, female)

For some participants, the length of time someone is disqualified from driving would depend on the circumstances of the offence and the driver. For example, someone who depended on their driving licence to work and support a family may receive a shorter disqualification than someone young who has newly passed their test.

“Just think if an older man – a family man – was driving, and he was dangerous driving. It was an accident, but it came under ‘dangerous driving’, I imagine he would get his licence before an 18-year-old who passed their test and was *really* dangerous driving.” (Focus group participant, female)

In addition to disqualification from driving for a period of time, there was a perspective that offenders should also have to re-sit and pass their driving test before driving again. However, some participants questioned whether this would make a difference to how people would drive in practice. Under section 36 of the Road Traffic Offenders Act 1988 a re-test is compulsory.

“I’m not honestly sure that that makes any difference because I don’t think...you know you can turn up and you can sit the test and you can do what you’re supposed to and then does that actually mean that subsequent to that people are going to drive as they should? No.” (Family member of victim, Female).

Participants also wanted to see non-custodial sentences, such as disqualification from driving, more rigorously enforced.

“The person that killed my brother he was disqualified but he was driving after that and nobody follows up on these things...the sentence wasn’t even executed in a sense, he was disqualified but then he continued to drive so there’s not even any follow up to ensure adherence to some kind of sentence that would involve disqualification.” (Family member of victim, female)

## Fine

A fine was also viewed as an appropriate sentence for causing death by driving. There was a view among some family members of victims that a financial penalty would have a bigger impact than a prison sentence.

“I think in society nowadays, the only thing that talks is *money* and taking their cars off them or something like that. That’s the only thing they listen tae. A jail sentence is not putting them off...It’s halved right away, and they maybe get two years and serve *one*. I think the only thing people listen to nowadays is...The only thing they understand nowadays is hitting them in the pocket.” (Family member of victim, male)

## 3.4 Views on sentencing for causing death by careless driving

All focus group and interview participants were asked what sentence they thought was usually given by a judge for each of the causing death by driving offences. This section outlines the typical sentences participants thought judges give for causing death by careless or inconsiderate driving offences and the sentence which participants think *should* be given. The current maximum sentence which can be imposed for a causing death by careless or inconsiderate driving (under section 2B) is five years’ imprisonment, with a minimum disqualification from driving period of 12 months and discretion as to the issue of a re-test.

### 3.4.1 Perceptions of typical sentencing practices

As for causing death by dangerous driving, opinions differed on whether a custodial sentence is typically given for causing death by careless (or inconsiderate) driving. While there were members of the public and family members of victims who thought a prison sentence is usually given, there were others who thought a custodial sentencing would not always be given. Suggestions regarding the typical lengths of the prison sentences given by the judge for causing death by careless driving ranged from three months to up to five years, lower than the range thought to be given for causing death by dangerous driving but in line with current sentencing practice.

“Well again it’s very lenient isn’t it? If its...I know there are different levels of it but I think it should be...I think at the moment is it five years the maximum for careless? Well again it should be more.” (Family member of victim, female)

Participants who thought a prison sentence would be given, thought it would be combined with other sentences such a disqualification from driving. Family members of victims were aware of cases where non-custodial sentences had

been given, such as a community-based sentence, a fine and/or disqualification from driving.

“Sometimes, the causing death by careless driving, in fact, a *lot* of the time that shocks me because sometimes that can be taken in sheriff courts, and I always feel that the victims of the person who’s been killed must be shocked that it’s taken place in sheriff court instead of a Crown Court<sup>34</sup>, and I’ve seen cases where it’s just 200 hours of community service that’s been done. They’re still causing death. It’s still a careless one.” (Family member of victim, female)

As with causing death by dangerous driving, the common view was that the sentence given for causing death by careless driving would depend on the individual circumstances of the case. For example, someone who has previous convictions for similar offences would get a harsher sentence than a first-time offender.

### 3.4.2 Views on what sentences should be given

This section covers views on what participants thought an appropriate sentence for causing death by careless or inconsiderate driving would be, as opposed to the sentence they thought was usually given by the judge for these offences.

#### Custodial sentence

As in the views on the sentence which is usually given for a causing death by dangerous driving offence, there were participants who thought a prison sentence was the appropriate sentence. The suggested length of sentence ranged from six months to 10 years, higher than participants thought is usually given by a judge and higher than the current maximum sentence of 5 years. There were participants who thought the sentence for causing death by careless driving should be the same as that given for causing death by dangerous driving.

“I think it should be the same as dangerous. I think taking a life on the road .. You’ve got to look at all the facts...some people have maybe taken a heart attack or there is a genuine reason for why it’s happened, and that is a tragic *accident*, but in our case, and in a lot o’ other cases, it’s people just being totally disrespectful to the road and thinking that they have a more right to be on that road than the person in the car next to them. They’re just far too lenient, and I think if they were stricter wi’ the *minor* points then the bigger points wouldn’t be such a problem because people

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<sup>34</sup> This implies a degree of misunderstanding about the criminal court structure in Scotland. The Crown Court operates in England and Wales and does not exist in Scotland. Death by driving offences prosecuted on indictment (jury-triable) in the Sheriff Court may reasonably be said broadly to overlap with the work and powers of the Crown Court of England and Wales.

would be obeying them because they would be hit so hard wi' the *minor* offences that they wouldn't want to take the chance wi' the bigger offences." (Family member of victim, female)

As with causing death by dangerous driving, there was also a view that the prison sentence for causing death by careless driving should mark and act as a deterrent. Participants thought family members of victims would also expect a prison sentence to reflect an appropriate level of punishment for the harm caused.

"Maybe somewhere between five and 10 [imprisonment]...Yeah as far as the victims are concerned I think they're looking for...some tangible form of punishment...Oh I think maybe a reasonable ban as well...Maybe somewhere between five and 10 years depending on the circumstances." (Family member of victim, female)

### **Supplementary sentences**

As with causing death by dangerous driving, there were participants who thought a prison sentence should be combined with additional penalties such as disqualification from driving, a fine and a community-based sentence.

"I think it should be a big fine which the family that's involved would get, and then three years [imprisonment] I think, and a ban on their licence for the three years as well while they're in jail, and maybe then a year or two when you get out, so you're not straight in to the road." (Focus group participant, male)

When asked how long someone should be disqualified from driving, there was a view that disqualification should be long enough to make a difference to the offender's attitude and behaviour. There were also participants that went further to say that people should be disqualified from driving for life to prevent them from reoffending.

"Sufficiently long to make them realise that this isn't something to mess around with. This is something to take seriously if they're going to indulge in this activity." (Family member of victim, male)

Conversely, there were participants who thought a community-based sentence would result in a better outcome than a custodial sentence. Some family members of victims said they would have liked the offender to get "community

service”<sup>35</sup> as they thought a prison sentence could ruin the offender’s life and the life of their family.

“So, for somebody, community service might be ghastly and might have *more* effect than a prison sentence, and also the community then might get some benefit from community service rather than a prison sentence.”  
(Family member of victim, female)

“I’m speaking from personal experience, but I know that chap didn’t go out that morning to kill my cousin, but I don’t feel it was *enough*, you know, what happened, but I didn’t really want him to go to prison either...could see how full o’ remorse...We’d talked about it in the family, and we said that we’d liked maybe if he’d got community service or something like that...[prison] it would totally ruin your life sort o’ thing. I didn’t want that for him either, ‘cause it’s not gonna bring my cousin back either.” (Family member of victim, female)

As with causing death by dangerous driving, participants found it difficult to define a generally appropriate sentence for causing death by careless driving because the offence could cover a wide range of circumstances.

## 3.5 Views on multiple fatalities caused by death by dangerous or careless driving offences

Focus group and interview participants were asked whether the number of fatalities that resulted from dangerous or careless (or inconsiderate) driving should have an impact on what the sentence should be.

### 3.5.1 Higher sentence for multiple fatalities

A view among family members and members of the public was that the sentence should take into account each life lost, and so a longer sentence should be given for causing death by dangerous or careless driving offences where there are multiple fatalities. Similar to views when there was a single fatality, participants also suggested up to a life time disqualification from driving.

“Cause if you were one o’ their family for all to say three people have got killed, and the guy had only got four years, I would think the families would be doing the maths also, and saying, ‘Well, that’s only equivalent to about

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<sup>35</sup> It is important to note that “community service” is not terminology that exists under Scottish Law but is commonly used by participants to describe what is known in Scottish Law as Community Payback Orders.



a year for each of our family members'. I think *they* would be doing the maths also.” (Focus group participant, female)

There was no consensus on how much higher a sentence should be for causing multiple fatalities. One suggestion was to multiply the sentence by the number of fatalities but this was not thought feasible. Another suggestion was to give a sentence at the higher end of the sentencing scale.

