



# Statutory offences of causing death by driving

## A Scottish Sentencing Council consultation Analysis of responses

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## Executive summary

1. The Scottish Sentencing Council (the Council) undertook a public consultation to gather views on a draft guideline on sentencing for death by driving offences. The consultation ran from August to November 2022, and received 58 responses from 49 individuals and 9 organisations (2 judicial organisations, 3 legal professional or academic organisations, and 4 third sector organisations). The relatively low number of responses should be borne in mind when considering the findings presented.

### Common themes in the responses

2. The sections below provide a summary of the views expressed in response to each of the consultation questions. However, there were some recurring themes that arose across all questions.

3. Organisations (and some individuals) emphasised:

- The need for the guideline to ensure clarity and consistency, and to enhance transparency and understanding for bereaved families and the wider public
- The need for more detail and examples in relation to certain aspects of the guideline, including the assessment of seriousness, and aggravating and mitigating factors
- The importance of flexibility and judicial discretion.

4. Individuals (and some organisations) emphasised the need for ‘tougher’ sentences for offenders and/or the use of the full range of available sentences, and a judicial system that prioritises the interests of victims, families and public safety.

### Overview of the guideline (Q1–Q5)

5. Questions 1 to 5 invited views on the guideline at a general level.

6. Most respondents (two-thirds or more) agreed with the structure (Q1) and style (Q2) of the guideline. They also agreed that the relationship between the draft guideline and other applicable guidelines was clear (Q3).

7. Respondents described the guideline as clear, logical, easy to understand, helpful (to professionals and the public) and likely to enhance flexibility and result in greater consistency in sentencing (Q1 to Q3). Suggestions (at Q1 to Q4) for improving the structure and style of the guideline and making the relationship between the guideline and other guidelines clearer included (i) providing extra information or detail on various aspects of the guideline, worked examples and a glossary (possibly in an appendix); and (ii) providing links to all other relevant guidelines and to the approved guidelines section of the Council website. Respondents also emphasised the importance of sentencers explaining **which** guidelines were taken into account in deciding a sentence, and **how** those guidelines were applied.

8. Most respondents (around two-thirds) agreed with the ordering of the offences in the draft guideline – with the most serious offences first (Q5). This was seen to be appropriate and logical, and easy for users of the guideline to understand.

### **Sentencing purposes and the assessment of seriousness (Q6–Q11)**

9. Questions 6 to 11 covered the purpose of sentencing and the assessment of seriousness.

10. Overall, three-fifths of respondents disagreed that the guideline should **not** emphasise any particular purpose or purposes of sentencing (Q6) – that is, they thought it **should** emphasise certain purposes. However, organisations were more likely than individuals to say that it should **not**. Respondents who thought the guideline should **not** emphasise any particular purpose of sentencing made two main points: (i) the purpose of sentencing would depend on the circumstances of each case, and (ii) this issue was already covered in the Council's *Principles and Purposes of Sentencing* guideline. Respondents (mainly individuals) who wanted information on the purpose of sentencing to be included in the guideline highlighted (i) punishment, (ii) deterrence, and / or (iii) protection of the public as appropriate purposes for sentencing in death by driving cases.

11. Around three-fifths of respondents agreed with the approach taken by the draft guideline for assessing seriousness (Q7). Organisations were particularly likely to support the guideline's approach, which they thought was clear and helpfully set out. At the same time:

- Around three-fifths of respondents thought that one or more changes should be made to the features of seriousness listed for each offence at step 1 of the guideline (Q8).
- Around three-fifths of respondents thought the difference between the quality of driving under Level B and Level C seriousness was unclear (Q9), with organisations more likely than individuals to say this.
- Just over two-thirds of respondents thought the distinction between Level B offences and Levels A and C would be clearer if Level B offences referred to 'driving that created a very significant risk of danger' (rather than 'driving that created a **substantial** risk of danger') (Q10).

12. There was a range of calls (often from third sector organisations) for features of seriousness to be moved upwards (from Level C to Level B, or from Level B to Level A). Some also suggested a need for further descriptive detail and, in some cases, examples to be provided to make the process of assessing seriousness clearer – particularly for the benefit of lay people.

13. On the issue of racing (Q11), of four options presented, the option which attracted the most support among respondents overall (favoured by just over two-fifths of respondents) was to include this behaviour as a feature of Level A seriousness (the highest level of

seriousness) as this behaviour was seen as particularly culpable, irresponsible and reckless. Organisations were especially likely to prefer this option. Respondents choosing other options – i.e. including racing in **both** Level A **and** Level B with suitable descriptions (option 2), including racing in **either** Level A **or** Level B with the option to move it depending on the nature of the racing (option 3), and including racing in Level B (option 4) – generally did so because they thought these alternative approaches would allow the circumstances of cases to be taken into account and support judicial discretion.

### **Sentencing ranges and starting points (Q12–Q15)**

14. Questions 12 to 15 invited views on how the issues of sentencing ranges and starting points within sentencing ranges should be dealt with in the proposed guideline.

15. Most respondents overall (around two-thirds) disagreed with the non-inclusion of starting points within sentencing ranges (Q12) – that is, they wanted starting points to be included. Respondents expressing this view thought that starting points would encourage the full use of available sentencing ranges and assist with public understanding. It was also suggested that, without them, sentencers would default to the mid-point in the range or revert to using the starting points included in the England and Wales guideline. The alternative view was that the non-inclusion of starting points allowed sentences to be better tailored to individual circumstances.

16. Most respondents overall (around two-thirds) disagreed that the sentencing ranges in the guideline should reflect current sentencing practice; however, most organisational respondents agreed – that is, they thought the sentencing ranges **should** reflect current practice (Q13). Some individuals said the new guideline should be used to bring about change and, in particular, to encourage the use of tougher sentences.

17. Most respondents overall also disagreed with the proposed sentencing ranges for each individual offence (Q14(i–iv)) – although the proportions disagreeing varied for each offence. Specifically, just over half of respondents disagreed with the sentencing ranges specified for dangerous driving; three-fifths disagreed with the ranges specified for (i) careless driving under the influence of drink or drugs and (ii) driving while unlicensed, uninsured or disqualified; and two-thirds disagreed with the ranges specified for careless or inconsiderate driving. However, for each of the offences, most organisations agreed that the specified sentencing ranges were appropriate. Those who agreed noted that the proposed ranges were based on research and current practice. Those who disagreed thought the proposed sentencing ranges were too lenient, and/or they said the sentencing ranges specified did not reflect recent changes to the maximum sentences available.

18. Most respondents overall (two-thirds) disagreed with the non-inclusion of guidance on disqualification periods – that is, they thought the guideline **should** include guidance on disqualification periods. However, respondents were divided in their views on whether guidance on the young driver scheme and the drink driver rehabilitation scheme should be included (Q15(i–iii)). Organisations were more likely than individuals to agree that guidance

on the young driver and the drink driver rehabilitation schemes should **not** be included in the draft guideline. However, four out of seven organisations thought guidance on disqualification periods **should** be included. Those who wished to see guidance included on these types of disposal thought this would increase awareness and understanding and improve clarity and consistency, particularly with regard to the use of disqualification from driving.

### **Aggravating and mitigating factors (Q16–Q20)**

19. Questions 16 to 20 addressed the treatment of aggravating and mitigating factors in the draft guideline.

20. At Question 16, most respondents (between just over a half and three-fifths) said that they disagreed with the aggravating and mitigating factors listed in the draft guideline for the three offences of death by dangerous driving, death by careless driving when under the influence of drink or drugs and death by driving unlicensed, uninsured, disqualified. For the remaining offence of death by careless or inconsiderate driving, respondents were divided in their views. However, for each offence individuals were more likely than organisations to say they disagreed with the factors listed. It was common for individuals to disagree with the inclusion of **any** mitigatory factors as they thought drivers should take responsibility for their actions, and they perceived mitigating factors as ‘excuses’ or ‘loopholes’ for offenders.

21. Most respondents (almost three-quarters) agreed that further guidance on previous convictions as an aggravating factor should be provided (Q17(i)). However, views were divided about whether further guidance should be provided on (i) remorse and (ii) the relationship between the offender and victim(s) as mitigating factors (Q17(ii–iii)). Those calling for extra guidance on one or more factors thought this would lead to greater consistency in sentencing. Those who did not think extra guidance was needed said that cases should be dealt with on their merits and highlighted the role of judicial discretion.

22. Most respondents overall (around two-thirds) agreed with the approach taken in the guideline to listing the contributory actions of others as a mitigating factor (Q18). However, views were divided in relation to whether the voluntary surrender of a licence by an older driver should be included as a mitigating factor (Q19).

23. Around two-thirds of all respondents thought that no additional aggravating or mitigating factors should be listed in the guideline (Q20), either because they thought the current list offered brevity and simplicity and was sufficient given that the list was intended to be non-exhaustive, or because they did not think that mitigatory factors should be part of the decision-making process. Those calling for the inclusion of additional factors suggested a range of health- and behaviour-related issues that might be listed.

### **Potential impacts of the guideline (Q21–Q25)**

24. Questions 21 to 25 asked for views on the potential impacts of the guideline. Most respondents (and especially organisational respondents) thought the guideline would

influence sentencing practice in Scotland by bringing clarity and consistency to an area of judicial decision making (Q21). Those who did not think the guideline would influence practice were mainly individuals who thought sentencers would continue to impose sentences that were perceived to be too lenient.

25. Organisational respondents also thought the guideline would lead to an increase in public understanding of sentencing decisions in death by driving cases, while individual respondents expressed divided views on this point (Q22). Those who thought the guideline would increase public understanding often said this would depend on effective communication and awareness raising, and accurate information and reporting on sentencing. Some also thought further development of the guideline (e.g. the inclusion of additional detail and examples) would be helpful.

26. At Questions 23 to 25, organisations (and some individuals) generally thought the guideline would be of benefit to a range of parties – sentencers, legal and other professionals, members of the public – by enhancing clarity, consistency and transparency, without entailing significant negative effects and costs. In contrast, individuals often saw no benefits to the guideline and/or were concerned about (i) negative effects in terms of public understanding of and confidence in the justice system, and (ii) additional costs in relation to the production of the guideline, lengthier and more complex cases and greater use of custodial sentences.



# 1 Introduction

1.1 The Scottish Sentencing Council undertook a public consultation to gather views on a draft guideline on sentencing for statutory offences of causing death by driving.<sup>1</sup> This report presents an analysis of the responses received to the consultation.

## Background

1.2 The Scottish Sentencing Council (the Council) is an independent body, established in 2015, with the aim of (i) promoting consistency in sentencing practice; (ii) assisting the development of policy in relation to sentencing; and (iii) promoting greater awareness and understanding of sentencing policy and practice. One of the Council's key functions is to produce guidelines to promote consistency in sentencing. Guidelines can be 'general', and cover all offences, or 'specific' and cover a particular offence or group of offences.

1.3 To date, the Council has published three general guidelines intended to provide a high-level framework for sentencing in Scotland, and to create a firm foundation for subsequent guidelines. These are:

- *Principles and Purposes of Sentencing* (effective from November 2018). This sets out the core principle of sentencing in Scotland, that is, that sentences must be fair and proportionate, and the main purposes of sentencing, which may include protection of the public, punishment, rehabilitation, giving the offender the opportunity to make amends, and expressing disapproval of offending behaviour.
- *The Sentencing Process* (effective from September 2021). This provides a framework for all sentencing decisions. It explains the steps taken when courts decide what sentence should be imposed, and the various factors considered in reaching a sentencing decision.
- *Sentencing Young People* (effective from January 2022). This sits alongside the two other general guidelines noted above and provides additional guidance for the sentencing of those under the age of 25.

1.4 Work on a fourth general guideline on discounting of sentences is at an early stage.

1.5 The Council is now turning its attention to the preparation of guidelines on specific types of offences. Guidelines on causing death by driving (the subject of the current public consultation) and sexual offences (including rape, sexual assault, and offences involving indecent images of children) are under development, with the guideline on death by driving offences the first to reach the public consultation stage.

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<sup>1</sup> <https://consultations.scottishsentencingcouncil.org.uk/ssc/death-by-driving-offences/>

1.6 Initial consideration is also underway in relation to proposed guidelines on domestic abuse and environmental and wildlife offences.<sup>2</sup>

### **Guideline on the sentencing of death by driving cases**

1.7 The draft guideline produced by the Council on the sentencing of death by driving cases covers the following statutory offences: causing death by dangerous driving; causing death by careless driving when under the influence of drink or drugs; causing death by careless, or inconsiderate, driving; and causing death by driving: unlicensed, uninsured, or disqualified drivers.

1.8 The sentencing of such offences has been identified as an issue of public concern. These offences are very serious in nature and can have a devastating effect on the families of victims and others. Circumstances, however, vary widely between cases. There may also be large differences between the harm caused – someone’s death – and the level of culpability, or blame, of the offender, particularly in careless or inconsiderate driving offences. As a result, cases involving death caused by driving can be among the most complex and emotive dealt with by the courts.

1.9 Research commissioned by the Council has highlighted limited understanding and awareness among the public of different death by driving offences and the sentencing of such cases; and has also found a discrepancy between public attitudes to sentencing in these cases, and actual sentencing practice.<sup>3</sup> Work with the judiciary has also identified death by driving cases as presenting specific challenges to sentencers because of the public focus on the outcome of these offences, rather than the actions leading up to them, and the complexities in assessing seriousness and aggravating and mitigating factors.

1.10 Currently, sentencers in Scotland can refer to guidance issued by the Sentencing Council for England and Wales. However, this guidance has limitations in its application in Scotland, given the different disposals available to the courts in the two jurisdictions. At the same time, the Scottish Sentencing Council’s recently implemented general guidelines now provide a framework for considering the issue in a Scottish context. Thus, the Council has identified this as an ‘opportune time’ for developing a specific death by driving guideline for the Scottish courts.