“A bigger sentence...I've known cases, where I've heard people, where the mother and father and their kids have all been totally wiped out, and they get eight years for having done this, whereas 14 years is the maximum.” (Family member of victim, female)

Opposing views included that the sentence should not be higher where there were multiple fatalities, or that it should not be too much higher as the circumstances that caused the incident could be the same for one or multiple fatalities and the sentence should be based on the circumstances.

“I don't think the numbers should make a difference too much if there's too many...if there's a lot of people in one accident because that's quite feasible that could happen anytime. Somebody causes a crash and a couple gets killed instead of just the one. It depends how many people are in the car.” (Family member of victim, male)

## 3.6 Views on sentencing for causing serious injury by driving

Finally, all focus group and interview participants were asked what sentence they thought was usually given by a judge and the sentence they thought should be given for causing serious injury by driving dangerously, carelessly or causing serious injury by driving when disqualified. The current maximum sentence which can be imposed for causing serious injury whilst driving is 5 years and a fine, if tried on indictment.

### 3.6.1 Perceptions of typical sentencing practices

Participants did not have a clear understanding of the sentence which was usually given for causing serious injury compared with sentences for causing death. There were participants who thought offenders would receive a prison sentence but that it would be shorter than if they had caused a death.

“I have no idea...Obviously less than *death* by dangerous driving.” (Family member of victim, male)

However, other participants did not think a prison sentence would be given and instead thought that a non-custodial sentence such as a fine, or being disqualified from driving for a period of time would be given for causing serious injury, depending on the circumstances of the offence.

“I don’t know, I would have thought that that could be either/or, that could [be] community service, or it could be imprisonment as well depending on what the sheriff felt was fit. I would have said that’s probably either/or depending on the severity of the driving you know?” (Family member of victim, female)

“Well there’s quite a lot of them they don’t even get a [prison] sentence, you can only go by what you read in the newspapers and they don’t even...they get community service or something like that which I think is totally inappropriate.” (Family member of victim, female)

“Oh, probably not very much. Probably disqualify them again for another couple o’ years, and fine them. I don’t know...I don’t think they’d get prison.” (Family member of victim, female)

### 3.6.2 Views on what sentence should be given

When asked about their views on what sentence should be given, overall, participants thought the sentence should be harsher than is currently given. One view was that the sentence for causing serious injury by driving should be the same as that for causing death by driving because the standard of driving was the same and the impact on the victim and/or family is still severe.

“If your family member, your loved one ends up with what are really life changing injuries then not only does it impact on their life for the rest of their life, it also impacts on the family for the rest of their life...so in some respects yeah causing a serious injury can have a bigger impact...I think it wouldn’t be unfair to level it at almost the same, level it at almost the same [as causing death by dangerous driving].” (Family member of victim, female)

A custodial sentence was viewed as the appropriate sentence for causing serious injury while driving while disqualified, as the offender is breaking the law by driving.

“If you’re disqualified you know you’re disqualified...I think they should be hit quite hard. Now how hard quite hard is...So I think people like that probably do deserve a term of imprisonment...they’re already culpable because they know what they’re doing is wrong.” (Family member of victim, female)

There was a view that the way someone was driving, and not the harm done, should form the basis of the sentence. There was also a view that a community-based sentence might be more appropriate.

Participants also thought offenders should be disqualified from driving, in addition to being given a custodial sentence, for causing serious injury although the length of sentence suggested ranged from two years to a lifetime ban. This was influenced to some extent by the circumstances of the offence. It was suggested that offenders should also have to re-sit their driving test.

“Well driving is supposed to be a privilege not a right...So if you are going to break the law you should lose that right for some period of time...Well the punishment has got to fit the crime.” (Family member of victim, male)

Making sentencing decisions for causing serious injuries by driving offences was seen to be particularly difficult due to the range of harm that constitutes serious injury. The severity of the injuries caused was a factor that was considered important in terms of the type and severity of the sentence given by the judge. In addition, there was recognition that a victim of causing serious injuries by driving may need a high level of care which can be costly. Therefore, part of the sentence should be a financial penalty to help pay for the injured person's care.

“Or even paying towards, if it's injury, if the person is seriously injured, then paying towards their care.” (Family member of victim, male)

As with other driving offences, the circumstances of an event were important to participants when thinking about what constitutes an appropriate sentence. Participants thought it was important to distinguish between those who were driving recklessly and thoughtlessly from those that were not.

“Again I think it's up to the sheriff to actually make that decision on the evidence because...again you could have across the board...you could have somebody that absolutely needed to be jailed for whatever, up to three years, five years, whatever it might be and then there's somebody that could be the circumstances were...serious bad luck rather than you know having done a five mile chase with the police behind, and five miles risking people to the left, to the right compared to you know somebody on a country lane hitting somebody by the road that didn't have a high vis jacket on or something.” (Family member of victim, female)

## 4 Perceptions of factors taken into account when sentencing

This chapter first explores participants' unprompted knowledge and understanding of the factors which could be taken into consideration when sentencing an offender for a causing death by driving offence. It then considers participants' views on these factors and whether participants think they should be taken into account by a judge when deciding on a sentence for a causing death by driving offence.

### 4.1 Knowledge of the factors taken into account in sentencing

Following the detailed discussion of the range of offences covered under the 1988 Act, all participants were asked what factors they think are taken into account when deciding on a sentence for causing death by driving offences and what factors they think should be taken into account when sentencing.

#### 4.1.1 Circumstances of the offence

Members of the general public and family members of victims noted the need to take the circumstances of the incident into account. This included factors such as where and when the incident took place, how the collision occurred, who was in the car, the driver's behaviour and the weather conditions at the time.

“The circumstances around it. Who else was in the car, and what they were doing, where they were going.” (Focus group participant, female)

Other circumstances of the incidents such as whether the driver was drinking or on drugs, whether they were driving uninsured or while disqualified and whether they were using a mobile device while driving were also important factors that participants felt a judge both would and should take into account when sentencing.

“Whether he's insured or disqualified, whether he's been drinking or taking drugs, whether he's been messing around with his mobile phone, sat nav.” (Family member of victim, male)

Another view was that it was also important to take into account whether the victim might share some responsibility for the accident occurring.

“It could be two people doing dangerous driving, but your negligence causes the death of the other person, but they're bombing up the fast lane at 100mph, and you pull out, but you don't look at your mirror when you

pull out. You could still be at fault 'cause you've pulled out, but they could be going too fast, so they're in the wrong as well, so they might look at that in a situation where they might give a lenient sentence or what not." (Focus group participant, male)

#### 4.1.2 Background of the offender

Participants listed a range of different factors related to the personal circumstances of the offender which they believed were taken into account by the judge when passing a sentence. These included:

- the age and gender of the driver
- how long the offender had been driving
- whether the offender was the main financial provider for a family or had someone they cared for
- any health conditions of the offender
- previous convictions.

However, participants also questioned whether some of these factors should, in fact, be taken into account by a judge. For example, there was a view that any contributing health condition of the offender should not be considered if the offender knew of their condition before deciding to drive.

"Yeah because again you will get people who will be told you shouldn't be driving or your eyesight is not good enough to drive and they're still driving. So yeah, things like that. I don't know that health should be brought into it." (Family member of victim, female)

#### 4.1.3 Remorse

Participants also felt that whether the offender showed any remorse is taken into account by a judge.

"Showing remorse and things like that as well. If you don't care when you're in the courtroom, you'll be sitting there smirking, not caring, then of course you're gonna get a much harsher sentence." (Focus group participant, male)

#### 4.1.4 Life of victim and loss to the family

Family members of victims of causing death by driving offences felt strongly that the life of the victim and the impact of their loss to the family should be taken into account by the judge when deciding on a sentence.

However, both members of the public, and in particular family members of victims, felt that the life of the victim and the impact of their loss on the family is the least considered factor in sentencing.

“I feel the person who has lost their life, or the person who is injured, is the person who is least considered in any charge.” (Family member of victim, female)

“I think more should be given to the victim’s family – listening to them more – because it's happening more and more that the victims are getting ignored, not just wi' drink driving, but with others.” (Focus group participant, female)

## 4.2 Views on factors that are taken into account by a judge

Having discussed their spontaneous knowledge and thoughts on the factors which a judge does, and should, take into account when sentencing, participants were then presented with a list of the factors a judge may consider when deciding on a sentence for *any* offence, not specifically causing death by driving offences. Participants were asked for their views on the list and later prompted, if necessary, as to whether they thought any of the factors were more important than others in relation to cases of causing death by driving offences.

The factors presented to participants were:

- the seriousness of the offence
- the harm caused
- the impact on the victim/survivor and others affected by the case
- the offender’s attitude to the offence:
  - Was it their first offence?
  - Did they show remorse?
  - Did they plead guilty? If so when?
  - Was it pre-planned?
- the personal circumstances of the offender:
  - Home background
  - Health
  - Current living situation
  - Money
  - Age

When asked to give their views on this list, participants found some of the factors that a judge could consider when deciding a sentence somewhat surprising. This

included whether the offender pled guilty, whether the offence was pre-planned and the offender's home background and current living situation.

“I never thought about the guilty thing. I just thought you just...Like if you've done something, I just thought you would say you done it, but I suppose people might say they're not guilty of it, so they might fight it. I would o' just thought it would be, 'I did that. I'm sorry'.” (Focus group participant, female)

#### **4.2.1 Factors considered to be more important than others**

There was some level of agreement among participants that certain factors should carry more weight than others when deciding on a sentence.

When asked whether any of the factors listed were more important than others, the following factors were considered by participants to be the most important.

##### **Seriousness of the offence**

The seriousness of the offence was seen as a key factor that should be taken into consideration.

“I think that the seriousness of the offence is the major one – the how serious the offence is – because that then leads on to everything else that follows on. Yeah. That's the strongest one.” (Family member of victim, female)

##### **Impact on victim and others affected**

There was also a view that the impact on the victim and others affected by the case, such as family members, should be given a high priority over other factors.

“[the impact of losing a family member] is something that never goes away. So I would say yes that's probably the most important. I mean...but then saying the seriousness of the crimes...so obviously...the seriousness of that is important too but I would say yeah at the end of the day it's the impact of the family really.” (Family member of victim, female)

##### **Risk of re-offending**

Participants also felt that it is important for the judge to consider whether the offender is likely to re-offend. Previous convictions were seen by the participants as a good predictor of whether an offender was likely to re-offend. This links to the view that protecting the public should be a key priority of the judicial system and those who have offended in the past are more likely to reoffend.

“If somebody has offended before then...maybe they should have learnt a lesson, so I don’t see there’s anything wrong in being a bit tougher on people who are repeat offenders.” (Family member of victim, female)

### **Guilty plea**

Members of the public debated whether a guilty plea was important to take into consideration. There was a view among the focus group participants that whether the offender pled guilty was important to take into consideration. On the other hand, there was also a view that the guilty plea should not carry much weight as the offender would already know, or be advised by their lawyer, that they would get a reduced sentence if they pled guilty.

Another view was that it is important to consider the timing of when the accused pled guilty. There was a sense that if the offender pled guilty immediately after the incident they were more likely to have done so because they felt genuine remorse, rather than to get a reduced sentence.

“Did they plead guilty? If so, when? I mean if they plead guilty straight away, I would say ‘yes’, but if they carry on and carry on and carry on, and they finally see, “I’m going down for this” and they turn around and go, ‘Oh, I done it’, that should’nae influence.” (Focus group participant, male)

Another view was that remorse and guilt should not be considered when sentencing as only “hard facts” should be considered as mitigating factors. The genuineness of a guilty plea or expressing remorse was viewed as hard to assess and as such, should not be considered in the sentencing process.

#### **4.2.2 Factors which should not be considered when sentencing**

Participants commonly mentioned factors that they thought should not be considered when sentencing alongside factors they thought should be considered. Once again, there were a diverse range of views about factors that people think should not be considered at all in sentencing.

#### **Personal circumstances of the offender**

One view that was commonly expressed in the interviews with family members of victims, and was also mentioned by some members of the public, was that the personal circumstances of the offender should not be taken into account during sentencing. Participants also felt that the offender’s background and upbringing, including any hardships they had faced, should not be taken into account. The challenges the offender had faced in their life was not seen as a legitimate reason for committing a crime and should not be used as an excuse for their actions. There was a view that, as the offender had made a choice to do something wrong,



their personal circumstances should not be taken into account to pass a shorter sentence.

“I don't think the judge should consider the offender's personal circumstances. I don't think that matters an iota whether they're going in to their background, their health. I don't think their living situation, their money, their age. No. I don't think it should be considered.” (Family member of victim, female)

“Well...I really don't see what their home background and so on has to do with it being perfectly honest. There are lots of people have difficult lives, but they don't go out driving like maniacs because of it. I mean I really don't see that that should come into it.” (Family member of victim, female)

Family members of victims also felt that the personal circumstances, including family background, of the offender should not be taken into account in sentencing as the long-term emotional and financial impact on the victim's family is not given due consideration.

“Like my mum and dad struggled financially after what happened to [victim], and they were given absolutely no help because my dad worked. My mum worked all her life as well, and couldn't go back to work, but they then found themselves in financial difficulty, but nobody asked my mum and dad how their health was...how their financial situation was, their current living state. That was never taken in to account, so why should it be for the person who's caused harm?” (Family member of victim, female)

There was a recurring perspective, particularly among family members of victims but also among the general public, that the sentencing process currently takes into account the circumstances of the offender far more than that of the victim.

“My view on it is all very sceptical. I mean my view on it is very, very coloured by the experiences that we had and so I think that it's very much more...I know that the law is that you should prove guilt but I feel as if it's very much in favour of the offender rather than actually looking at the crime and the impact on not the family but on the individual.” (Family member of victim, female)

## 4.3 Views on whether the impact on the victim's family should be taken into account

In general, there was consensus among both family members of victims and members of the public that the impact on the victim's family should be taken into account in the sentence. However, there were two different perspectives on the level to which the impact on family should affect the sentence.

On the one hand, there were those who felt very strongly that the impact on the family should be taken into account, as the emotional and financial impact could be tremendous and should be accounted for.

“[Be]cause their lives will be totally, totally changed. The loss of mother, father, children, whatever, I mean totally destroys life.” (Family member of victim, female)

“Put the families who have lost somebody first and foremost...the victim and their families first and foremost.” (Family member of victim, female)

On the other hand, there was also a perspective that while the impact on the victim's family should be taken into account, it should not be given a high degree of importance, as someone who does not have a family should receive the same level of justice.

“I agree that it should have an impact, but I think that it shouldn't have a big impact. It should be quite slight, on the basis that if you kill a professional that's got a family, it's still the same as killing a homeless man who's got no family and no job. It's still a life, and I think they should be kind of punished accordingly.” (Focus group participant, female)

### 4.3.1 Views on whether victim statements should be taken into account

All participants were asked to share their views specifically on whether they felt the impact on the family of the victim should be taken into account when sentencing. In addition, family members were asked about their own personal experience of producing victim statements.

There was a general consensus among family members that victim statements should be taken into account when deciding on the sentence. The family members felt that the victim statement should be taken into account because it is the only way the judge can learn about the victim, as seen by the family, and the impact that the loss has had on the family.

“Well, the victim statement should be taken into account because it's up to four people who were close to the person who was killed. I don't think that's

taken into account enough, but the judge has that. The judge has the victim statements to look at.” (Family member of victim, female)

“That would probably be one o’ the factors that I think should be taken in to account. It’s the only way you’re gonna learn about how the victim or the victims’ families feeling.” (Family member of victim, female)

Family members also felt that the victim statement was the only way they could speak on behalf of the victim. They felt that the offender was at an advantage in that respect because they were physically present and able to voice their thoughts, whereas the views of the victim of a causing death by driving offence cannot be expressed first hand.

“The sentence is actually weighted more in favour of the offender rather than thinking about the harm caused and the seriousness of the offence. I think it’s...because the offender is there to stand up or his lawyer is...his or her lawyer is there to stand up and provide all these...my client is so remorseful and so sorry and all this kind of stuff and you can actually hear that, then I think that then sways probably everybody in the court. You know oh poor guy or poor girl or whatever. But because...unless it’s a serious injury the victim is not there to stand up, then you don’t have that kind of...it’s not balanced.” (Family member of victim, female)

Furthermore, family members felt that the victim statements were the only means by which bereaved families were given a voice in the entire sentencing process as they are not called to testify.

“Definitely. Yeah...because you can’t go up there and...They don’t call you as a witness, so it’s the only way you’ve really got a way of saying how it’s affecting you.” (Family member of victim, female)

Several members of the general public had no prior knowledge of victim statements. Members of the general public were also divided in their views on whether the victim statement should be taken into account. A commonly held view was that victim statements should be taken into account but there were also opposing views that emerged from the discussion.

One such opposing view was that while the family has a right to express themselves, the statement itself should not be taken into account.

“If they feel that they need to say something well that’s fine, but I don’t think that should be taken into account.” (Focus group participant, female)

Another view was that the victim statement should not affect a custodial sentence, but instead the monetary compensation families of victims should receive, especially if the family is financially deprived.

“I don't think it should make a difference to the *jail* sentence necessarily. I think it should have a greater impact on maybe the monetary value, because I think a jail sentence is a jail sentence. It depends what the impact statement says. If it's talking about how they're financial deprived as a *result* of the death, then I think that should be consideration brought in to the fact that the family would get more money.” (Focus group participant, male)

### **Family members' experience of producing a victim statement**

Family members of victims were asked to share their experience of producing a victim statement, whether they felt their views were taken into account, and what would have helped them feel more involved.