1.11 The proposed guideline is intended to address the issues noted above. In particular it aims to:

- Promote public awareness and understanding of, and confidence in, sentencing for causing death by driving offences by: (i) improving awareness of the law and practice as it relates to sentencing, (ii) improving understanding of the complex issues

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<sup>2</sup> See the Council’s [business plan for 2021–2024](#).

<sup>3</sup> See [focus group research](#) and [survey research](#) commissioned by the Council.

involved in the sentencing exercise, and (iii) explaining how sentencing decisions are made and why

- Promote consistency and predictability in sentencing for death by driving cases by setting out a framework for the sentencing exercise and providing guidance on appropriate sentences
- Be useful to sentencers, legal practitioners, and others who are involved in the delivery and administration of criminal justice, or who participate in or observe such cases: for example, the families of victims, the media, or support organisations.

1.12 The guideline is not intended to cover every situation, but aims to provide clear, accessible and precise information and guidance for the public and for those involved in the justice system.

## The consultation

1.13 The Council follows an eight-stage process in developing, implementing, and monitoring new sentencing guidelines. This involves (1) initial consideration of a topic; (2) development of a draft guideline (including stakeholder engagement and the gathering of evidence); (3) seeking the views of the judiciary; (4) consultation with the public, Ministers and the Lord Advocate; (5) finalising the guideline; (6) submission of the guideline to the High Court for approval; (7) raising awareness of the guideline; and (8) monitoring and reviewing the guideline following implementation.

1.14 The current consultation sought the views of the public and interested organisations on a draft guideline on death by driving offences (and thus formed part of stage 4 of the process outlined above). The draft guideline took account of a wide range of research, evidence gathering and stakeholder engagement, as well as consultation with members of the judiciary. The responses received will assist the Council in finalising the guideline prior to submission to the High Court for approval.

1.15 The consultation paper was published on the Scottish Sentencing Council's website on 30 August 2022, along with a copy of a draft guideline, and a draft impact assessment, with a deadline of 22 November 2022 for responses.

1.16 The consultation paper contained three parts. Part 1 outlined the background to the guideline, the reason for developing a specific guideline for death by driving cases, the evidence that had been considered in taking the work forward, and the aims and broad approach taken in developing the guideline. Part 2 explained the various aspects of the draft guideline in more detail. It covered the applicability, structure, and style of the guideline, and its interaction with other guidelines; the purpose of sentencing; the assessment of seriousness; starting points and sentencing ranges; aggravating and mitigating factors; and the potential impacts of the guideline. Part 3 contained a complete list of the consultation questions.

1.17 The consultation paper contained 26 questions, 22 of which comprised both a closed (tick-box) question (in some cases including multiple parts) and an open question inviting respondents to explain their answer. The remaining four questions invited comments only. The questions focused on the following issues:

- Overview of the guideline (Questions 1 to 5)
- Specific aspects of the guideline (Questions 6 to 20)
- Potential impacts of the guideline (Questions 21 to 25).

1.18 A final question (Question 26) invited any other relevant comments.

## About the analysis

1.19 This report is based on a systematic analysis of the responses to the consultation. Frequency analysis was undertaken in relation to all the closed questions, and the findings are shown in tables throughout the report. Qualitative analysis was undertaken of the comments made in response to each question. The aim of this analysis was to identify the main themes and the full range of views expressed in response to each question (or group of questions), and to explore areas of agreement and disagreement among respondents.

1.20 The relatively small number of consultation responses received should be noted in considering the findings presented in this report.

1.21 As with all consultations it is important to bear in mind that the views of those who have responded are not representative of the views of the wider population. Individuals (and organisations) who have a keen interest in a topic – and the capacity to respond – are more likely to participate in a consultation than those who do not. This self-selection means that the views of consultation participants cannot be generalised to the wider population.

1.22 For this reason, the approach to consultation analysis is primarily qualitative in nature. Its main purpose is not to identify how **many** people held particular views, but rather to understand the full range of views expressed.

## The report

1.23 The remainder of this report is structured as follows:

- Chapter 2 presents information on the respondents to the consultation and the responses submitted.
- Chapters 3 to 8 present findings from the analysis of the responses to each of the consultation questions.
- Annex 1 presents a list of the organisational respondents.
- Annex 2 presents the number of responses received to each consultation question.

## 2 Description of the responses and respondents

2.1 This chapter provides information about the respondents to the consultation and the responses submitted.

### Number and type of responses received

2.2 The consultation received 58 responses from 49 individuals and 9 organisations. (See Table 2.1.)

**Table 2.1: Types of respondents**

Respondent type	Number
Individuals	49
Organisations	9
<b>Total</b>	<b>58</b>

2.3 The nine organisational respondents comprised two judicial bodies, three legal professional or academic organisations, and four third sector organisations with an interest in the issue. (See Table 2.2.) The latter group comprised two organisations representing the interests of individuals affected by crime in general and individuals and families affected by road accidents in particular; one organisation with a focus on cycling; and one organisation with a focus on accident prevention.

**Table 2.2: Types of organisational respondents**

Organisation type	Number
Judicial organisations	2
Legal professional and academic organisations	3
Third sector organisations	4
<b>Total</b>	<b>9</b>

2.4 Annex 1 contains a list of the organisational respondents.

2.5 Note that, for the sake of brevity, 'legal professional and academic organisations' are referred to as 'legal organisations' in the remainder of this report.

### Responses to individual questions

2.6 The response rates for individual questions varied. The number of respondents answering each closed question ranged from 47 to 54 (out of the total 58). The response to the open questions was somewhat lower, with between 21 and 36 respondents providing comments at each question. Respondents were least likely to comment at Questions 16 to 20, which asked about factors of mitigation and aggravation – between 21 and 26 respondents answered each of these questions. The questions on impacts (Questions 21 to

25) attracted most comments, with between 28 and 36 respondents commenting at each of these questions.

2.7 See Annex 2 for full details.

### 3 Overview of the guideline (Q1–Q5)

3.1 The first section within Part 2 of the consultation paper presented an overview of the draft guideline, explaining the offences it covered, its structure, how it interacted with other sentencing guidelines, and the style adopted in presenting the guidance.

3.2 Five questions invited views on these overall aspects of the guideline:

**Question 1:** Do you agree or disagree that the general structure of the guideline, providing guidance in line with steps 1 to 3 of the sentencing process guideline, is appropriate? [Agree/Disagree]

Please provide any reasons for your response.

**Question 2:** Do you agree or disagree that the style of the guideline, employing narrative and tables, is helpful? [Agree/Disagree]

Please provide any reasons for your response.

**Question 3:** Do you agree or disagree that the draft guideline makes the relationship between this guideline and other applicable guidelines clear? [Agree/Disagree]

Please provide any reasons for your response.

**Question 4:** Is there anything that can be done to make the relationship between this guideline and other applicable guidelines clearer? [Yes/No]

Please provide details along with any reasons for your response.

**Question 5:** Do you consider that the offences should be listed within the guidelines by order of seriousness, the order they appear in the Road Traffic Act 1988, or in any other order? [Seriousness / Order in the Road Traffic Act 1988 / Other order (please specify below)]

Please provide any reasons for your response.

#### Structure of the guideline (Q1)

3.3 The consultation paper explained that the draft guideline addresses each death by driving offence separately, and follows the general framework and three-step approach set out in the Council's already published general guideline, *The Sentencing Process*. These steps cover (i) the assessment of seriousness, (ii) the selection of the sentencing range, and (iii) the consideration of aggravating and mitigating factors. Question 1 asked if respondents agreed or disagreed with the general structure of the guideline.

3.4 Table 3.1 shows that more than two-thirds of respondents overall (38 out of 54) agreed that the general structure of the guideline was appropriate, while one-third (16 out of 54) disagreed. The eight organisations that answered this question were unanimous in their agreement.



**Table 3.1: Q1 – Do you agree or disagree that the general structure of the guideline, providing guidance in line with steps 1 to 3 of the sentencing process guideline, is appropriate?**

Respondent type	Agree	Disagree	Total
Organisations	8	0	8
Individuals	30	16	46
<b>Total (all respondents)</b>	<b>38</b>	<b>16</b>	<b>54</b>

3.5 Altogether, 31 respondents – 6 organisations and 25 individuals – commented at Question 1.

3.6 As seen in Table 3.1, all (eight) of the organisational respondents answered ‘agree’ at Question 1. These respondents said the following:

- The detail provided in the proposed guideline was helpful, clear and accessible, and that the steps set out in the guideline flowed logically.
- There was no good reason to depart from the structure set out in the sentencing process guideline, and that to do so may cause confusion among sentencers.
- The factors listed at each step reflect those routinely considered by sentencers.

3.7 For the most part, individuals who answered ‘agree’ at Question 1 either did not comment or did not address the question in their comments. Those who did highlighted the importance of consistency across guidelines, and/or they described the structure of the proposed guideline as ‘clear’. There was a suggestion that the draft guideline would help surviving family members of victims to better understand the process of sentencing. One respondent agreed with the general structure but commented that there also needs to be discretion for a judge to interpret the specific circumstances of each case.

3.8 Other respondents in this group made general comments about the need for ‘tougher’ sentences (some called for compulsory prison sentences in all death by driving cases); or they argued that current sentences did not give adequate consideration to the impact of death by driving offences on the families of victims. The views expressed by respondents who answered ‘disagree’ at Question 1 largely echoed the points made by these individuals.

## **Style of the guideline (Q2)**

3.9 The draft guideline uses a combination of both narrative and tables to present information, with the consultation paper stating that this was intended to recognise the different preferences among sentencers, and to enhance flexibility and discretion in applying the guideline. The consultation paper noted that this combination of narrative and table presentation had been tested with, and generally welcomed by, sentencers, and it was hoped that this style would also be helpful to other users of the guideline, including



members of the public. Question 2 asked if respondents agreed or disagreed that this style of presentation was helpful.

3.10 Table 3.2 shows that four-fifths of all respondents (43 out of 54) agreed that the style adopted was helpful, while one-fifth disagreed (11 out of 54). All nine organisational respondents agreed that the style was helpful. Amongst individual respondents three-quarters (34 out of 45) agreed while the remaining quarter (11 respondents) disagreed.

**Table 3.2: Q2 – Do you agree or disagree that the style of the guideline, employing narrative and tables, is helpful?**

Respondent type	Agree	Disagree	Total
Organisations	9	0	9
Individuals	34	11	45
<b>Total (all respondents)</b>	<b>43</b>	<b>11</b>	<b>54</b>

3.11 Altogether, 26 respondents – 8 organisations and 18 individuals – commented at Question 2. Organisational respondents described the style of the guideline – and its use of both narrative and tables – as:

- Clear, concise, and informative
- Easy to understand
- Helpful in making the guideline ‘less dense’ and therefore easier to use
- Likely to enhance flexibility in the use of the guideline by allowing the reader to move between sections depending on the circumstances of the offence
- Likely to result in greater consistency in sentencing and more appropriate sentences.

3.12 Some organisations also commented that the style of the guideline would be useful to members of the public.

3.13 Two organisations (both legal organisations) offered the following suggestions regarding the style of the guideline:

- Additional information setting out the reasons for the inclusion or omission of certain points could be included as an appendix. This would help to improve the transparency and understanding of the guideline.
- Step 3 of the guideline could be simplified by removing the categories of ‘consequences’, ‘record and circumstances’ etc. It was suggested that these categories added no valuable information to the guideline.

3.14 One legal organisation argued that the ‘multi-dimensional’ nature of the guideline adds a layer of complexity which might make it less, rather than more, clear why an offence ends up in a particular category. The example was given of a case of death by dangerous

driving in which multiple features across more than one level of seriousness may be present. If such a case had Level C features of seriousness together with a Level A feature, it might call into question whether the offence was a Level A offence in a way that would not happen if there were no additional lower-level features. This respondent suggested that the presence of lower-level features in a Level A offence should aggravate the Level A feature, not mitigate it. This concern was also raised by an individual respondent who suggested that the approach of having different levels of seriousness could lead to 'ambiguous thresholds' and the 'downgrading' of more serious offences to lower categories.

3.15 Individuals agreeing at Question 2 suggested that the tables and the information in them were clear and easy to understand. They thought the style of the guideline would help to promote consistency in sentencing and transparency for members of the public. However, there was one suggestion (from an individual who answered 'agree') that further detail may be needed in the tables to support consistency in sentencing. At the same time, a second individual highlighted the need for discretion in sentencing saying that the guideline should not be followed 'slavishly'.

3.16 Not all individuals who disagreed at Question 2 addressed the question in their comments. Some called for 'stronger punishments' (including imprisonment for life) in relation to death by driving offences and some said that the impacts on victims and families should be given priority over all other considerations. One respondent who addressed the question made the point that the use of the guideline should not be a 'tick box exercise to review which box the guilty party belongs in' – perhaps suggesting that judicial discretion would be needed to take account of all the circumstances of a particular case.

### **Relationship between the guideline and other general guidelines (Q3 and Q4)**

3.17 The consultation paper explained that sentencers must refer to all relevant guidelines when reaching sentencing decisions. Thus, the guideline on death by driving offences is intended to be read alongside the Council's existing general guidelines: *Principles and Purposes of Sentencing*, *The Sentencing Process* and, where relevant, *Sentencing Young People*. This position was explained on page 3 of the draft guideline. Additionally, the draft guideline was intended to complement *The Sentencing Process* guideline which gives sentencers a general framework for making sentencing decisions.