Most of the family members interviewed had been involved in producing a victim statement. The experience was described as emotionally distressing and challenging. One parent explained the reasons they found the experience of writing the statement difficult in the following way.

“Distressing. You have to go over the facts or the events again, again, and come to terms with and articulate your feelings as a result. That's difficult. It's difficult.” (Family member of victim, male)

A parent of one victim expressed how difficult it was to produce a statement so early in the grieving process.

“You're still in shock at that stage, and you don't realise the full impact until maybe a year or two later, so I think what you would write at that time wouldn't be...it's not a true picture.” (Family member of victim, male)

Despite the challenging nature of writing the statement, when asked about level of involvement which family members would have preferred, family members felt either that they would have preferred to be more involved, or that the level of involvement was about right. They felt that their involvement was limited to writing the victim statement and that they were not given the opportunity to be more involved in the process. They noted finding it very difficult to access information on how the procedure was going and feeling somewhat shut out from the process, although there was a level of recognition that to some extent the lack of information they were given was due to the way the legal system works.

“Well...I mean they did'nae give you any idea exactly how the procedure was going to go you know? I just think that you were'nae given enough information.” (Family member of victim, female)

“Well, sometimes when I’d ring, they couldn’t tell me things. They said, ‘Well, we know this now, but we can’t talk about it’, or even sometimes they would say, ‘Well, we don’t even know if it’ll go to court’...But the person that dealt with it, oh, he was fantastic. Don’t get me wrong. It was just the law! He was going by the law.” (Family member of victim, female)

Another view was that it would have been an easier process if the impact statement had been produced through a face-to-face session with a third party instead of families being asked to produce and submit a written statement on their own.

“I mean you just had to write a statement, nobody came and sat face to face and basically sort of said to you what would you prefer and why? I think it was probably it was difficult at the time, even trying to think back, it’s a blur...I know I did one, I can’t even remember totally what I even said in it. So would it have been easier if somebody had just interviewed you more or sat and had a cup of coffee with you and actually got more out of you like this situation than you having to actually sit down and write something which I know I was quite strong enough to do it because I felt quite strong about doing it...but I totally understand maybe parents or family that wouldn’t feel up to doing that.” (Family member of victim, female)

### **Guidance to produce victim statements**

Family members of victims felt that some guidance on how to write the statement would have helped them when preparing their statement. Family members felt they were unsure of what they were expected to say in the statement and that providing them with some guidelines or guiding questions would have helped them structure their statements.

“Perhaps to guide you. It was just a blank sheet of A4 with basically a margin round it which you were given to write within. If they’d had three headings perhaps, or two headings, it would have maybe guided us. My husband found it really difficult to just keep...because you can write a story. If there was maybe two, three guidelines – impact, initial feelings or something like that.” (Family member of victim, female)

“Well, I suppose you don’t quite know what you’re meant to write, so you write, we don’t know if that’s right or wrong. You don’t really know what they’re looking for.” (Family member of victim, female)

Another solution highlighted by family members was to have two different options for filling out the statement: one with some guiding questions and one without.

“That statement is so important, and so much thought goes in to it that a touch of structure might be good. There might be people who say I don’t want structure, but if you’ve got the option. Even if there was two sheets that said, Just put down if you wish to...Here you are. If you can't, there's three headings, and you can do that.” (Family member of victim, female)

#### 4.3.2 Effect of the victim statement on sentencing

From their own experience, family members felt either unsure or sceptical about whether victim statements made a difference to the sentence given to the offender.

“I think it should have. I don't know whether it does have.” (Family member of victim, female)

“Oh yes. Well, I would hope so. If the judge doesn't take it into account, then she's not doing her job properly. Oh yes.” (Family member of victim, male)

“I don't know to be honest; my perception is that it wouldn't.” (Family member of victim, female)

Family members felt that the impact statements they had submitted in their own cases were not taken into account.

“As I say I was'nae convinced anybody actually read it to be perfectly honest.” (Family member of victim, female)

It was evident that family members felt unsure or sceptical about the use of victim statements in sentencing because they had not received any acknowledgement that the statement they had submitted had been received. They had also received no feedback on how the victim statement had been used. This made them feel uncertain about whether the statement had been read by anyone or been considered in the sentencing process.

“There was no follow up, there was nothing ever to make you feel that it had any impact whatsoever.” (Family member of victim, female)

Family members also felt that, had they received some feedback on how the victim statement was used, they would have been more confident that their statements had been taken into account in the sentence given by the judge.

“It would be nice to know how much [the victim statement] was taken in to account. After this, when the sentence was given, you don't really have...you're just told that's what the sentence is, and there's not really a follow up to tell you why. You've got your Crown Office...your lawyer that

deals with it, but it doesn't go in to detail, so it doesn't really say...There's no feedback from it. There's no feedback." (Family member of victim, female)

#### **4.3.3 Views on whether the way victim statements are written makes a difference**

There was a general consensus among members of the public and family members of victims that the way a statement is written should not affect the sentence. However, there was also a widely held view that it is likely that it would affect the level of impact the victim statement has on the sentence.

There was a view that if the victim's family are unable to produce a strong enough victim statement, the sentence is more likely to be in favour of the offender.

"If you get someone that can write the correct letter, in the right tone, they're going to get more justice than somebody that can't present it." (Focus group participant, male)

A similar perspective was that the level of education of the writer and their general communication skills could make a difference to how much impact the statement may have.

"Less well educated, as opposed to someone who is very eloquent and can rattle off seven or eight pages of terrible things that...feelings he has, as opposed to some maybe older person who just write down and say, 'I'm awfully worried and I dinnae want to go outside any more'. It's a wee sentence, but it's a huge impact on their life." (Focus group participant, male)

Another aspect that was seen as potentially affecting the impact of the statement was related to how people manage their grief after a tragedy. While some people might be forthcoming and feel able to express their emotions, others may not be comfortable sharing their emotions in a written statement to court.

"I think that's a difficult one too because some people might find it difficult to write down their feelings, so it might come across as a bland piece of information, and then you'll get someone else who can put their emotions down easily on paper, and it would be difficult then to say, 'That one's feeling more pain than this person'." (Family member of victim, female)

## 4.4 Views on whether the views of families of victims should be taken into account in sentencing

There was no consensus among family members and members of the public on whether views of family members on sentencing should be taken into account. One perspective was that views of the family should be taken into account because they are the next closest person after the victim to the case and will know the case in-depth.

“I think they should. I think because you’re so close to it because you...well okay I mean you’re affected by it obviously but then in the lead up to the court case you do so much kind of information gathering and actually you know...in my experience then you know much more than the Procurator Fiscal because you’ve...and not in an emotional...well yes in an emotional way but also in a factual way because you’ve gathered so much information.” (Family member of victim, female)

Another view was that families should be able to give their views on the sentence but it should be left to the judge to decide whether their views should be taken into account.

“I think maybe you should be able to give your views. I mean obviously the judge doesn’t have to take them, but I think you should be able to give your views.” (Family member of victim, female)

“I think if you’ve had your view take[n] into account and you’ve been heard then I think it’s...it’s up to the judge or the jury then to weigh up both sides in an equitable sense and decide what’s...because of course we’d all lock them away and throw away the key but its...it needs to be a fair judicial system. I don’t think it is at the moment, but it should be.” (Family member of victim, female)

One opposing view was that views of the victims’ families should not be taken into account as it could affect the impartiality of the process. Furthermore, participants also noted that allowing families’ views to be taken into account could be unfair to both the victim and the offender as some families could be more forgiving than others and that could affect the severity of the sentence.

“I think that would colour the view of the sentence because – yes – it could work one way, but it could also work the other way.” (Family member of victim, female)

“Are their families quite forgiving of the circumstances? But there's other people that would hold a grudge and never be able to get past that, and is



that fair to punish someone more because their family couldn't see some of the other circumstances than someone else?" (Focus group participant, female)

## 4.5 Views on whether impact on offender and offender's family should be taken into account

All participants were asked if they thought the impact on the offenders' family should be taken into account in sentencing. One perspective was that as the offender had made a choice and put their family in that position, the impact on the family should not be taken into account. Participants empathised with the family of the offender but felt the offender should still pay the price for their actions.

"Well they've caused the damage and it doesn't matter if they need to take wee Jimmy to school or...it's their job, or...they've caused the damage so they have to pay the price for that. It's very sad that the family will lose out in whatever way, emotionally and everything else but I don't really think that should be taken into account." (Focus group participant, female)

Another perspective that emerged from both the family members of victims and the general public was that the impact on the offender's family should not be taken into account as the justice system is already skewed in favour of the offender.

"No because I think there's too much focus on the criminal. I mean that is just...that's the whole impression I got, it was like the criminal was there and you were here [hand gesture indicating criminal at the top and the victim at the bottom] and it should be the other way around." (Family member of victim, female)

There was an opposing perspective that if the offender had caring responsibilities or was the sole breadwinner of a family, the impact on the family should be taken into account.

"If that person is, for instance, the carer of an invalid mother or something...they're doing something good for the community in their day to day life or they've got family that are dependent on them, or things like that, then I would say that yes there should be some kind of...yeah...it should be taken into consideration." (Family member of victim, female)

However, even those that felt the impact on the offender's family should be taken into account, questioned the degree to which it should influence sentencing.

Participants still thought there needed to be some form of punishment. Some were also of the view that it would be unfair to give a lesser sentence to someone who had family responsibilities than for someone who had no immediate family. They felt that offenders should receive the same level of punishment, irrespective of their family background and responsibilities.

“How much it should be taken into consideration is the question. But I think it would be essentially wrong to say well that person is a breadwinner in the family so therefore we’re not going to put them in prison. We’re not going to disqualify them, there is to be no punishment. There has to be something.” (Family member of victim, female)

“The offender might not have an immediate family. So why should he get a greater sentence than somebody that has got a family that’s done exactly the same crime?” (Family member of victim, male)

#### 4.5.1 Lack of transparency

There was a view that there was a lack of transparency in the factors that are taken into account in sentencing. Family members of victims felt that, in their cases, they were not given enough information regarding the factors which were taken into consideration in the sentence that was passed.

“It would help enormously if this was available to the public on a website for those who are interested, and perhaps for the victims’ families if this were also given out in some sort of form or whatever so they understand – not in every single detail – what’s been happening, but what is being considered / taken into account and how it can influence the judge.” (Family member of victim, male)

Another view was that the level of transparency when sentencing was not consistent across cases. For example, the following conversation between parents of a victim about a case they had seen in the media highlights their view that sentencing in more high-profile cases receives more detail and explanation than other cases.

“Well, in summing up was that, in the [name] case wasn’t it? He did make quotes from the defence counsel and the prosecuting counsel and explained why he had come up with the sentence – not in every single detail obviously – but I mean he did give some reason, so this sort of thing would help.” (Family member of victim, male)

“But that was a high-profile case, so that was the difference I think. These are not high-profile cases.” (Family member of victim, female)

#### 4.5.2 Support and information available throughout sentencing process

There were family members who felt that they were treated well through the sentencing process and were satisfied by the sentence given to the offender. Participants particularly valued being kept informed via the Victim Notification Scheme which informed family members when the offender was being released from prison.<sup>36</sup> Family members appreciated receiving information and being asked about how they had been impacted by the offence. Participants thought it was important that all families of victims were informed about the scheme.

“You can be a member of the victim information [scheme] that you get from the prison. I found that very helpful...I knew exactly what was going on all the time, and they were the best people at communicating...I think it's important to be kept in the loop of what's actually happening, so they informed me when he was allowed to come out on day release, and when he was allowed to do certain things, so it kept me informed because I live in the area where I could easily have just met this person, so I did find them helpful. And also I found that they wrote back...I got [the] opportunity, if he was going to be allowed parole, to write what I felt, and I was able to do that, and that was taken in to consideration, and I was given letters back saying that my impact comments had been relevant, so that's important...I liked the fact that they gave me an opportunity to write in – like the victim impact statement. There was feedback afterwards, and I think that's important to get the feedback afterwards.” (Family member of victim, female)

However, not all participants had been informed about the Victim Notification Scheme and not everyone who had been informed found the scheme helpful in accessing information about the sentencing process.

“There's a victim information scheme which we were told absolutely nothing about...as I say we found out he was out and going around and nobody had told us. That was when we said why, because we had'nae joined the victim information scheme and I said well how can you join a scheme you know nothing about?” (Family member of victim, female)

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<sup>36</sup> Participants referred to the Victim Notification Scheme as the Victim Information Scheme. Participant terminology is used in the quotes below.

## 5 Scenario

### 5.1 Views on the preliminary details of the offence

Focus group participants were given a causing death by driving offence scenario, based on a real case, to consider. Details of the offence were presented to participants in four phases and they were asked to consider and share their thoughts on the scenario at each stage. Participants were first presented with some basic facts of the incident including: where and when the incident took place; the number of people involved; the speed and nature of the driving which took place; and details of the casualties (see Figure 1).

**Figure 1: Details of the causing death by driving offence scenario (1)**

On the evening in question the accused was driving a car with four passengers; three males in the rear of the car; one female in the front of the car.

The accused was driving fast (no less than 60mph in a 30mph limit area) not long after midnight on a busy urban high street. The radio volume was loud.

The accused overtook two vehicles and while trying to overtake a third vehicle, failed to get back onto the correct side of the road and struck a double decker bus.

One of the rear passengers was ejected by the impact of the collision and suffered fatal injuries. Another rear passenger suffered the collapse of both lungs and fractured ribs. The two passengers that suffered injuries were the only people in the car not wearing a seatbelt.

This section includes focus group participants' initial thoughts regarding the scenario information they received, including what sentence they would give, whether they have enough information to decide a sentence and any other information they would require before deciding on a sentence.

Based on the information presented, there was general agreement that the charge in this case would be both a dangerous and careless driving offence. When asked what sentence they would give with the information they had, the sentence ranged from three years to life imprisonment as well as a disqualification from driving.

### 5.1.1 Key factors taken into consideration

From the information presented at the first stage of the scenario, speeding was a key factor that participants used in determining the sentence they thought was appropriate.

“Straight away, you're double the speed limit, so straight ban on your licence. As soon as you hit double, it's a straight ban anyway. You've killed someone as well now, so I reckon that'd be another three or four years or that. And it would be jail time as well.” (Focus group participant, male)

All three focus groups discussed whether the driver should be held accountable for the passenger not wearing their seatbelt. Participants felt this was an important factor to consider as the only passengers with injuries were those not wearing seatbelts. One view was that the driver was responsible for all the passengers in their car and therefore should be held accountable.

“As we've mentioned before, he's responsible for the people in his car, so he should have told them to put their seatbelts on.” (Focus group participant, male)

Another view was that as it is the legal responsibility of the passenger to wear their seatbelt if they are over 14<sup>37</sup> years of age, it would be unfair to factor that into the sentence.

“Initial thoughts, number one is the seatbelts, well if you're over 16 and you don't wear a seatbelt it's your own responsibility. So you should'nae be charged for no seatbelts but he should be charged for the rest.” (Focus group participant, male)

There was also a view that both the driver and the passenger were accountable for the passenger suffering fatal injuries due to not wearing a seatbelt.

“I believe the driver's still culpable for letting him in the car, but you can be liable for a fine *yourself* for not wearing a seatbelt, so I think maybe both. Yeah.” (Focus group participant, male)

### 5.1.2 Additional information participants felt they needed

While there were participants who felt able to give their views on what sentence they would give the accused, others in the focus groups felt they required more information before they could pass a sentence. It was evident that the information

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<sup>37</sup> It is the legal responsibility for a passenger over the age of 14 to wear a seatbelt. The participant thought the legal age of responsibility was 16.

previously presented to focus group participants on factors taken into account by judges had also aided some participants to ask for more information.

“I would say we need more information. Like there's this other list here about things that are taken in to account, and so I wouldn't want to make a judgment on that until I know a bit more.” (Focus group participant, female)

Participants felt they needed more information such as whether the driver was under the influence of drugs or alcohol, if there was a reason they were speeding, the driver's health, whether the car was owned by the driver, whether the car was insured, the behaviour of the other passengers in the car (for example, whether they were pressuring the driver to drive faster) and whether there was an effect on the people in the bus.

“Was he drunk? Did he have any drugs in his system? Was there a reason why he was going as fast as that and as crazy as that?” (Focus group participant, male)

## 5.2 Views on the aggravating factors of the case

Participants were then presented with further details of the scenario and asked to share their thoughts and views (Figure 2).

**Figure 2: Details of the causing death by driving offence scenario (2)**

**The accused had been drinking:** the breath test analysis from the incident was more than double the legal limit for driving. Before getting in the car, the accused and two of the rear passengers consumed one large and one small bottle of brandy between them.

The group decided to drive to an off-licence to buy more alcohol. They were driving back from an off-licence when the incident occurred. The off-licence was in walking distance from the group's location.

The person who was fatally injured and the person with serious injuries were the two rear passengers who had been drinking with the accused.

Some or all of the male passengers in the rear of the car were reported to have been calling for the accused to drive faster and overtake cars. The female passenger in the front seat had not been drinking and asked the accused (who was driving) to slow down.