3.18 Question 3 asked respondents if they agreed or disagreed that the draft guideline on death by driving offences makes clear the relationship between the guideline and other applicable guidelines. Table 3.3 shows that around two-thirds of respondents (32 out of 51) agreed that the relationship was clear, and one-third (19 out of 51) disagreed. There was a similar pattern of responses for organisations and individuals.

**Table 3.3: Q3 – Do you agree or disagree that the draft guideline makes the relationship between this guideline and other applicable guidelines clear?**

Respondent type	Agree	Disagree	Total
Organisations	6	3	9
Individuals	26	16	42
<b>Total (all respondents)</b>	<b>32</b>	<b>19</b>	<b>51</b>

3.19 Altogether, 22 respondents – 7 organisations and 15 individuals – offered comments at Question 3.

3.20 Among respondents answering ‘agree’ at Question 3, it was noted that the section entitled ‘How to use this guideline’ referred to other applicable guidelines and provided links to them. Among those answering ‘disagree’, there was a suggestion that, apart from the reference to the *Principles and Purposes of Sentencing* and *The Sentencing Process* guidelines, it wasn’t clear what other guidelines might be applicable and how those would interact with the draft guideline.

3.21 Regardless of whether they agreed or disagreed at Question 3, most organisations – and some individuals – made suggestions about how the relationship between the draft guideline and other applicable guidelines could be made clearer. These comments are discussed below together with comments made at Question 4.

3.22 Question 4 asked for views on whether anything could be done to make the relationship between this guideline and other applicable guidelines clearer. Table 3.4 shows that respondents were divided in their views on this question, with just under half (22 out of 49) answering ‘yes’ and just over half (27 out of 49) answering ‘no’.

**Table 3.4: Q4 – Is there anything that can be done to make the relationship between this guideline and other applicable guidelines clearer?**

Respondent type	Yes	No	Total
Organisations	4	3	7
Individuals	18	24	42
<b>Total (all respondents)</b>	<b>22</b>	<b>27</b>	<b>49</b>

3.23 Altogether, 18 respondents – 4 organisations and 14 individuals – who answered ‘yes’ at Question 4 went on to make comments. However, not all the individuals made suggestions about how to help clarify the relationship between the draft guideline and other applicable guidelines. In most cases, individuals used their comments to call for stricter sentences in cases of causing death by driving – including greater use of imprisonment (and life imprisonment) – and/or they emphasised the importance of ensuring that the family of the victim is informed about and understands all sentencing decisions.

3.24 Respondents who addressed the question offered a number of suggestions, most of which were made by just one respondent. However, a recurring theme in the comments

was a view that there was a need to better inform families of victims about how different guidelines are taken into consideration (and interact) in sentencing decisions. There was a specific concern voiced that many death by driving offences are committed by young people, who are also subject to a different set of guidelines – and that this may lead to a perception among families and the media of undue leniency in sentencing. Respondents (both organisations and individuals) wanted the sentencer to fully explain in court **which** guidelines were taken into account in deciding the sentence, and **how** those guidelines were applied – irrespective of whether this resulted in a ‘harsher’ or ‘more lenient’ sentence than that recommended by the guidelines.

3.25 Organisations also suggested:

- Including a link in the guideline to the Approved Guidelines section of the Scottish Sentencing Council’s website so that readers are aware of the *Sentencing Young People* guideline and any other relevant guidelines that may be approved in future
- Creating an appendix to the guideline with some worked examples of how other guidelines might impact on the application of the death by driving guideline, making it clear that the sentence handed down by the court may differ from that suggested in the guideline because of the specific circumstances of the case.

3.26 Individuals made the following additional suggestions. In every case, these were made by one person:

- All relevant guidelines should be included in a single document.
- A larger font should be used, or a section break should be inserted before introducing other applicable guidelines. There was a view that, at present, the section detailing existing guidelines does not stand out.
- All guidelines should be able to be understood by lay people as well as the sentencing judge.

3.27 Finally, one individual expressed the view that having to take numerous guidelines into consideration when determining a sentence would only result in errors in decision-making and result in reduced sentences.

## Ordering of offences within the guideline (Q5)

3.28 The proposed guideline will be applicable to individuals convicted of one of the death by driving offences under the Road Traffic Act 1988. The draft guideline addresses each of the offences separately in order of seriousness (with the most serious first), as follows: causing death by dangerous driving (section 1 of the Road Traffic Act 1988); causing death by careless driving when under the influence of drink or drugs (section 3A); causing death by careless, or inconsiderate, driving (section 2B); causing death by driving: unlicensed, uninsured, or disqualified drivers (sections 3ZB and 3ZC).

3.29 Question 5 invited views on the ordering of offences in the guideline, asking if the offences should be listed in order of seriousness (as currently presented in the draft guideline), in the order they appear in Road Traffic Act 1988, or in any other order. Table 3.5 shows that ordering by seriousness was the preferred option among the largest proportion of respondents (around two-thirds, 36 out of 53), with a similar level of support among organisations and individuals. The remaining respondents (both organisations and individuals) were split in their support for ordering the guideline in accordance with the Road Traffic Act or adopting another order.

**Table 3.5: Q5 – Do you consider that the offences should be listed within the guidelines by order of seriousness, the order they appear in the Road Traffic Act 1988, or in any other order?**

Respondent type	Seriousness	Road Traffic Act 1988	Other	Total
Organisations	5	2	1	8
Individuals	31	6	8	45
<b>Total (all respondents)</b>	<b>36</b>	<b>8</b>	<b>9</b>	<b>53</b>

3.30 Altogether, 24 respondents – 7 organisations and 17 individuals – offered comments at Question 5.

### Ordering by seriousness

3.31 Respondents who preferred the offences in the guideline to be ordered by seriousness gave the following reasons for their views:

- They thought it was ‘appropriate’ and ‘pertinent’ to start with the most serious offence(s).
- They thought most users of the guideline would find ordering by seriousness more intuitive, easier to understand, and more ‘logical’ than any other ordering.

3.32 It was noted that the more serious offences would attract more severe sentences. Those who mentioned this point thought that placing the offences with the more severe sentences first made sense.

### Ordering as in the Road Traffic Act 1988

3.33 As Table 3.5 above shows, two organisations and six individuals thought the offences in the guideline should be ordered as they are in the Road Traffic Act 1988. None of the individuals who selected this option offered further comments. The organisations made the following points:

- This ordering was seen to be ‘objective’ and ‘logical’. Given that it may be difficult to determine which among some of the offences are the most serious, adhering to the statutory ordering of the offences could avoid unintended consequences.

- There was no clear rationale for deviating from the order of the offences set out in the Road Traffic Act 1988.

### **Other ordering of the offences**

3.34 Table 3.5 showed that one organisation and nine individuals thought the offences in the guideline should be ordered neither in terms of seriousness, nor in the order they appear in the Road Traffic Act 1988, but in some other way.

3.35 The organisational respondent expressing this view (a third sector body) commented that road traffic legislation has developed differently in Northern Ireland, and that the Road Traffic (Northern Ireland) Order 1995 includes 'grievous bodily injury' in all 'causing death' offences (and penalties). It was suggested that this legislation might provide a model for further development of (UK) legislation and related sentencing guidelines in Scotland – as it (the NI legislation) 'condenses an already complex UK Road Traffic Act'.

3.36 Most individuals who selected 'other' did not directly address the question and in some cases the responses were unclear. This suggests there may have been some confusion among this group about what this question was asking. Some in this group simply referred back to comments they made at previous questions, or they reiterated their previous comments, that causing death by driving should be given more serious punishments and/or treated as murder in all cases. One contrasting view was that some death by driving incidents are simply tragic accidents and such cases should not be treated as serious crimes. Another respondent thought the order of the offences in the guideline was not important 'as long as the correct section is considered by the sentencers'.



## 4 The purpose of sentencing and the assessment of seriousness (Q6–Q11)

4.1 This chapter presents views on (i) the purposes of sentencing in death by driving cases, and (ii) the assessment of seriousness of an offence. The purposes of sentencing are covered in the Council's existing *Principles and Purposes of Sentencing* guideline, and is not explicitly covered in the draft guideline on death by driving. The assessment of seriousness is covered in step 1 of the draft guideline on death by driving. Six consultation questions addressed these issues:

**Question 6:** Do you agree or disagree that the draft guideline should not emphasise any particular purpose or purposes of sentencing? [Agree/Disagree]

Please provide any reasons for your response.

**Question 7:** Do you agree or disagree that the approach to the assessment of seriousness set out at step 1 for each of the offences covered by the guidelines is appropriate? [Agree/Disagree]

Please provide any reasons for your response.

**Question 8:** Are there any changes that should be made to the features of seriousness listed at step 1 of each offence? [Yes/No]

Please provide any reasons for your response.

**Question 9:** Do you agree or disagree that the difference between the quality of driving under Level B seriousness and Level C seriousness for death by dangerous driving offences is sufficiently clear? [Agree/Disagree]

Please provide any reasons for your response.

**Question 10:** Do you agree or disagree that the feature of seriousness regarding the quality of driving for Level B offences should instead refer to 'driving that created a very significant risk of danger' to make the distinction more clear? [Agree/Disagree]

Please provide any reasons for your response.

**Question 11:** In relation to the categorisation of racing in death by dangerous driving offences, which of the options presented at paragraph 60 of the consultation do you consider the most appropriate? [Option 1 / Option 2 / Option 3 / Option 4]

Please provide any reasons for your response.

### Purposes of sentencing (Q6)

4.2 The *Principles and Purposes of Sentencing* guideline provides a list of purposes a sentence might try to address (such as protection of the public; punishment; rehabilitation of the offender; giving an offender the opportunity to make amends; and expressing disapproval of offending behaviour). The consultation paper stated that any or all of these purposes may be appropriate in sentencing death by driving cases, depending on the circumstances, and that the guideline did not, therefore, seek to emphasise any particular purpose or purposes.

4.3 Question 6 asked respondents if they agreed or disagreed that the guideline on death by driving should not emphasise any particular purpose or purposes of sentencing. Table 4.1 shows that, overall, around two-fifths of respondents agreed (21 out of 51) and three-fifths (30 out of 51) disagreed. Organisations were more likely than individuals to agree that the guideline should **not** emphasise a particular purpose.

**Table 4.1: Q6 – Do you agree or disagree that the draft guideline should not emphasise any particular purpose or purposes of sentencing?**

Respondent type	Agree	Disagree	Total
Organisations	4	3	7
Individuals	17	27	44
<b>Total (all respondents)</b>	<b>21</b>	<b>30</b>	<b>51</b>

4.4 Altogether, 34 respondents – 7 organisations and 27 individuals – commented at Question 6.

**Agreement that the draft guideline should not emphasise any particular purpose or purposes of sentencing**

4.5 Respondents agreeing in response to Question 6 (both organisations and individuals) gave two reasons. The first, and main, reason was that they thought the purpose of sentencing should depend on the circumstances of each case. Therefore, to emphasise any particular purpose (or purposes) in the guideline could reduce the flexibility of the process and restrict the decisions of sentencers. Those who raised this point wanted all possible sentencing objectives to be available. The second reason was that it was unnecessary for the death by driving guideline to emphasise any particular purpose or purposes of sentencing since this is already covered in the *Principles and Purposes of Sentencing*, and a link is provided to this general guideline. Some respondents suggested that to emphasise any particular purpose or purposes of sentencing in the draft guideline could cause confusion.

4.6 Few of the individual respondents who answered ‘agree’ went on to provide comments at Question 6, and those who did generally echoed the views expressed by organisations. However, one individual respondent qualified their agreement, suggesting that there should be no particular purpose or purposes of sentencing emphasised in the guideline **except** in cases where there had been multiple offences, or where a ‘serious disregard for the law and the victim’s family’ had been identified prior to sentencing.<sup>4</sup>

**Disagreement that the draft guideline should not emphasise any particular purpose or purposes of sentencing**

4.7 Organisations disagreeing in response to Question 6, in general, thought the purposes of sentencing should be included in the guideline for the benefit of members of

<sup>4</sup> The respondent did not state specifically what the purpose of sentencing should be in these cases, but the implication is that they would prefer punishment as the main purpose of sentencing in such cases.



the public. These respondents thought that the current cross-reference to the *Principles and Purposes of Sentencing* guideline may not be sufficient, and that the draft guideline itself should be clear about what the sentence is expected to achieve and what it is not attempting to achieve. One organisational respondent made the point that ‘this relates to the difficult issue of sentencing on the basis of culpability and not placing a value on a human life’. A second organisational respondent suggested adding a short paragraph after the section ‘How to use this guideline’ which could give a brief overview of the purposes of sentencing.

4.8 Individuals who disagreed at Question 6 made a range of points – some of which did not address the question. Those who did address the question generally argued that a guideline on sentencing death by driving offences **should** emphasise certain purposes of sentencing, and that these should be (i) punishment, (ii) deterrence, and (iii) protection of the public. One person in this group also identified rehabilitation of the offender as a purpose. Other relevant points included the following:

- Given the loss of life in all death by driving offences, there is no possibility that the offender can make amends (i.e. they cannot bring the victim back).
- Expressing disapproval is irrelevant since, whatever the circumstances, being responsible for the death of someone is never approved.

4.9 There was also a suggestion – made by both those who agreed and those who disagreed at Question 6 – that the sentencing judge should explain the purpose of the sentence (e.g. punishment, rehabilitation, or both) at the time of sentencing. This, it was argued, would provide greater transparency to families.

## The proposed features of seriousness (Q7)

4.10 Step 1 of the sentencing process set out in the draft guideline provides guidance on assessing the seriousness of an offence.