The accused was taking prescribed medication which carries a warning that it interacts with alcohol and that alcohol must not be consumed whilst taking the medication. The medication also warns it may affect ability to drive or operate machinery.

The accused's car had been refused an MOT certificate so it was uninsured.

After reviewing the aggravating factors presented, the groups found it difficult to decide which of the offences under causing death by driving offences the accused should not be charged with. One view was that the accused should be charged with all five offences that fall under causing death by driving offences under Part I of the Road Traffic Act 1988. Another view was that the accused should at minimum be charged with causing death by dangerous driving, causing death by careless driving while under the influence of drink or drugs and causing death by driving while uninsured.

### 5.2.1 Key factors taken into consideration

After reviewing the aggravating factors, participants felt the case was more serious than they had initially considered. There were two key factors that participants took into consideration in their decision-making process. Firstly, participants took into consideration that the accused was driving under the influence of alcohol and was taking medication which they had been advised should not be taken alongside alcohol. Participants felt that the accused should be held accountable for driving after having consumed alcohol.

“He already knows...he already knew not to drive 'cause he was on the tablets, and then he was drinking when on tablets. He shouldn't be going in to the car in the first place. He shouldn't be drinking, going to the shop to get more drink if he's on the tablets.” (Focus group participant, male)

The second factor that participants noted as important to consider was that the accused was driving without an MOT and therefore uninsured.

“Under the influence. Drink driving first of all, and then the car not being MOT'd.” (Focus group participant, female)

Participants did not think that the fact passengers encouraged the accused to drive faster was important because the driver should have pulled over and told them to stop.

“It's still her responsibility then, if that was all going on, to pull the car in to the side and say, 'Well, right. Shut up. I'm no' going any further'. Simple as that. I know that some people wouldnae be brave enough to do that.” (Focus group participant, male)

### 5.2.2 Sentence proposed by participants

After reviewing the second set of scenario information, more participants felt able to suggest a sentence they would give. The suggested sentences ranged from five years to a life sentence or more and disqualification from driving. There was some debate amongst participants regarding the length of disqualification. Participants' views on the length of disqualification ranged from a minimum of two years up to a lifetime disqualification depending on their personal values and experiences.

“Oh, well, totally banned for life. I wouldn't even consider giving him a licence back.” (Focus group participant, female)

“I don't know. I would say definitely a sentence – maybe six, seven, eight years – but I would say maybe a ban after that of two or three years. I think there's still potential for people to reform. I don't think he should give up his licence forever.” (Focus group participant, female)

“I think if they take his licence away, you should have to re-sit your test before you get your licence back.” (Focus group participant, female)

When asked if they felt they required any further information to make a judgement, participants' views were split. Some felt they needed more information including the age of the accused, the length of time they had been driving, any previous offences and their personal circumstances while others felt that any additional information would be inconsequential given the nature of the offence.

“Have they done any crimes before, or have they had things like this before? Have they caused death or an accident before, driving? Have they been brought up...the kinda social background as well.” (Focus group participant, male)

“I don't care about that personal thing for that incident because they're doing everything they know they shouldn't...D'you know? They're just driving when they're drunk, they're going fast when they shouldn't. The passengers in the seat. It's constant. I wouldn't care what...how old they were.” (Focus group participant, female)

## 5.3 Views on the mitigating circumstances of the case

Participants then received the third set of scenario information (Figure 3).



**Figure 3: Details of the causing death by driving offence scenario (3)**

The accused entered a guilty plea at the earliest opportunity.

The accused has shown genuine remorse in court and in the pre-sentence criminal justice social work report. They did not intend to kill or injure anyone.

The accused claimed to have only two drinks of small measures and they believed they were below the legal limit and their judgement was sufficient to drive safely.

The accused had been driving for only six months at the time of the offence.

The accused had no previous convictions.

When given information on the mitigating circumstances of the case, on the whole participants did not change their views on the sentence they would give the accused. Factors such as showing remorse and entering an early guilty plea did not noticeably change their views.

“For me, that doesn’t change what I’d said before, so that was kind of what I’d thought in my head. It’s not any worse or better. ‘It’s the same’.” (Focus group participant, female)

There was a view among participants that the mitigating circumstances presented were insufficient to reduce the level of culpability of the accused. Participants felt that the aggravating circumstances were stronger and bore more weight in the sentence which they felt should be given.

“Other thing is he’s only had a licence for six months, which could be, in some people’s view, ‘Well, he doesnae really know what he’s doing’, but from my point of view – you’ve probably noticed I’m quite hard these days – is that he should’nae have been driving at 70 mile an hour through the 30 mile, or sixty mile, I beg your pardon, through a 30. He should’nae o’ been trying to overtake vehicles.” (Focus group participant, male)

Participants did not change their views on the length of imprisonment they would give based on the new information with which they were presented. However, there was some debate among participants regarding whether the driving disqualification should be for less time than they had initially judged. In their discussions, participants took into consideration the ways in which disqualification for life would affect the accused. Interestingly, the factors considered mostly involved potential personal circumstances of the accused (age and livelihood) rather than the mitigating circumstances that were presented, implying that these specific mitigating circumstances continued to have little bearing on their overall sentence.

“I would say personally with him only been driving for six months, I would maybe not remove the licence for life to apply to a 17, 18-year-old possibly. I would make that still should be at least 10 years minimum – removal of licence – to grow up a little bit and learn, but even then I'm still not sure.”  
(Focus group participant, male)

When asked if they required any additional information, some participants felt they did not need any further information while the others felt they would like to know the age of the accused.

Participants had already made assumptions about the age and gender of the accused throughout, for example that the accused was young and male, despite not being presented with this information.

## 5.4 Views on the personal details of the accused

Finally, participants were presented with some personal detail about the accused (Figure 4).

**Figure 4: Details of the causing death by driving offence scenario (4)**

Age: the accused is 22 years old

Gender: female

The accused is the primary carer of her two-year-old son. The father only has periodical contact with the child.

The accused lives in a rented flat from the council with her two-year-old son.

The accused has obtained a training course place that would lead on to a university placement and nursing degree qualification. Due to the nature of the offence and the fact the accused will have a criminal record, the accused may have to pursue another career.

Family background: The accused has a good relationship with her mother but has not met her father who had perpetrated domestic violence against the accused's mother.

There were focus group participants who were not sympathetic to the personal details of the accused. Some were surprised that the accused was female but they did not think that this changed anything. A key personal detail that was discussed among participants was the young child of the accused. There was a view that the accused should have considered that factor beforehand and therefore it should not be used as a factor in reducing the sentence. In fact, the accused being a mother made some participants react more harshly towards the accused and the offence she committed. However, this did not lead to the

participants suggesting that the accused should be given a higher sentence. While others did sympathise with the circumstances of the accused, particularly that their child would be left without a mother for several years, they felt this still should not be taken into account when sentencing.

“But that can be the emotional side of it, but then also, if you have a two-year-old child, you shouldn't be going around drunk driving. That shows even more gross negligence in that environment.” (Focus group participant, male)

“The fact she's a mum changes, but it shouldn't change it. It should be the exact same as it is before, but as soon as...It's 'cause I'm a mum too. I have a...baby, so, as soon as somebody mentions something a mum and a kid just now, for me, I'm like 'Oh, the poor kid. Two-year-old. They've got a two-year-old.' But it shouldn't affect anything. It should still be the same.” (Focus group participant, female)

Another view was that the victim also could have had children and family who have been deprived of their mother or father due to the actions of the accused. Therefore, it would not be fair to consider the accused's family circumstances.

“No. I'm sorry. I just feel as if the victim's also got a family that maybe have a kid that's maybe not going to see her father or her mother. And it could be somebody that he killed maybe 16, 17. Maybe the mother o' that person, that's maybe the grandchildren it could be.” (Focus group participant, female)

Participants also discussed the age of the offender. There was a view that the offender was old enough to know better and therefore should not have her sentence reduced because of her age.

“She's 22, she's not 16 which there is a difference and she showed no sign of making any normal judgment.” (Focus group participant, female)

Other personal details of the accused that participants debated included the upbringing of the accused and the fact that she was currently enrolled in a university programme. Knowing that the accused had personal aspirations made some participants question whether they should be more lenient with their sentence. Similarly, participants also debated whether the disadvantaged family background of the accused should be a factor to be considered.

“But, as someone who actually grew up in that same environment, that shouldn't be involved in any way in this discussion. That has nothing to do with the effects of going out driving and doing that sort o' thing. Yes –

maybe she drinks on occasion because of it, but that still shouldn't need to be drunk driving.” (Focus group participant, male)

“Her family background didn't jump out at me. It was the fact she was going back to uni and learning – to be a good mum, and education for her kid – jumped out at me, only because I'm a mum.” (Focus group participant, female)

Another view that emerged from the focus group discussions was that people may empathise with the personal details of one offender and not the circumstances of another and, therefore, personal circumstances of any kind should not be considered when sentencing as the law should be applied in the same way across the board.