4.11 The draft guideline states that the seriousness of an offence is determined by two things: (i) the culpability of the offender and (ii) the harm caused, or which might have been caused, by the offence. However, in the case of death by driving offences, the level of harm caused – i.e. a person’s death – is fixed by statute, and therefore, the seriousness of the offence is largely determined by the culpability of the offender. Moreover, culpability is determined by reference to the quality of driving involved.

4.12 Three categories of seriousness (A, B and C, with A being the most serious) and associated features for each offence were set out in table format in the guideline (although for offences of causing death by driving: unlicensed, uninsured, or disqualified drivers only two categories of seriousness – A and B – were given). The consultation paper explained that the lists of features (or determinants) of seriousness given in the guideline are not

exhaustive and that the court may give regard to other features in assessing the seriousness of an offence. The consultation paper also stated the following:

- Features of the offence which are relevant to the assessment of seriousness should be treated separately from a consideration of any aggravating or mitigating factors – the latter are discussed at step 3 of the guideline – and not ‘double-counted’.
- In cases where multiple determinants of seriousness are present or are present for more than one level of seriousness, the court should balance the relative significance of these features in arriving at a decision as to which level of seriousness the case falls into.

4.13 Respondents were asked (at Question 7) if they agreed or disagreed that the approach to assessing seriousness, as set out in the draft guideline, was appropriate. Table 4.2 shows that around three-fifths of respondents agreed (29 out of 50) with the draft guideline’s approach to assessing seriousness and two-fifths (21 out of 50) disagreed.

**Table 4.2: Q7 – Do you agree or disagree that the approach to the assessment of seriousness set out at step 1 for each of the offences covered by the guidelines is appropriate?**

Respondent type	Agree	Disagree	Total
Organisations	6	2	8
Individuals	23	19	42
<b>Total (all respondents)</b>	<b>29</b>	<b>21</b>	<b>50</b>

4.14 Altogether, 22 respondents – 5 organisations and 17 individuals – commented at Question 7. Note that some of the comments made at Question 7 were more relevant to Question 8 and vice versa. All comments made at Questions 7 and 8 are discussed only once in the analysis presented below.

### Views agreeing with the approach to assessing seriousness

4.15 Organisations that answered ‘agree’ gave several reasons for their views. The reason mentioned most frequently was related to the perceived clarity and usefulness of the guideline – respondents thought the features related to culpability were clearly set out, easy to understand and easy to navigate. Other reasons given were as follows:

- The approach provides a helpful overview without going into too much prescriptive detail or providing too much narrative. Moreover, the guideline makes it clear that the list is not exhaustive.
- The draft guideline covers most of the same features of seriousness as the (English and Welsh) Sentencing Council guideline on causing death by driving, but (in the view of one respondent) does so more succinctly.
- The guideline emphasises the importance of considering **all** the circumstances of the offence to arrive at a fair assessment of seriousness.

- It is clear in the guideline that the sentencer has the discretion to assess a case at a higher level of seriousness where features are present from more than one level.
- In relation to section 1 offences specifically (causing death by dangerous driving), it was suggested that the three culpability factors – ‘nature or manner of driving’, ‘capacity of the driver’, and ‘other’ – were appropriate.
- In relation to offences committed under sections 2B, 3A, 3ZB and 3ZC, the guideline was seen to be ‘easy to follow’ regarding the standard of driving, the level of intoxication, the level of careless driving and the features of causing death when unlicensed, uninsured or disqualified.

4.16 Only one individual who answered ‘agree’ at Question 7 explained their view. This individual thought the approach used in the guideline for assessing seriousness was ‘clear and concise’. However, two other individuals who answered ‘agree’ offered comments. One stated that they had reservations in respect to the approach to assessing seriousness for cases of causing death by careless or inconsiderate driving but did not expand on their concerns. The other respondent expressed concern about young people being treated differently to older people in sentencing. This view is discussed elsewhere (see, for example, Question 4, paragraph 3.24).

### **Views disagreeing with the approach to assessing seriousness**

4.17 Comments were offered by both organisations that answered ‘disagree’ at Question 7. One of these respondents commented that they were ‘not convinced’ that the behaviour outlined for Level C seriousness was any less culpable than that described for Level B. However, they thought that the facts and circumstances of each death were likely to be different and there would be variations in the level of culpability of the individual driving the vehicle in any death by driving case.

4.18 The second respondent noted that the UK Parliament had amended the Road Traffic Act 1988 in recent years to increase the penalties available and take account of the culpability of the driver.<sup>5</sup> This respondent suggested that the assessment of seriousness outlined in step 1 of the draft guideline does not reflect these changes.

4.19 This same respondent – again referring to the 1988 Act – noted that one of the distinguishing features of careless driving was that it involved a standard of driving that ‘falls below that which would be expected of a competent and careful driver’ whereas a key feature of dangerous driving was that the standard of driving falls ‘**far** below that which would be expected of a competent and careful driver’.<sup>6</sup> This respondent suggested that it had been ‘complex’ and ‘problematic’ for prosecutors and sentencers to distinguish

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<sup>5</sup> The Police, Crime, Sentencing and Courts Act 2022, increased the statutory maximum sentences for death by dangerous driving offences and death by careless driving when under the influence of alcohol or drugs, from 14 years to life imprisonment.

<sup>6</sup> The reference here is to the Road Traffic Act 1988, section 2A, (1) and section 3ZA(2).

between these two, both for the purposes of deciding on which charge should be brought (i.e. dangerous driving vs careless driving), and for the purposes of sentencing.

4.20 Individuals who answered ‘disagree’ at Question 7 and who made additional comments made a range of points. The most common theme in these comments was that penalties for death by driving offences should be more stringent and should include life imprisonment.

4.21 Less often, individuals made suggestions for changes to the features of seriousness listed at step 1 for each offence. These suggestions were both general in nature (i.e. a request for further detail without providing information about what further detail was needed) and specific. These types of comments were often repeated at Question 8 and therefore are discussed below together with other comments made at Question 8.

### Suggested changes to the proposed features of seriousness (Q8)

4.22 Question 8 asked respondents if any changes should be made to the proposed features of seriousness listed at step 1 in the draft guideline. Table 4.3 shows that around three-fifths of all respondents (30 out of 52) thought changes should be made to the proposed features. Around two-fifths (22 out of 52) thought no changes were needed.

**Table 4.3: Q8 – Are there any changes that should be made to the features of seriousness listed at step 1 for each offence?**

Respondent type	Yes	No	Total
Organisations	5	4	9
Individuals	25	18	43
<b>Total (all respondents)</b>	<b>30</b>	<b>22</b>	<b>52</b>

4.23 Altogether, 28 respondents – 7 organisations and 21 individuals – commented at Question 8, and in most cases suggested one or more changes to the features of seriousness listed. Among organisations, most of the suggestions at Question 8 were made by third sector organisations, and among this group there was a common view that certain features should be moved to a higher level of seriousness – i.e. from Level C to Level B, or from Level B to Level A. Only two non-third sector organisations suggested a specific change to the features of seriousness listed at step 1. Comments from these respondents are listed at the first two points below.

4.24 The following points were made by organisations:

- Racing should be included in both Level A and Level B, with, for example ‘racing over a prolonged distance and/or at grossly excessive speeds’ in Level A and simply ‘racing’ at Level B. (Reference was made to Question 11 below, which specifically addressed the issue of racing.)

- For Level B, further guidance with examples as to what is meant by ‘aggressive driving’ may be helpful. The respondent who made this point suggested that ‘tailgating’ could be given as an example.
- In relation to death by dangerous driving offences, several features listed at Level B should be listed at Level A instead – in particular, ‘creating a substantial risk or danger to others’, ‘aggressive driving’, ‘grossly excessive speed’, ‘prolonged distraction’ and ‘ignoring the warnings of others’.
- Features listed at Level C should be moved to Level B. The examples given were: (i) ‘a single dangerous manoeuvre which could create a significant risk of danger to others’ – since an action such as a close pass only needs to happen once to be fatal, and (ii) ‘excessive speed for the road and/or prevailing conditions and/or the particular vehicle being driven’ – since a driver in such conditions only needs to be slightly over the speed limit to potentially cause a fatal accident.
- For the offence of causing death by careless, or inconsiderate, driving, the absence of examples of behaviour leaves a gap in the guidance, particularly in relation to Level A seriousness.
- All the examples listed in Level C were offences in their own right, and aggravating factors in causing a death. The respondent making this point thought that any behaviour other than ‘a single moment of inattention’ should be listed at either Level A or Level B in the tables at step 1. This point was echoed by another respondent who said that ‘we do not believe there are three levels – two would be more appropriate’.
- ‘Having a notifiable medical condition or disability’ should be highlighted in the guideline (in a similar way to driving with uncorrected defective eyesight). The respondent making this point thought that having a diagnosis of such a condition (whether or not the driver had notified the DVLA) should be considered in the assessment of culpability. This respondent commented that fitness to drive varies across the life course, and that the over-60 age group accounts for over a fifth of section 2B offences (causing death by careless, or inconsiderate, driving). They pointed out that the number of drivers in this age group was increasing and suggested that many people do not voluntarily report their medical conditions to the DVLA. Raising this issue in the guideline would (it was thought) ‘assist the conversation’ about fitness to drive.

4.25 Some individuals who made suggestions for changes in the features of seriousness listed at step 1 of each offence made general comments. For example, one respondent wanted ‘more detail’ to be provided at Level A. Another suggested that ‘more clarity was needed in offences other than death by dangerous driving’. A third wanted to see ‘more detail and more examples’.

4.26 Other individuals made specific suggestions that were often similar (or the same) as those made by organisations (see above). In particular, there was a recurring view that

features listed at the lower levels of seriousness (B or C), should be listed at higher levels (A or B, respectively). The points made by these respondents included the following:

- All driver behaviour other than ‘a single moment of inattention’ should be listed either at Level A or B.
- ‘Driving while avoidably distracted for a prolonged period, for example through use of a mobile phone or similar device’ should be moved from Level B to Level A.
- ‘Grossly excessive speed’ should be moved into Level A and ‘excessive speed’ into Level B.
- ‘Aggressive driving’ should be seen to be at least as serious as ‘racing’. All aggressive driving should be at Level A. Alternatively, further detail could be provided to distinguish between aggressive driving at Levels A and B. For example, Level A aggressive driving could include ‘aggression towards a vulnerable road user (cyclist, pedestrian, etc.)’ and ‘aggression with a large vehicle (van, pickup, works vehicles, etc.)’.

4.27 One respondent expressed concern about what they saw as an attempt to create a ‘completely artificial distinction’ between Levels A and B. This respondent highlighted the challenges of distinguishing, for example, between ‘racing’ (at Level A) and ‘driving at grossly excessive speed for the road’ (at Level B), and they suggested that the focus on driver motivation displayed a reluctance by the justice system to expect adequate levels of responsibility from drivers.

4.28 A number of other views related to the issue of assessing seriousness were expressed at Question 8:

- Impairment resulting from use of prescribed or over-the-counter medicines should be assessed as less serious than impairment from using alcohol or illegal drugs. However, there should also be a greater distinction made between cases where the driver was aware of the potential effects of their medication on their ability to drive and where they were not aware of these effects. A driver who suffers an **unforeseen** effect of prescribed medication should be seen as **less** culpable than a driver who knew of a likely effect from their medication.
- The guideline should highlight that not all serious road traffic accidents occur on roads; cars moving at even very low speeds in car parks can be dangerous too.
- There should be a review of the driver’s medical background and criminal history in all cases of causing death by driving.

## Distinguishing levels of seriousness – quality of driving (Q9)

4.29 Step 1 of the draft guideline set out (in table format) a description of the nature and manner of driving relevant to death by driving cases of different levels of seriousness.



4.30 Question 9 asked respondents if they agreed or disagreed that the difference between the quality of driving under Level B seriousness and Level C seriousness for death by dangerous driving offences was sufficiently clear. Table 4.4 below shows that two-fifths of respondents overall agreed (22 out of 52) that the distinction was clear, and three-fifths (30 out of 52) disagreed. Organisations were more likely than individuals to disagree.

**Table 4.4: Q9 – Do you agree or disagree that the difference between the quality of driving under Level B seriousness and Level C seriousness for death by dangerous driving offences is sufficiently clear?**

Respondent type	Agree	Disagree	Total
Organisations	2	6	8
Individuals	20	24	44
<b>Total (all respondents)</b>	<b>22</b>	<b>30</b>	<b>52</b>

4.31 Altogether, 24 respondents – 7 organisations and 17 individuals – commented at Question 9.

#### **Views agreeing that the distinction is clear**

4.32 Just two respondents who answered ‘agree’ at Question 9 – one organisation and one individual – provided further comments. The organisation reiterated their view that the difference in quality of driving under Levels B and C was clear. They also thought the descriptions allowed for flexibility and discretion by the sentencer, depending on the circumstances of the case.

4.33 However, the individual requested clarity between ‘disregarding road signals (for example, traffic lights)’ in Level B and ‘disregarding road signs (for example, a ‘Give Way’ sign)’ in Level C.

#### **Views disagreeing that the distinction is clear**

4.34 Organisations that disagreed at Question 9 did so mainly because they thought the difference between ‘substantial risk’ (Level B) and ‘significant risk’ (Level C) was difficult for a lay person to understand. There was a suggestion that the inclusion of a short glossary explaining the difference between key terms, together with some examples, would help to promote clarity and understanding among members of the public.

4.35 One organisation also commented on the difference between ‘disregarding road signals’ (Level B) and ‘disregarding road signs’ (Level C) (as above) and queried the suggestion in the guideline that one was more serious than the other in relation to a fatal accident. A second organisation thought all the features listed at Level C were offences in their own right. This respondent reiterated a view (which they expressed earlier in response to Question 8) that, in relation to the Level C features, everything other than a momentary distraction should be incorporated into Levels A and B.

4.36 There was a common view among third sector organisations that having only two levels of seriousness would be more appropriate.

4.37 A range of points were made by individuals who answered ‘disagree’ at Question 9 **and** who addressed the question in their comments. All points were made by a single respondent:

- Driver intent needs to be reflected in the features of seriousness. For example, one of the features in Level C seriousness involves a ‘single dangerous manoeuvre’. However, if this manoeuvre were a deliberate swerve into a cyclist or pedestrian, rather than an accidental act, it should be seen as more serious. Deliberate intent should be a cause for increasing the level of severity in every case.
- ‘Excessive speed’ should be moved from Level C to Level B.
- Clarity is needed in relation to the difference between ‘excessive speed’ and ‘grossly excessive speed’. One respondent suggested a definition should be provided in terms of speed above the speed limit. This same respondent asked for clarity about the distinction between ‘prolonged’ and ‘momentary’ distraction through use of a mobile phone (listed as features of Level B and Level C seriousness, respectively).
- Level C features could also include cases where a death has not occurred, but a victim may have sustained life-changing injuries.

### Distinguishing levels of seriousness – risk caused by driving (Q10)

4.38 Question 10 asked respondents if the guidance regarding the quality of driving for Level B offences should refer to ‘driving that created a **very significant** risk of danger’ (rather than ‘driving that created a **substantial** risk of danger’) to make clearer the distinction between Level B seriousness and Levels A and C.

4.39 Table 4.5 below shows that just over two-thirds of all respondents (34 out of 50) agreed that the wording should refer to ‘a very significant risk of danger’. One-third (16 out of 50) disagreed.

**Table 4.5: Q10 – Do you agree or disagree that the feature of seriousness regarding the quality of driving for Level B offences should instead refer to ‘driving that created a very significant risk of danger’ to make the distinction more clear?**

Respondent type	Agree	Disagree	Total
Organisations	4	3	7
Individuals	30	13	43
<b>Total (all respondents)</b>	<b>34</b>	<b>16</b>	<b>50</b>

4.40 Altogether, 21 respondents – 6 organisations and 15 individuals – provided comments at Question 10.



### **Views agreeing that Level B should refer to ‘driving that created a very significant risk of danger’**

4.41 Organisational respondents answering ‘agree’ thought that the distinction between ‘significant’ and ‘substantial’ was familiar to sentencers but would be less well understood by or less easy to explain to members of the public. There was a view that members of the public would see these terms as interchangeable, and that it would be preferable to use the same term (significant) at both Level B and Level C, with Level B seriousness qualified as ‘very’ significant.

4.42 There was a suggestion that it may be useful for the guideline to include an appendix (another respondent suggested a glossary) containing specific examples of Level B and Level C offences that have been upheld by the appellate court.

4.43 Individuals answering ‘agree’ suggested that ‘significant’ was a more precise word than ‘substantial’. However, whilst agreeing that ‘very significant’ was preferable to ‘substantial’ at Level B, there was also a view that there was a lack of consistency in the interpretation of the type of behaviour that constitutes a ‘very significant risk’.

### **Views disagreeing that Level B should refer to ‘driving that created a very significant risk of danger’**

4.44 Organisations answering ‘disagree’ at Question 10 highlighted what they perceived as the subjective nature of such terms as ‘significant’ and ‘very significant’. These respondents argued that the difference between these two terms was not clear. As mentioned above, one organisation in this group suggested creating a glossary as part of the guideline to define such terms – and giving examples to illustrate them.

4.45 One organisational respondent argued that, in court, defence lawyers often raise doubt about the distinction between driving which ‘falls **far** below’ – or simply ‘falls below’ – that which would be expected of a competent and careful driver. The distinction between these two determines whether a defendant is charged with death by dangerous driving or death by careless driving. This respondent thought that distinguishing between ‘driving that created a **very** significant risk’ and ‘driving that created a significant risk’ would present the same challenges for sentencers.

4.46 Individuals who answered ‘disagree’ at Question 10 and who addressed the question in their comments generally thought that changing ‘substantial’ to ‘very significant’ made little difference in clarifying the distinction between Level B and Level C seriousness.

## **Racing (Q11)**

4.47 The consultation paper discussed a scenario in which a death by driving was the result of racing. Reference was made to the Sentencing Council’s (England and Wales) guideline on death by driving offences which includes racing as a determinant of level 2

seriousness (level 1 being the highest category of seriousness) and a departure from this approach was proposed in the Scottish guideline.

4.48 The consultation paper noted the Council’s view that racing is a deliberate act involving two or more people with a common purpose, representing a disregard of the risk of harm to others. Thus, it was proposed that racing should be treated as a more serious offence, and the draft guideline included racing as a feature of Level A seriousness. However, the consultation paper acknowledged that this could have implications for practice in relation to dangerous driving and causing serious injury by dangerous driving cases. Views were thus sought on the Council’s proposal and three other possible options:

- Option 1: Include racing in Level A only
- Option 2: Include racing in both Level A and Level B seriousness, with suitable descriptions
- Option 3: Include racing in either Level A or Level B with an indication that it could move into another level of seriousness depending on the nature of the racing
- Option 4: Include racing in Level B, noting that application of the guideline as presently drafted provides the option for moving a case from Level B to Level A: a particularly bad racing case could be regarded as one possessing a combination of Level B features.

4.49 Question 11 asked respondents which of the four options they thought was most appropriate. Table 4.6 shows that Option 1 was preferred by the largest proportion of respondents (just over two-fifths; 21 out of 49). This option was preferred both by organisations and individuals. Of the two organisational respondents who selected other options, one selected Option 2 and one selected Option 3. Individual respondents who did **not** select Option 1 were more likely to prefer Option 4 (selected by nearly a third of individuals; 12 out of 43) or Option 3 (selected by a fifth of individuals; 9 out of 43) over Option 2.

**Table 4.6: Q11 – In relation to the categorisation of racing in death by dangerous driving offences, which of the options presented at paragraph 60 of the consultation do you consider the most appropriate?**

Respondent type	Option 1	Option 2	Option 3	Option 4	Total
Organisations	4	1	1	0	6
Individuals	17	5	9	12	43
<b>Total (all respondents)</b>	<b>21</b>	<b>6</b>	<b>10</b>	<b>12</b>	<b>49</b>

4.50 Altogether, 24 respondents – 7 organisations and 17 individuals – commented at Question 11. This includes one organisation that did not answer the closed part of the question. The comments below summarise respondents’ reasons for choosing each of the four options.

## Option 1

4.51 Respondents who preferred Option 1 generally did so because they saw racing as particularly culpable behaviour. One individual argued that ‘it shows a blatant disregard to the safety of other road users’. Respondents described such behaviour as ‘completely unacceptable’, ‘totally irresponsible’, ‘selfish and reckless’, and ‘creating a clear and present danger to all innocent road users’.

4.52 One organisational respondent noted (referring to paragraph 49 of the consultation document) that the list of features of seriousness are not exhaustive and the court may have regard to any other features which it considers to be relevant to the assessment of seriousness, as well as any aggravating and mitigating factors.

## Option 2

4.53 Only one respondent who preferred Option 2 provided comments. This organisation wanted to see racing included as a feature both at Level A and Level B and suggested that Level A could include a description such as ‘racing over a prolonged distance and/or at grossly excessive speeds’, whereas Level B could simply refer to ‘racing’ (without further description).

4.54 This respondent thought that such an approach would be the best way of emphasising the judge’s discretion in cases where the circumstances surrounding the racing might be very different. This respondent also thought this type of approach would have a greater deterrent effect if the guideline made it clear that the sentencer could assess a case as Level A, depending on the circumstances.

## Option 3

4.55 Two respondents who preferred Option 3 explained their views. One thought that racing should be included at Level A by default but, if the (exceptional) circumstances suggested less culpability, then it would be open to the sentencer to treat it as a Level B offence. The other emphasised the importance of context and the need to consider all the circumstances of a case before deciding on the level of seriousness.

## Option 4

4.56 Among the four respondents who preferred Option 4 and who also offered comments, most did not explain why they chose this option. Instead, these respondents called for stricter penalties in death by driving offences. However, one respondent explained that they had picked Option 4 because they saw it as ‘the least silly’ option. This respondent did not understand why racing was given ‘special treatment’. In their view, racing was simply another type of speeding – and the important issue is that the driver was speeding.

## Other views expressed

4.57 As noted above, one organisation made comments at Question 11 without answering the closed part of the question. Comments from this organisation did not indicate a preference for any one of the options. However, the comments suggested that this organisation did **not** prefer Option 1 – as categorising every case of racing as a Level A case would seem to go against the aim of creating a guideline that attempts to assess each case according to its own unique facts and circumstances. This respondent thought that Option 1 would not give the sentencer sufficient flexibility.

## 5 Starting points and sentencing ranges (Q12–Q15)

5.1 Step 2 in the draft guideline covered the selection of a sentencing range. For each offence, a table provided guidance on sentencing ranges, based on the assessment of seriousness at step 1. Information was also provided on maximum sentences in law and disqualification periods. Four consultation questions addressed the issues of sentencing ranges, starting points within sentencing ranges, and the non-custodial elements of sentences.

**Question 12:** Do you agree or disagree with the non-inclusion of starting points within the sentencing ranges? [Agree/Disagree]

Please provide any reasons for your response.

**Question 13:** Do you agree or disagree that the ranges set out within the guideline should reflect current sentencing practice? [Agree/Disagree]

Please provide any reasons for your response.

**Question 14:** Do you agree or disagree that the sentencing ranges specified within the guideline are appropriate for each offence? [Agree/Disagree]

Please provide any reasons for your response.

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

Please provide any reasons for your response. If you selected 'disagree', please indicate what guidance should be included within the guideline.

### Starting points (Q12)

5.2 The consultation paper noted that the sentencing ranges given within the draft guideline did **not** include 'starting points'. A starting point is a suggested sentence within a range which is then adjusted for seriousness and any aggravating or mitigating factors. The arguments for and against this approach were discussed, and respondents were asked if they agreed or disagreed with the non-inclusion of starting points within the sentencing ranges.

5.3 Table 5.1 shows that just over a third of respondents (18 out of 50) agreed with the non-inclusion of starting points and just under two-thirds (32 out of 50) disagreed, with a similar pattern of responses for organisations and individuals.

**Table 5.1: Q12 – Do you agree or disagree with the non-inclusion of starting points within the sentencing ranges?**

Respondent type	Agree	Disagree	Total
Organisations	2	5	7
Individuals	16	27	43
<b>Total (all respondents)</b>	<b>18</b>	<b>32</b>	<b>50</b>

5.4 Altogether, 26 respondents – 8 organisations and 14 individuals – provided comments at Question 12. The views of those who agreed and disagreed with the non-inclusion of starting points are presented below.

### **Agreement with the non-inclusion of starting points**

5.5 Six respondents who indicated agreement with the non-inclusion of starting points – three organisations and three individuals – explained their views. This included one organisational respondent who did not answer the closed part of the question but whose response indicated overall support for the non-inclusion of starting points.

5.6 The organisations providing comments comprised two legal organisations and one judicial organisation. These respondents thought that the non-inclusion of starting points:

- Was appropriate, and consistent with the approach taken in the Council's general guideline, *The Sentencing Process*
- Allowed sentences to be tailored to the circumstances.

5.7 Respondents in this group also expressed concern that starting points were 'arbitrary' and could affect public expectations regarding the use of sentences at the lower end of the prescribed ranges.

5.8 Among the individuals providing comments, one thought that the inclusion of starting points would make it harder for sentencers to take account of the 'uniqueness' of individual cases, echoing the views of organisational respondents above. The other two respondents cited issues of consistency and clarity. However, the comments made by these respondents were somewhat ambiguous and it is possible that these individuals may have misunderstood the question as asking if they agreed or disagreed with the inclusion (rather than **non-inclusion**) of starting points.

### **Disagreement with the non-inclusion of starting points**

5.9 Five organisations explained why they thought starting points **should** be included in the sentencing ranges. Respondents in this group said that starting points would:

- Encourage the use of sentences from the full range indicated, and act as a deterrent to potential offenders
- Assist public understanding and help address the gap between public expectations and sentencing practices.

5.10 Additionally, judicial and legal organisations in this group argued that, in the absence of formal starting points, sentencers would default to the mid-point in a given range or revert to the starting points included in the England and Wales sentencing guideline. One respondent described starting points as allowing the court to 'craft an individual sentence by moving up and down from the starting point to accommodate all relevant circumstances'.

5.11 One legal organisation further stated that starting points (albeit framed in various ways) ensured uniformity and consistency in sentencing guidelines around the world, and that there was no evidence of such starting points leading to inflexibility in sentencing.

5.12 Individuals who disagreed at Question 12 thought that the inclusion of starting points would (i) assist sentencers by providing greater direction, (ii) improve consistency in sentencing practice, and (iii) provide greater clarity for families in terms of managing expectations and understanding the sentences imposed. One individual suggested that starting points would act as ‘minimum sentences’, and that the clarity provided by their inclusion would act as a deterrent for potential offenders and help improve public confidence in the justice system.

5.13 Some individuals did not comment directly on the issue of ‘starting points’ but instead gave their views on the proposed sentencing ranges or (perceived) sentencing practices, largely expressing the view that the current sentencing of death by driving cases was too lenient. These comments are considered more fully at Question 14.

### Whether sentencing ranges should reflect current practice (Q13)

5.14 The consultation paper stated that the sentencing range proposed in the draft guideline for each level of seriousness was intended to reflect current practice in sentencing for death by driving offences. Thus, the ranges do not incorporate the maximum possible sentence as set out in legislation – although the maximum sentence for each offence was noted in the guideline (in text below the sentencing range table) for reasons of transparency.