“The facts should be the facts. It should be the same whether it's a mum of two, or a 17-year-old boy. It's still driving drunk, still overtaking the cars, still in the High Street. Everything's still the same, but the fact that she's a mum trying to get her life together by going back to uni, and learning, makes me feel bad for her, but I shouldn't be because she still did that!” (Focus group participant, female)

While participants themselves felt that the personal circumstances should not influence the length of sentence, there was also a view that it would probably affect how a judge would review the case.

“No, but I can see that the fact that there's a training course and you know she was going to be a nurse might have swayed the judge in her favour. I wouldn't have changed my mind.” (Focus group participant, female)

## 5.5 Views on what sentence should be given

After discussing the personal information about the accused, focus group participants were asked what sentence they would give the accused and why. The sentence which participants would give once they had all the information about the case ranged from a community-based sentence and a 10 to 15 year disqualification from driving; six to eight years imprisonment with disqualification from driving for two to three years after prison; to eight to 15 years imprisonment with a lifetime disqualification from driving. There was also a view that the accused should be made to re-sit her driving test. For the most part, these suggested sentences are within the current maximum sentence for this kind of offence under parliamentary law.

Participants were asked what factors they had taken into account for their sentence and whether some were more important than others. There were participants who, on reflection, reduced their initial sentence as a result of the

personal circumstances of the accused. Participants were concerned about what would happen to the accused's son and the impact a prison sentence would have on the accused's future.

“Slightly lesser sentence, given the child, the age o' the child. Not sure about her future with her degree. Might just be one o' those things where she does need to look for another career...originally, after the scenario printout 1, it was 10 plus years, whereas now you're probably looking at maybe *maximum* 10 years – given her remorse, sort of mitigating factors such as her child and stuff like that. I feel like that will be given consideration.” (Focus group participant, male)

“I would still ban her from driving – like for the 10, 15 years – but I would feel like I wouldn't *want* to put her in jail 'cause of her kid...Maybe for a little bit, but I'd feel bad.” (Focus group participant, female)

However, there were participants who were concerned about the welfare of the accused's son but did not reduce the sentence because they thought family members could care for the child. The possibility of the accused losing their home was not considered by participants when sentencing.

“The fact she had a two-year-old son makes a difference, but also there's the point about well the mother could look after the baby, so that kinda cancels itself out.” (Focus group participant, male)

For a number of participants the aggravating factors played an important role in making the decision on the sentence they would give. The accused had been drinking alcohol, speeding and generally driving recklessly, all things that she would have known she should not have been doing. In doing so, the accused was endangering the lives of others.

“Realistically, there was her and four passengers in the car. She's put five people's lives at risk, *plus* others. It's not like it was even just her in the car. There's the people she had in the car as well as the general public.” (Focus group participant, female)

The fact that the accused did not need to drive, and could have walked to the off-licence, was also taken into account by participants.

“Well, it was in walking distance, so she didn't need to get in to the car, and she knew she was drinking, so she didn't need to get in to the car.” (Focus group participant, male)

### **5.5.1 If the accused had not been drinking or on prescribed medication, should this change the sentence?**

Participants were asked whether the sentence would change if some of the factors of the case were different. For some participants, if the accused had not been over the legal alcohol limit then they would have given a shorter sentence. Participants discussed whether being over the legal alcohol limit led the accused to speed and drive recklessly which resulted in the accident. For some this meant they thought the sentence should be reduced if no alcohol had been consumed.

“Aye I would have changed the sentence aye. If there was’nae drink.”  
(Focus group participant, male)

If the accused had been sober and speeding and driving recklessly, there were participants who would not reduce the accused’s sentence.

“I still think it’s dangerous driving actually, twice the speed limit, passing three cars.” (Focus group participant, male)

However, participants would not have changed the sentence if the accused had not been on prescribed medication because she would have still been over the legal alcohol limit and driving recklessly in a car that was uninsured.

“Still overtaking cars, still going fast and doing everything else committed. Don’t think medication can make you go up twice over the speed limit.”  
(Focus group participant, female)

### **5.5.2 If the accused hadn’t been speeding, should this change the sentence?**

If the accused had not been speeding, there were participants who would have considered giving a slightly reduced sentence. However other participants took the view that even if the accused had not been speeding, other circumstances of the case such as the accused dangerously overtaking vehicles, driving while under the influence of alcohol and drugs and driving while uninsured made the offence as severe.

“It still fits in to all four categories you were discussing it had been charged under before.” (Focus group participant, male)

One view was that if the accused had not been speeding, the accident itself may not have happened and someone might not have been killed so the whole scenario could have been different.

“The consequences of her driving, because she was speeding at that speed, is a main factor in there. If she had not been speeding, the whole

accident could...may well have been negated and never happened, or at least people won't be killed.” (Focus group participant, male)

### **5.5.3 If the accused was a different age, gender or had different personal circumstances, should this change the sentence?**

Overall, participants did not think that the gender or age of the accused would change the sentence they would give. Many participants had assumed the accused was young before the age was given and they did not think the accused was too young to not know what they were doing was wrong. There were participants that had assumed that the accused was male but the fact they were female did not change their view of the sentence that should be given.

“Genders shouldn't mind whatsoever. Age: we all felt she was quite young...well, he/she was quite young – 17, 16. I don't think anyone's really changed their mind by going up to 22, because the *child's* involved.” (Focus group participant, male)

### **5.5.4 Did the accused's guilty plea affect the sentence you would give?**

There was no consensus between participants on whether they would change their sentence because the accused pled guilty early. There were participants who said they would reduce the accused's prison sentence and disqualification from driving by a couple of years because pleading guilty early on showed that they had some remorse.

“[She] shows remorse, so it shows to me that she didn't want anyone to die, so that, straight away, to me is manslaughter. Because it's dangerous driving under the influence it probably is for me less than actual manslaughter by fighting someone, so I think it's gonna drop down...a few years, even if at *all* jailing.” (Focus group participant, male)

However, there were also participants who thought that the accused making a guilty plea did not change the circumstances of the case and therefore the sentence should remain the same.

“I don't think saying, ‘Honestly. I'm guilty. I'm wrong’. It's maybe the right thing to *do*, and it should hold you at a certain level of sentence...Just saying that you're aware that you were wrong [doesn't make them] any less guilty.” (Focus group participant, male)

Participants did say that if the accused in the scenario had denied guilt then they would increase the sentence because it would have showed a lack of awareness on the part of the accused of their behaviour and the seriousness of the offence.

“I think – yes – it would. If I thought that this person at the end of this whole incident was going, ‘Nah. I'm no guilty? My friend's dead. I was over the drink drive limit. I didn't, I'm not guilty’, I would be thinking, ‘Right. You need a more severe sentence because you're not understanding the *gravity* of this!’” (Focus group participant, female)

### **5.5.5 The sentence participants thought would be passed by a judge for this case**

Before participants were told what the actual sentence was, they were asked what sentence they thought a judge would pass. Participants thought a judge would give a shorter sentence than they had suggested or a non-custodial sentence, partly because of the potential impact on the accused's child. The sentence participants suggested a judge would give ranged from a community-based sentence to a prison sentence with disqualification from driving for a couple of years. The length of prison sentence suggested tended to be between two to six years, although there were participants who thought the judge would give a prison sentence of up to 10 years. Participants also thought the accused would be ordered to re-sit their driving test.

“I think three years, take your licence away, and community service.”  
(Focus group participant, female)

“I don't think she would get a custodial, I think she would get...what do you call it?...community service and be disqualified...Or a suspended sentence and be disqualified...Because...the judge is not as hard as I am!”  
(Focus group participant, female)

“That's it! He's thinking of the child; he'll be thinking of the child and that.”  
(Focus group participant, male)



## 5.6 Views on the sentence given by the judge

After discussing their views on the scenario, participants were shown the sentence the judge gave. Focus group participants were asked what they thought of the sentence given by the judge (Figure 5).

**Figure 5: Details of the causing death by driving offence scenario (4)**

**Sentence:** Four years, nine months imprisonment and disqualified from driving for five years with the requirement of the offender to sit an extended driving test.

The sentence had been reduced by one third for the guilty plea and reduced by a further nine months for the personal factors in the case (personal mitigation and the inevitable effect on the child and his relationship with his mother).

Reasoning:

- The offence was aggravated by the fact:
  - that the accused voluntarily consumed the alcohol and was twice the legal limit;
  - the speed was twice the limit and the accused was overtaking other vehicles;
  - the accused could have walked to the shop, so no need to drive;
  - the accused didn't listen to the only sober passenger telling them to slow down.
- The early guilty plea was taken into account along with the previous good character of the accused.
- Although the accused had only been driving for six months prior to the offence, this crash was attributed to recklessness not inexperience.