5.15 Question 13 asked respondents if they agreed or disagreed that the sentencing ranges set out in the guideline should reflect current sentencing practice. Table 5.2 shows that one-third of all respondents (17 out of 51) agreed that the guideline should reflect current sentencing practice and two-thirds (34 out of 51) disagreed. However, on this question there was a difference in views expressed by organisations and individuals. While most individuals disagreed at this question (31 out of 43 respondents), most organisations (5 out of 8 respondents) agreed.

**Table 5.2: Q13 – Do you agree or disagree that the ranges set out within the guideline should reflect current sentencing practice?**

Respondent type	Agree	Disagree	Total
Organisations	5	3	8
Individuals	12	31	43
<b>Total (all respondents)</b>	<b>17</b>	<b>34</b>	<b>51</b>

5.16 Altogether, 32 respondents – 8 organisations and 24 individuals – provided comments at Question 13.



### **Agreement that the guideline should reflect current sentencing practice**

5.17 Six respondents (comprising all five judicial and legal respondents to the consultation and one individual) who selected 'agree' at Question 13 provided comments. These respondents saw no reason for the guideline to deviate from current practice, and/or said that sentencing guidelines should only deviate from current practice where there was a 'demonstrable' need for change – something that respondents did not think applied in the case of sentencing for death by driving cases. Respondents also pointed out that the guideline was not binding and offered flexibility for sentencing outwith the stated ranges where sentencers felt this was appropriate. It was also argued that an alternative approach might lead to unrealistic public expectations about the sentences likely to be imposed.

### **Disagreement that the guideline should reflect current sentencing practice**

5.18 Twenty-four (24) respondents (3 third sector organisations and 21 individuals) explained why they disagreed that the guideline should reflect current practice. These respondents (both organisations and individuals) generally disagreed with current (perceived) sentencing practices. They thought that sentencing of death by driving cases was too lenient, too inconsistent, and/or out of step with public opinion. These respondents saw the introduction of the guideline as an opportunity to reconsider the sentencing of such cases, with a view to changing practice and ensuring more appropriate, 'tougher' sentences.

5.19 Some respondents (organisations and individuals) referred to recent increases in statutory maximum sentences for death by dangerous driving offences and death by careless driving when under the influence of alcohol or drugs (introduced via the Police, Crime, Sentencing and Courts Act 2022 – see footnote 5), and wished to see this reflected in the new guideline.

### **Sentencing ranges specified for each offence (Q14)**

5.20 Question 14 asked respondents if they agreed or disagreed with the sentencing ranges specified in the guideline for each death by driving offence. Table 5.3 presents the responses for each separate offence. It shows:

- Causing death by dangerous driving: Just under half of respondents overall (24 out of 52) agreed that the proposed sentencing ranges were appropriate and just over half (28 out of 52) disagreed.
- Causing death by careless driving when under influence of drink or drugs: Two-fifths of respondents overall (20 out of 50) agreed that the proposed sentencing ranges were appropriate and three-fifths (30 out of 50) disagreed.
- Causing death by careless, or inconsiderate, driving: One-third of respondents (17 out of 49) agreed that the proposed sentencing ranges were appropriate and two-thirds (32 out of 49) disagreed.



- Causing death by driving: unlicensed, uninsured, or disqualified drivers: Just over two-fifths of respondents (22 out of 50) agreed that the proposed sentencing ranges were appropriate and just under three-fifths (28 out of 50) disagreed.
- For each offence, most organisations (five out of eight in each case) agreed that the proposed sentences ranges were appropriate, while most individuals disagreed.

**Table 5.3: Q14 – Do you agree or disagree that the sentencing ranges specified within the guideline are appropriate for each causing death by driving offence?**

Offence	Respondent type	Agree	Disagree	Total
Causing death by dangerous driving	Organisations	5	3	8
	Individuals	19	25	44
	<b>Total (all respondents)</b>	<b>24</b>	<b>28</b>	<b>52</b>
Causing death by careless driving when under the influence of drink or drugs	Organisations	5	3	8
	Individuals	15	27	42
	<b>Total (all respondents)</b>	<b>20</b>	<b>30</b>	<b>50</b>
Causing death by careless or inconsiderate driving	Organisations	5	3	8
	Individuals	12	29	41
	<b>Total (all respondents)</b>	<b>17</b>	<b>32</b>	<b>49</b>
Causing death by driving: unlicensed, uninsured, or disqualified drivers	Organisations	5	3	8
	Individuals	17	25	42
	<b>Total (all respondents)</b>	<b>22</b>	<b>28</b>	<b>50</b>

5.21 Altogether 34 respondents – 7 organisations and 27 individuals – provided comments at Question 14. Most respondents commented on the proposed sentencing ranges at a general level, with just a few providing comments on the sentencing ranges for each individual offence. Both types of comments are covered in the sections below.

### General views on the proposed sentencing ranges

5.22 For the most part, respondents who provided general comments expressed the view that the proposed ranges were too restricted. Individuals in this group wished to see tougher sentences imposed in death by driving cases, with most favouring greater or automatic use of (lengthy) custodial sentences regardless of the circumstances of individual cases. One respondent said the ranges should reflect recent legislative changes to maximum penalties for death by driving cases (see also paragraph 5.19), while another (a third sector organisation) called for the maximum statutory sentences for each offence to be included in the sentence range tables in the guideline (rather than being noted under the tables, as in the draft guideline). Additionally, there were calls for the full range of available sentences to be used.

5.23 In contrast, two respondents – both organisations – expressed general support for the proposed sentencing ranges set out in the draft guideline. They noted (i) that the proposed ranges were based on extensive research and consultation as set out in the consultation paper, and (ii) that sentencers had discretion to depart from the specified ranges, based on the circumstances of individual cases.

5.24 One further organisation noted that the sentencing ranges were lower than those included in the equivalent English and Welsh guideline, but that no explanation of this divergence in approach was provided.

### **Death by dangerous driving**

5.25 Four respondents commented specifically on the sentencing ranges for death by dangerous driving offences.

5.26 Two organisations (both third sector bodies) that disagreed with the proposed range made two different points:

- One pointed out that the ranges did not take account of recent legislative changes to the maximum sentences for death by dangerous driving and death by careless driving when under the influence of drink or drugs (see paragraph 5.19).
- One reiterated their view (see Question 6) that there was no need for three levels of seriousness, and by extension no need for three separate sentencing ranges, given the similarities between Level B and Level C cases – however, it was not clear how this respondent wished this to be reflected in the sentencing ranges for their preferred two-tier system of seriousness.

5.27 In the case of the two individuals who commented on sentencing ranges for death by dangerous driving offences, one simply said that they thought the sentences were not long enough; the other likened the most serious death by driving cases such as those involving drink or drugs or racing behaviour to culpable homicide, and said that, in that context, the 12-year maximum guideline sentence was too low.

### **Death by careless driving when under the influence of drink and drugs**

5.28 The three respondents who commented specifically on the sentencing ranges for death by careless driving when under the influence of drink and drugs stressed the seriousness of such cases and/or wished to see tougher sentences for such offences.

5.29 As noted above, one third sector respondent thought the range should take account of recent legislative changes to the maximum sentences for death by careless driving when under the influence of drink or drugs, and one individual thought the top of the sentencing range for cases involving drink or drugs was too low for cases that were, in their opinion, comparable to culpable homicide. A second individual believed that tougher sentences would reflect the choices made by offenders and might act as a deterrent to other drivers.

### **Death by careless or inconsiderate driving**

5.30 Nine respondents commented specifically on the sentencing ranges for death by careless or inconsiderate driving.

5.31 The most common view amongst those commenting on the sentencing range included in the draft guideline for this offence was that the penalties set out were too 'light' in all or some circumstances. Some individuals said that the proposed sentences did not take account of the impact on the victim's family, the expectations of families or the wider public, or the need to provide a deterrent to other drivers.

5.32 A few respondents commented more specifically on cases at the upper or lower levels of assessed seriousness:

- With regard to the most serious death by careless or inconsiderate driving cases (i.e. those at **Level A**), two third sector organisations highlighted the gap between the top of the proposed sentencing range for careless or inconsiderate driving offences (Level A) and the bottom of the range for death by dangerous driving offences (Level C). These respondents did not think the gap was justified given the potential closeness in the seriousness of the cases in each category. Similarly, one individual also suggested that some careless or inconsiderate driving cases may be serious enough to warrant a longer prison sentence than that currently stated as the top of the range in the draft guideline. This respondent suggested an additional category of seriousness may be required to cover such cases.
- With regard to cases assessed as being at the lower end of seriousness (i.e. those at **Level C**), there was particular concern about the possibility of **only** a financial penalty being imposed, with one individual saying that either a community order or a prison sentence would demand more of the offender and give them the opportunity to reflect on their behaviour.

5.33 However, not all respondents who commented thought the proposed sentencing range was too lenient or too restrictive. There were two other views put forward, in contrast to the main views noted above:

- One legal organisation thought the range was appropriate given the wide variety of circumstances involved in careless and inconsiderate driving cases, and the often low level of assessed culpability.
- One individual suggested that the penalty for Level C death by careless or inconsiderate driving should be limited to automatic licence revocation only.

5.34 Additionally, there was also a suggestion (from one individual) that there should be a wider range of financial penalties included in the guideline, and that any fines imposed should take account of the financial means of the offender.

### **Death by driving: unlicensed, uninsured, or disqualified drivers**

5.35 Seven respondents commented specifically on the sentencing ranges for death by driving: unlicensed, uninsured, or disqualified drivers.

5.36 The main view among those who commented on the sentencing ranges for these offences was that tougher sentences were required in some or all cases. Respondents focused on a number of different issues, making the following suggestions:

- All cases involving unlicensed, uninsured, or disqualified drivers should be treated the same.
- Cases involving unlicensed drivers should be treated the same as those involving disqualified drivers, with a focus on imposing a custodial sentence.
- Disqualified drivers should always get a custodial sentence to act as a deterrent to others.
- The proposed sentences for driving while disqualified were light compared to other offences.

5.37 Respondents making such points highlighted the knowing and deliberate nature of the offences, the fact that such drivers should not have been on the road, the need to provide deterrents to others, and, in the case of disqualified drivers, the previous record of the offender.

5.38 The alternative view, expressed by one legal organisation, was that the proposed sentences were appropriate as they reflected the focus of the offence on the disqualified, unlicensed or uninsured status of the driver, rather than the nature of the driving.

5.39 Finally, one individual did not comment on the proposed sentencing range, but argued that death by driving cases involving disqualified, unlicensed, or uninsured drivers should be prosecuted under one of the other death by driving offences, with the status of the driver (as disqualified, unlicensed, or uninsured) treated as an aggravating factor.

### **Disqualification periods, young driver scheme, and drink driver rehabilitation scheme (Q15)**

5.40 The consultation paper noted that the guideline did not include guidance on disqualification periods or the use of drink driver or young driver schemes. Question 15 asked respondents if they agreed or disagreed with this approach. Table 5.4 shows:

- One-third of all respondents (18 out of 51) agreed with the non-inclusion of guidance on disqualification periods and two-thirds (33 out of 51) disagreed.
- Just over half of all respondents (26 out of 50) agreed with the non-inclusion of guidance on the use of the young driver scheme, and just under half (24 out of 50) disagreed.
- Respondents were divided in their views on the non-inclusion of guidance on the use of the drink driver rehabilitation scheme, with 25 agreeing and 25 disagreeing.

- Compared with individuals, organisations were more likely to agree that guidance on the young driver scheme and the drink driver rehabilitation scheme should **not** be included in the draft guideline. However, four out of seven organisations thought guidance on disqualification periods **should** be included.

**Table 5.4: Q15 – Do you agree or disagree with the non-inclusion of guidance on (i) disqualification periods, (ii) the young driver scheme, and (iii) the drink driver rehabilitation scheme?**

Sentencing option	Respondent type	Agree	Disagree	Total
Disqualification periods	Organisations	3	4	7
	Individuals	15	29	44
	<b>Total (all respondents)</b>	<b>18</b>	<b>33</b>	<b>51</b>
Young driver scheme	Organisations	5	2	7
	Individuals	21	22	43
	<b>Total (all respondents)</b>	<b>26</b>	<b>24</b>	<b>50</b>
Drink driver rehabilitation scheme	Organisations	5	2	7
	Individuals	20	23	43
	<b>Total (all respondents)</b>	<b>25</b>	<b>25</b>	<b>50</b>

5.41 Altogether, 34 respondents – 7 organisations and 27 individuals – commented at Question 15. Some respondents provided comments of a general nature, while others focused on one or more of the three disposals included in the question. Additionally, respondents (individuals in particular) often provided views on the disposal itself rather than on the inclusion of guidance on its use.

5.42 It should also be noted that the pattern of responses to the closed question and the accompanying comments suggest that some people may have misunderstood (or misread) the question. Thus, the sections below do not cover the views of those who agreed or disagreed separately. Instead, they present views on the inclusion of guidance on the use of the disposals, followed by a section summarising other points made by respondents who commented on this question.

### Views on the inclusion of guidance on the three disposals

5.43 Around a third of those commenting at Question 15 addressed the specific issue of whether the proposed guidelines should include guidance on the use of driver disqualification and the young person and drink driver rehabilitation schemes. Most of those answering in this way were organisations.

5.44 Those that wished guidance to be included often commented at a general level, saying that guidance would raise public awareness and understanding, enhance transparency in the sentencing process and improve clarity and consistency in sentencing

practice. Those offering such views included judicial respondents who noted that the decision to use these disposals was an important and difficult aspect of sentencing in death by driving cases. Additionally, one respondent (a legal organisation) who did not answer the tick-box part of the question stated in their comments that they saw no reason not to provide guidance and suggested that this might be included in an annex to the main guideline.

5.45 Comments on the inclusion of guidance on the individual disposals most often focused on disqualification periods. On this issue, respondents thought that clear guidance would be helpful and, in particular, would improve consistency in the use of disqualification across similar offences. One organisational respondent (a third sector body) argued that 'disqualifications would improve road safety and may serve as an additional deterrent against dangerous driving behaviour'. This respondent suggested that guidance on this issue would 'allow the courts to stay under the maximum possible sentence'.<sup>7</sup>

5.46 Those generally in favour of **not** including guidance on the use of these disposals included two legal organisations. One noted that the use of such disposals was specific to individual cases, and that sentencers were aware of and 'alive to' the options where relevant. The other said that it may, nevertheless, be useful to include a statement about making use of the young person and drink driver rehabilitation schemes as a reminder to sentencers.

### **Other views on the use of the three disposals**

5.47 Some respondents (individuals and third sector organisations) offered other comments on the use of each of the three disposals, as follows:

#### *Disqualification periods*

5.48 Individuals generally called for automatic, lengthy or permanent disqualification from driving for those convicted of death by driving offences, with any time-limited period of disqualification starting on release from custody. Respondents saw disqualification as a way of improving road safety and protecting the public by taking dangerous drivers off the road and deterring others from dangerous behaviour whilst driving. Some saw driving as a 'privilege rather than a right' and said that this privilege should be removed from those who proved themselves unable to drive safely and responsibly.

5.49 It was also suggested that those who drive while disqualified should be given a lengthy (five years or more) custodial sentence.

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<sup>7</sup> This respondent did not expand further on their comment, but it is possible that they envisaged the court imposing a very long disqualification rather than a lengthy imprisonment, thus providing public protection by keeping the driver off the road.



### *Young person and drink driver rehabilitation schemes*

5.50 Almost all of the respondents (mainly comprising individuals) who commented specifically on the use of rehabilitation schemes were opposed to their use in the context of death by driving cases. Respondents in this group offered the following views:

- The use of such schemes favoured the guilty, who should not be given another chance, and did not help victims and families.
- Rehabilitation should be separate to punishment.
- Referral to such schemes was not appropriate for drink drivers, or for those who had caused death or serious injury.
- Such schemes are not effective – there were two views: (i) that some people cannot be rehabilitated and (ii) that there was evidence that rehabilitation doesn't work.
- With regard to the young driver scheme, young people should not be treated any differently to other drivers (and should be given a prison sentence).

5.51 In contrast to the views summarised above, one individual respondent (who ticked agree at each part of the closed question) said that rehabilitation could possibly save lives.

## 6 Aggravating and mitigating factors (Q16–Q20)

6.1 Aggravating and mitigating factors are circumstances or actions which can influence the assessment of seriousness of an offence and the sentence selected. At step 3 of the sentencing process, the draft guideline listed – for each of the death by driving offences – possible aggravating and mitigating factors. These were described as 'non-exhaustive'. The consultation paper contained five questions inviting views on different aspects of the guideline with respect to aggravating and mitigating factors.

**Question 16:** Do you agree or disagree that the aggravating and mitigating factors listed in the table at step 3 for each offence are appropriate? [Agree/Disagree]

Please provide any reasons for your response.

**Question 17:** Do you agree or disagree that the guideline should provide further guidance on the following aggravating and mitigating factors? Previous convictions / Remorse / The relationship between the offender and the victim(s) [Agree/Disagree]

Please provide any reasons for your response.

**Question 18:** Do you agree or disagree with the approach to listing contributory actions of others as mitigating factors? [Agree/Disagree]

Please provide any reasons for your response.

**Question 19:** Do you agree or disagree that the voluntary surrender of a licence by an older driver should be listed as a mitigating factor? [Agree/Disagree]

Please provide any reasons for your response.

**Question 20:** Should any additional mitigating or aggravating factors be listed? [Yes/No]

Please provide any reasons for your answers. If answering 'Yes', please indicate what additional factors should be listed and for what offences.

### Aggravating and mitigating factors listed for each offence (Q16)

6.2 Question 16 asked if respondents agreed or disagreed that the aggravating and mitigating factors listed for each of the offences were appropriate. Table 6.1 presents the responses for each separate offence.

- In relation to causing death by dangerous driving around two-fifths of all respondents (22 out of 51) agreed that the aggravating and mitigating factors listed were appropriate and around three-fifths (29 out of 51) disagreed.
- In relation to causing death by careless driving when under the influence of drink or drugs, two-fifths of all respondents (20 out of 50) agreed that the aggravating and mitigating factors listed were appropriate and three-fifths (30 out of 50) disagreed.

- In relation to causing death by careless or inconsiderate driving, just over half of all respondents (25 out of 49) agreed that the proposed aggravating and mitigating factors were appropriate, and just under half (24 out of 49) disagreed.
- In relation to causing death by driving: unlicensed, uninsured or disqualified drivers, just under half of all respondents (22 out of 47) agreed that the proposed aggravating and mitigating factors were appropriate and just over half (25 out of 47) disagreed.
- For each offence, individuals were more likely than organisations to disagree with the appropriateness of the lists of aggravating and mitigating factors.

**Table 6.1: Q16 – Do you agree or disagree that the aggravating and mitigating factors listed in the table at step 3 for causing death by dangerous driving are appropriate for each death by driving offence?**

Offence	Respondent type	Agree	Disagree	Total
Causing death by dangerous driving	Organisations	4	3	7
	Individuals	18	26	44
	<b>Total (all respondents)</b>	<b>22</b>	<b>29</b>	<b>51</b>
Causing death by careless driving when under the influence of drink or drugs	Organisations	4	3	7
	Individuals	16	27	43
	<b>Total (all respondents)</b>	<b>20</b>	<b>30</b>	<b>50</b>
Causing death by careless or inconsiderate driving	Organisations	4	3	7
	Individuals	21	21	42
	<b>Total (all respondents)</b>	<b>25</b>	<b>24</b>	<b>49</b>
Causing death by driving: unlicensed, uninsured, or disqualified drivers	Organisations	4	3	7
	Individuals	18	22	40
	<b>Total (all respondents)</b>	<b>22</b>	<b>25</b>	<b>47</b>

6.3 Altogether, 24 respondents – 6 organisations and 18 individuals – commented at Question 16. Respondents answered this question in a range of different ways, with some offering general comments, and others commenting on specific factors or on the factors included for specific offences. The analysis below presents a summary of the comments of those offering views of a general nature, followed by a summary of views relating to individual factors. This latter section draws together relevant comments made in relation to factors for specific offences.

6.4 The analysis presented below also includes comments made at Questions 17, 18, 19 and 20 that related to whether the respondent agreed or disagreed with the listing of individual aggravating or mitigating factors.

## General views on aggravating and mitigating factors

6.5 As noted above some respondents offered general views only on the aggravating and mitigating factors listed across all the death by driving offences included in the draft guideline.

6.6 Most commonly, those answering in this way were individuals who wished to see a standard, tougher approach taken to the sentencing of death by driving offences, regardless of the individual circumstances of a case, or the presence of mitigating or aggravating factors. In particular, these respondents did not think the inclusion of **mitigating** factors was relevant to sentencing and did not think such factors justified any reduction in sentence. They argued that drivers should take responsibility for their actions and that the inclusion of mitigating factors offered ‘excuses’ or ‘loopholes’ to offenders, or favoured the interests of offenders over the interests of victims and families. One individual was concerned that the ‘non-exhaustive’ list of factors allowed offenders to use the ‘hardship defence’ (i.e. claiming loss of livelihood if they were to be disqualified from driving) as a mitigating factor. Respondents in this group often repeated views of this type at all the consultation questions related to aggravation and mitigation.

6.7 Two organisations also provided comments of a general nature. One respondent (a judicial organisation) endorsed the factors listed, while also noting that sentencers had discretion to consider all the circumstances of any particular case. Another respondent (a legal organisation) argued that ‘in the interests of consistency’, any factor included in the guideline should be listed for all offences.

## Views on specific aggravating or mitigating factors

6.8 Specific comments on the appropriateness of each proposed aggravating or mitigating factor are summarised below. The factors which attracted most comment were ‘previous relevant convictions’, ‘remorse’ and ‘actions of others’, each of which attracted between eight and twelve comments. Other factors were commented on by between two and five respondents.<sup>8</sup> In most instances, the specific comments reported were made by one or two respondents only.

### *More than one person killed / serious injury caused to another person or person(s)*

6.9 Three respondents (all organisations) commented on the inclusion of ‘more than one person killed’ as an aggravating factor with one also commenting on the inclusion of ‘serious injury caused to another person or person(s)’. All three respondents focused on the issue of seriousness, culpability and the relationship with the outcome of the accident in their comments.

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<sup>8</sup> There were no specific comments on the inclusion of ‘other offences committed at the same time’ as an aggravating factor.

6.10 These respondents broadly agreed that culpability was not directly linked to the number of people killed or the causing of serious injury to others, but offered a number of different comments and viewpoints about how the number of people killed should be reflected in the guideline, as follows:

- The 'model' adopted in the guideline (and also used in the existing guideline for England and Wales) of including multiple deaths as an aggravating factor was not appropriate. The respondent (a legal organisation) making this point argued that more than one death 'entails greater harm', and was therefore more properly relevant to the assessment of seriousness at step 1 of the sentencing process at which culpability and harm are considered. In cases with multiple fatalities the respondent felt these should be assessed as being in the most serious category.
- The inclusion of multiple deaths as an aggravating factor for dangerous driving cases was only relevant 'at the lower end of culpability'.
- Causing multiple deaths should be included as an aggravating factor for (i) causing death by dangerous driving, (ii) causing death by careless driving when under the influence of drink or drugs, and (iii) causing death by careless or inconsiderate driving. However, there should be flexibility for the whole circumstances of a case to be considered.
- Causing serious injury to another person(s) (excluding the driver) should be included as an aggravating factor for (i) causing death by dangerous driving, (ii) causing death by careless driving when under the influence of drink or drugs, and (iii) causing death by careless or inconsiderate driving as this outcome was a 'foreseeable consequence' of the driving conduct.
- Causing multiple deaths and/or causing serious injury to another person(s) (excluding the driver) should **not** be included as aggravating factors for the offence of causing death by driving: uninsured, unlicensed, or disqualified since culpability in such cases is not determined by the standard of the driving on the part of the driver.

#### *Relevant previous convictions*

6.11 Eight respondents (three organisations and five individuals) commented on the inclusion of 'relevant previous convictions' as an aggravating factor.

6.12 These respondents generally agreed that the inclusion of this aggravating factor was appropriate as it revealed something about the character of the offender and/or suggested a pattern of behaviour that was relevant to sentencing. One respondent suggested that not taking this into account would undermine public confidence in sentencing.

#### *Driver sustained serious injury*

6.13 Two respondents (one organisation and one individual) commented on the inclusion of 'driver sustained serious injury' as a mitigating factor.

6.14 One legal organisation agreed with the inclusion of this mitigating factor but said that the weight attached to it would depend on the facts of the case – namely, the nature of the injuries sustained, and the culpability of the driver. With regard to the latter point, this respondent suggested that serious injury to the driver may thus be regarded as more of a mitigatory factor in cases of (i) causing death by careless or inconsiderate driving, and (ii) causing death by driving: uninsured, unlicensed, disqualified.

6.15 One individual argued that serious injury to the driver was a sign of a ‘high level of recklessness and hence culpability’ and should be considered as an aggravating rather than mitigating factor.

#### *Previous good driving record*

6.16 Four respondents (two organisations and two individuals) commented on the inclusion of ‘previous good driving record’ as a mitigating factor.

6.17 One legal organisation endorsed the inclusion of ‘previous good driving record’ as a mitigating factor for all offences as this could be an indicator that the incident was a ‘one-off lapse of judgment’ and was ‘out of character’ for the individual concerned.

6.18 The remaining three respondents (one third sector organisation and two individuals) who specifically commented on this mitigating factor all queried its inclusion. They said:

- Drivers should not be rewarded for having adhered to minimum expected standards of safe driving (or for having not been previously caught for a driving offence).
- In the case of causing death by driving: unlicensed, uninsured, or disqualified drivers, a previous good driving record should not be regarded as relevant in circumstances in which the offender should not have been driving.

#### *Relationship between the driver and victim(s)*

6.19 Five respondents (two organisations and three individuals) commented on the inclusion of ‘relationship between the driver and victim(s)’ as a mitigating factor.

6.20 One respondent (a legal organisation) endorsed the argument set out in the consultation paper that causing the death of a family member or close friend would in itself act as a punishment for the offender and should, therefore, be taken into account in sentencing by the court.

6.21 Two respondents (one third sector organisation and one individual) thought that this should only be listed as a mitigating factor in causing death by careless driving offences.

6.22 Two respondents, both individuals, argued against the inclusion of this as a mitigating factor – one said the relationship with the victim should not have any bearing on the sentence imposed, while the other thought that this was an indicator of recklessness

and culpability and should therefore be treated as an aggravating factor (this respondent made the same point with regard to ‘driver sustained serious injury’ – see paragraph 6.15).

6.23 In addition, one individual respondent highlighted the option of considering this factor at the prosecution stage. They described the one-time practice of the Procurator Fiscal in using discretion not to prosecute drivers involved in single-car accidents resulting in the death of a spouse or partner, where there were children of the family who would need to be cared for.

### *Remorse*

6.24 Twelve respondents (four organisations and eight individuals) commented on the inclusion of ‘remorse’ as a mitigating factor.