There were participants who thought the judge gave the sentence they had expected, but others were surprised by the sentence. They thought it was fair given the circumstances but thought if there was not a dependent child then the sentence would have been higher.

“I was right in what I thought it would say, ‘cause the kid was involved, but I’d think if the child wasn’t there, I think it would o’ been a lot higher, ‘cause she did kill somebody.” (Focus group participant, female)

“I think it's a fair sentence in terms of the crime that's been committed, but it also does give an opportunity to reform and do something different,

whereas if you're looking at a much longer sentence and things like that, that it would be difficult to.” (Focus group participant, female)

However, there were also participants who thought the sentence given by the judge should have been longer. Participants didn't think that an early guilty plea should reduce the sentence.

“I think a lot of sentences are get a lot o' mitigating factors come in to it, and they do get reduced by about a third for a guilty plea and stuff like that, so I still think they are low, but I think they are still in keeping with the rest o' the law.” (Focus group participant, male)

“Well I don't think the early guilty plea should have been taken into account at all. I don't think that ever should be taken into account.” (Focus group participant, female)

There were also participants who thought that, despite the sentence being shorter than they would have given, that it was fair.

“I still think it's too lenient but I can see why...Why they've done that...she realised what she had done.” (Focus group participant, female)

Participants were then informed that after an appeal the sentence was reduced to three years 10 months. It was successfully argued that the original sentence did not sufficiently take into account the mitigating circumstances, in particular the impact on the child. The overall view was that reducing the sentence on appeal made the sentence too short. Participants thought that the impact on the child was taken into account in the original sentence and that it was not necessary to reduce the sentence further. Participants queried whether nine months would make a difference in terms of the impact on the child. Participants also thought reducing the sentence further undermined the process and they thought the victim had been forgotten about.

“Initially, I think I was much harder and much more set – almost angry – way of looking at things. As it became more obvious that there was other things in it, the things weren't maybe as *important* as what has then happened, apart from the effect on the wee one. I did'nae really change my mind till the very end, and, even that, I did'nae like the way it was cut down because it was giving in even *more* to what...it was a fair *initial* thing in it, but the appeal I think, for more than just the reason that she got more *off*, but from the reason that *you* were saying.” (Focus group participant, male)

“The law now, all courts don't want to jail you now because it costs the government too much money. So they're trying to give sentences as

leniently as possibly. I know she should have got 20 times longer than that. But they'll no' want that because it just encourages them to come oot and commit more." (Focus group participant, male)

"And yet if you look at the reasoning here in the sentence thing, the offence was aggravated by the fact and all these I would have thought would meant that she should get more not less." (Focus group participant, female)

"There's been someone killed, so I would o' thought that it would o' been more than that." (Focus group participant, male)

## 5.7 Changes in attitudes to sentencing for causing death by driving offences

After discussing the scenario, focus group participants were asked if their attitudes to sentencing for causing death by driving offences had changed. In the focus groups there were participants who said their opinion that sentences were "too lenient", had stayed the same.

"I've no changed my mind at all. Sorry. I feel exactly the same." (Focus group participant, male)

"I would say stayed the same because...it's never long enough for me in a lot of situations." (Focus group participant, female)

However, for other participants, going through a scenario made them realise that there were a lot of factors to consider when deciding on a sentence and it was not as clear cut as they had first thought.

"I think it's kinda changed. I think there's so many things to consider. It's not as black and white." (Focus group participant, female)

"Yeah. There's so many factors that you have to pull in and take account of, and it's quite different to be *part* of that scenario and reading it in the newspaper and saying, 'Oh, that's terrible. She only got five years'." (Focus group participant, female)

## 6 Discussion and conclusions

### Awareness of the law

The results from this research show that participants have a limited understanding of the legal landscape in this area. Participants generally recognised that driving which includes drugs, alcohol and speeding would fall within the ambit of the criminal law, but the distinction between careless driving and dangerous driving was not readily identifiable to all. There appeared to be confusion as to whether or not criminal liability requires intent or merely negligence in cases of causing death by driving. Perhaps unsurprisingly, those participants who were the families of victims felt that they had a greater awareness of the existing structure of offences than those participants from the general public.

### Support for proportionate sentencing sensitive to the facts and circumstances of each case

While there was some support for more severe sentences being imposed, overwhelmingly members of the public and family members of victims wanted to see a common policy grounded in proportionate sentencing, sensitively scaled to the facts and circumstances of the case. In particular, there was strong support for the importance of recognising the high level of harm caused and scaling the sentence according to the culpability of the person. That is not to say, however, that participants did not want to see greater consistency in sentencing, as they were critical of sentencing practices which they believed could differ depending both on the sentencing judge and the area the offence took place. Sentencing guidelines were seen as one way to support consistency in sentencing whilst still recognising that the individual circumstances of each case needed to be taken into account.

### Perceptions of sentencing

The cases considered most serious by both members of the public and family members of victims were those where it was considered that the offender had made a deliberate and informed choice which had led to the fatality: taking alcohol or drugs, driving without insurance, driving dangerously, or driving whilst disqualified. Resultantly, there was a view that causing death by driving whilst disqualified was as serious as causing death by dangerous driving.

The views on the appropriateness of sentencing varied: some considered that prison should only be used in the most severe cases, others expressed that current sentencing practices were “too lenient” and did not truly reflect the loss of a loved one. For those who considered that prison sentences should only be for

the most culpable of offenders, there was recognition that the length of the sentence should not be so long as to prevent rehabilitation and reform of the offender. In terms of supplementary elements to a custodial sentence, the significance of an apology by the offender to the family was also emphasised. Other alternatives included the removal of the licence, fines and a community-based sentence. The need for flexibility in sentencing was recognised. Interestingly, participants in this study did not feel prison was an appropriate consequence where the context of the offence was one where the state had allowed the offender to continue driving, such as with older drivers.

### **Factors taken into account**

There was a perceived lack of awareness in terms of the factors which the court takes into account during sentencing. Once presented with the list of factors considered by the judge, participants agreed that certain factors, namely the seriousness of the offence, the harm caused, the impact on the victim and the risk of re-offending should carry more weight than other factors.

Initially, there was reluctance to take the offender's family background into account as mitigation for their actions. However some people's views did alter once they were presented with the details of a real case, though others remained reluctant to take an offender's background into account.

### **Perception of sentences as “too lenient”**

Members of the public and family members of victims were critical of a perceived tendency of the system to promise a certain level of seriousness in its response which then did not materialise, leaving them feeling misled and disappointed. They noted, in particular, the impact that guilty pleas have in relation to lower charges and reduced sentences, as well as the fact that the prison sentence announced in court is not served in full. There was limited knowledge about the reasons why offenders were released before the end of their sentence, an area where providing additional information to the public and specifically to members of the family of victims during the criminal justice process, could be considered.

Further, participants perceived that the maximum sentence was rarely given. In practice, the maximum sentence for causing death by driving has never been passed in Scotland. In general, the lack of the use of maximum sentences was seen as the system not being transparent enough, as the public are led to expect one thing but that the reality is more lenient. Interestingly, people did not universally support judges passing longer sentences. There were also family members of victims who felt that a prison sentence was not always appropriate, as this could ruin the offender's life and have a negative impact on their family. Instead, community-based sentences were suggested.

### **Importance of communication, especially with family members of victims**

Family members of victims expressed disappointment at a perceived lack of appropriate communication, although this view was not universally held, as others reported a good experience in this area. The lack of appropriate communication was seen to have manifested in three ways.

First, family members did not always feel they had enough information on why a particular sentence was given, what had been considered as aggravating or mitigating factors, and how sentences might be reduced on appeal. Second, there were family members who wanted to hear directly from the person who caused the death or serious injury, not least by way of apology. Third, there was a lack of awareness, among some family members, of the support that was on offer, such as the Victim Notification Scheme. Interestingly, there was no clear consensus from family members of victims on whether their own views should be taken into account during sentencing. Improved communication with family members of victims would lead to them having a greater understanding of the different parts of the process and provide more clarity on the reasons behind decisions that were made in the case of their family member.

This in-depth research about public opinion and attitudes in cases of causing death (or serious injury) by driving offences is the first of its kind to be conducted in Scotland. Public attitudes and knowledge of cases involving causing death (or serious injury) by driving must be considered in the broader context of how public attitudes are, in part, a function of limited public knowledge about sentencing. Previous international studies have shown that most people consider sentencing to be too lenient. However, this body of research has also evidenced that when people are presented with a scenario, people suggest sentences that tend to be less disparate from the courts do pass and that they also tend to over-estimate the leniency of the courts.

The findings of this work in relation to the views of victims' relatives concur with earlier research, particularly that carried out in England and Wales. Such negative feelings may be intensified by often not hearing any explanation (in particular remorse) from the offender.

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