6.25 Some respondents (including legal and judicial organisations) endorsed the inclusion of remorse as a mitigating factor without explaining their views in any detail, or simply noted (at Question 17) that it was standard practice to consider remorse as part of the sentencing process in all types of case. (See also paragraph 6.51).

6.26 However, it was more common for respondents (third sector organisations and individuals) to disagree with or raise concerns about the listing of remorse as a mitigatory factor. Respondents in this group made one or both of the following points:

- They said that remorse was not relevant, was ‘too late’ or should not make a difference to sentencing. One third sector organisation said that any consideration of remorse as a mitigating factor, even in cases involving lower levels of culpability, had to be balanced against the fact that the death of an ‘innocent road user’ had been caused.
- They highlighted the challenges presented in considering remorse as a mitigating factor, and noted:
  - The difficulty in proving or ‘evaluating’ remorse, especially as most offenders in this position would be remorseful, and/or
  - The need to identify ‘genuine’ remorse, and the risk of offenders ‘using’ remorse to achieve a reduced sentence – some said that only genuine remorse should be treated as a mitigating factor.

6.27 It was also suggested (by one respondent) that showing no sign of remorse should be considered as an aggravating factor.

### *Driver inexperience*

6.28 Two organisational respondents (one third sector and one legal organisation) commented on ‘driver inexperience’ as a mitigating factor, making the following points with regard to each death by driving offence:



- Death by dangerous driving and death by careless or inconsiderate driving: One respondent agreed with the listing of driver inexperience as a mitigating factor for these offences, but suggested it was more likely to be a factor in careless or inconsiderate driving cases, and conversely might be given less weight in dangerous driving cases which involve a greater level of culpability.
- Death by careless driving when under the influence of drink or drugs: One respondent suggested that, while inexperience may be a factor in any incident, the consumption of alcohol or drugs would also have played a part and the facts of each case would therefore have to be considered on their merits.
- Death by driving: uninsured unlicensed or disqualified: Neither of the respondents who commented thought that driver inexperience was relevant in such cases – with one respondent pointing out that the assessment of seriousness for such offences made no reference to the standard of driving.

#### *Providing assistance at the scene*

6.29 Three respondents (two organisations and one individual) commented on ‘providing assistance at the scene’ as a mitigating factor, arguing for and against its inclusion, as follows:

- One respondent (an individual) endorsed its inclusion as an indicator of remorse.
- Two respondents (a legal organisation and an individual) offered similar views, saying that assistance at the scene did not justify a reduction in sentence. One of the respondents expressing this view (a legal organisation) argued that such action was not exceptional enough to be recognised in mitigation. They said that such action ‘represents the standard moral response for anyone in such a situation and is best treated with neutrality’.

#### *Driving in an emergency*

6.30 Four respondents (two organisations and two individuals) commented on the inclusion of ‘driving in an emergency’ as a mitigating factor.

6.31 One respondent (a legal organisation) supported the inclusion of driving in an emergency as a mitigating factor on the basis that this offered ‘an explanation rather than an excuse’ for the driving that had led to the offence.

6.32 Three respondents (one third sector organisation and two individuals) opposed the inclusion of this as a mitigating factor, giving three linked reasons: they said that (i) culpability should be assessed on the basis of driving standard, not the context in which the

driving was taking place, (ii) those driving emergency vehicles were trained to do so, and that (iii) drivers in all circumstances had the same duty of care to other road users.<sup>9</sup>

### *Involuntary intoxication*

6.33 Two respondents (one third sector organisation and one individual) commented on the inclusion of 'involuntary intoxication' as a mitigating factor for the offence of death by careless driving when under the influence of drink or drugs.<sup>10</sup> Both disagreed with its inclusion on the basis that 'drivers should be aware of how any drugs (illegal or prescribed) and or alcohol would impair their ability behind the wheel of a vehicle'.

### *Actions of others*

6.34 Sixteen respondents (six organisations and ten individuals) commented on the inclusion of 'actions of others' as a mitigating factor.

6.35 Those respondents who agreed that the actions of others should be listed as a mitigating factor thought this could be a relevant contributory factor in an incident leading to a death. One legal organisation stated that this reduced the offender's liability for the harm caused and as such should be recognised in the sentencing process. There was also a view that this factor should be listed for all offences, rather than just the two careless driving offences as was the case in the draft guideline.

6.36 Those who disagreed argued that drivers should be held responsible for the consequences of their actions, and should not be able to use the actions of others as an 'excuse'. One respondent specifically disagreed that this should be listed for the offence of careless driving when under the influence of drink or drugs.

### *Genuine belief that a driver was not uninsured / unlicensed / disqualified*

6.37 Two respondents (one third sector organisation and one individual) commented on the inclusion of 'genuine belief that a driver was not uninsured / unlicensed / disqualified' as a mitigating factor. They offered the following views:

- In the case of driving while uninsured, while a driver could, plausibly, be unaware of this situation, the fact that they were uninsured was not relevant to the standard of driving or the incident and should not be treated as a mitigating factor.
- In the case of driving while unlicensed or disqualified, a driver would not be ignorant of this fact, and that this flouting of the law should be regarded as increasing culpability and the assessed seriousness of the case.

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<sup>9</sup> It should be noted that this mitigating factor was intended to cover all drivers driving in an emergency situation, and not just those doing so in a professional capacity.

<sup>10</sup> Note that the draft guideline issued with the consultation paper erroneously included involuntary intoxication as a mitigating factor for the offence of death by careless or inconsiderate driving. Comments on this incorrectly listed factor have been disregarded.

## Further guidance on specific factors (Q17)

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

- On previous convictions, the consultation paper explained that ‘relevant previous convictions’ was included as an aggravating factor for each offence, and that this was ‘not necessarily limited to convictions for road traffic offences’. The consultation paper noted that the Council was considering the need for further guidance on this issue.
- On remorse, the consultation paper noted that, while many sentencers regard remorse as integral to mitigation on the basis that it demonstrates regret and indicated the possibility of a future change in behaviour, research carried out for the Council had found mixed views on this issue among the public.
- On the relationship between the offender and victim(s), the consultation paper explained that in circumstances where a family member or friend of the driver is killed, it could be argued that the offender is already suffering a ‘punishment worse than that which would be achieved by any punitive aspect of a sentence’. However, the consultation paper acknowledged that this may be seen as more relevant in death by careless driving cases, rather than death by dangerous driving cases, citing issues of culpability, foreseeability and a societal need to indicate that the behaviour involved is unacceptable in the case of dangerous driving.

6.39 Views on the need for further guidance on each of these proposed mitigating factors were invited.

6.40 Table 6.2 shows the responses to the closed questions for each of the proposed mitigating factors. It shows that:

- Previous convictions: Around three-quarters of respondents overall (37 out of 51) agreed that further guidance should be provided, and around one-quarter (14 out of 51) disagreed. There was a similar pattern of responses among organisations and individuals.
- Remorse: Overall, just over half of all respondents (27 out of 49) agreed that more guidance should be provided and just under half (22 out of 49) disagreed. Individuals were more likely than organisations to agree.
- Relationship to the victim: Overall, just over half of respondents (26 out of 50) agreed that further guidance was required and just under half (24 out of 50) disagreed. The pattern of response was similar among organisations and individuals.

**Table 6.2: Q17 – Do you agree or disagree that the guideline should provide further guidance on (i) previous convictions as an aggravating factor (ii) remorse as a mitigating factor (iii) relationship between the offender and victim(s) as a mitigating factor?**

Factor	Respondent type	Agree	Disagree	Total
<b>Aggravation: Previous convictions</b>	Organisations	5	3	8
	Individuals	32	11	43
	<b>Total (all respondents)</b>	<b>37</b>	<b>14</b>	<b>51</b>
<b>Mitigation: Remorse</b>	Organisations	3	4	7
	Individuals	24	18	42
	<b>Total (all respondents)</b>	<b>27</b>	<b>22</b>	<b>49</b>
<b>Mitigation: Relationship between offender and victim(s)</b>	Organisations	4	4	8
	Individuals	22	20	42
	<b>Total (all respondents)</b>	<b>26</b>	<b>24</b>	<b>50</b>

6.41 Altogether, 25 respondents – 7 organisations and 18 individuals – commented at this question. The sections below present views on the inclusion of further guidance at a general level as well as views on the inclusion of further guidance on each individual factor.

6.42 It was common for respondents (individuals in particular) to provide views on the factor itself rather than on the inclusion of guidance on its use. In some cases, the comments suggested that the response at the closed question may have been intended to express agreement or disagreement with the inclusion of the aggravating or mitigating factor, rather than with the inclusion of further guidance. Views on whether each of the factors should be listed have already been discussed at Question 16 above (paragraphs 6.5 to 6.37).

### **General views on the inclusion of additional guidance on the three factors**

6.43 As noted above, some of those commenting at Question 17 did so at a general level without addressing any of the individual factors.

6.44 Among respondents (including one legal organisation) who agreed that further guidance on the three factors should be included, there was a view that the guideline should be as comprehensive as possible, that it was 'sensible' to set out how the factors would be treated, and that this would enhance consistency in sentencing. One individual called for the inclusion of more detail and examples, and a general explanation of how aggravating or mitigating factors might affect a headline sentence.

6.45 In contrast, organisations (one judicial respondent and one legal respondent) that disagreed with the inclusion of additional guidance said that cases should be dealt with on their merits, on the basis of all the facts and circumstances. These respondents stressed

the importance of judicial discretion in this process and were concerned that additional guidance could inhibit the application of professional judgement and expertise. Individuals who gave this view expressed a preference for the guideline to be short, concise and simple.

### **Views on the inclusion of additional guidance on individual factors**

6.46 The comments on the inclusion of additional guidance on each individual factor are summarised in the sections below.

#### *Previous convictions*

6.47 Those who favoured the inclusion of further guidance on the consideration of previous convictions thought that further detail was needed on what was, and was not, a relevant offence. This group also thought that clarity on how analogous previous offences might impact on sentences would be useful. One legal organisation called for more detailed guidance on the role of and weight attached to previous convictions, including for driving offences, in the sentencing process. This respondent drew attention to the guidance on this issue offered by the Sentencing Council for England and Wales.

6.48 Those opposed to the inclusion of further guidance on this point argued that the varying circumstances of each case and the number of potentially relevant offences would make it difficult to expand on what was meant by 'relevant previous convictions' and might have an adverse effect on the flexibility of the guideline.

#### *Remorse*

6.49 Those favouring the inclusion of more guidance on remorse as a mitigating factor emphasised the difficulty in assessing remorse and identifying 'genuine' remorse (as opposed to statement of remorse designed to achieve a lesser sentence). One third sector respondent suggested that the voluntary surrender of a licence could be regarded as an indication of remorse.

6.50 One individual whose response indicated their role as a sentencer said that further specification of this factor was required, given that the involvement of insurance companies in cases often had an impact on whether and how offenders express remorse. This respondent said that the demands of the insurance industry regarding acceptance of liability often led to offenders saying little during police investigations or court proceedings that would help in assessing remorse. They went on to highlight their practice of asking offenders to submit a letter addressed to the victim's family about the incident for consideration as part of the sentencing process.

6.51 Those who did not wish to see further guidance on remorse included judicial and legal respondents who said that sentencers were familiar with taking account of remorse, and that the weight attached to this should be at their discretion, and that further guidance on this issue may restrict the flexibility of the guideline.

### *The relationship of the offender to the victim(s)*

6.52 Those who did not wish to see further guidance on the relationship of the offender to the victim(s) included legal and judicial respondents who said (i) that the extent that this should be taken into account would vary in individual cases, and (ii) that sentencers were familiar with taking account of this in sentencing, and that the weight attached to this should be at their discretion.

6.53 Those who thought that further guidance should be provided on the relationship of the offender to the victim(s) included third sector organisations. These respondents offered two views. One said that the closeness of the relationship should be clarified in additional guidance, while the other said that the factor should be limited to 'nearest and dearest' in careless driving cases (see also Question 16). There was one further suggestion (made by one individual) that the weight attached to the factor should depend on the quality of relationship rather than just the existence of a relationship.

### **Contributory actions of others (Q18)**

6.54 The draft guideline included the actions of others (including those of victims) as a mitigating factor for two death by driving offences – (i) causing death by careless, or inconsiderate, driving and (ii) causing death by careless driving when under the influence of drink or drugs offences. The consultation paper noted that the Council would welcome views on whether or not this should be included as a mitigating factor in the guideline, and if so, to what offences it should apply.

6.55 Question 18 asked respondents if they agreed or disagreed with the approach to listing the contributory actions of others as a mitigating factor in the draft guideline. Table 6.3 shows that two-thirds of respondents overall (33 out of 49) agreed with the approach in the draft guideline and one-third (16 out of 49) disagreed. The seven organisations that answered the question were unanimous in their agreement.

**Table 6.3: Q18 – Do you agree or disagree with the approach to listing contributory actions of others as mitigating factors?**

Respondent type	Agree	Disagree	Total
Organisations	7	0	7
Individuals	26	16	42
<b>Total (all respondents)</b>	<b>33</b>	<b>16</b>	<b>49</b>

6.56 Altogether, 23 respondents – 7 organisations and 16 individuals – commented at Question 20. Respondents presented their reasons for agreeing or disagreeing, and/or commented on how this factor should be incorporated into the guideline.

### **General agreement with listing contributory actions of others as a mitigating factor**

6.57 Some respondents (including legal organisations and individuals) offered general reasons for their agreement with the approach adopted in the draft guideline. These



respondents thought the actions of others could be relevant in some cases – either contributing to the outcome of the offence and/or affecting the culpability of the offender – and should therefore be considered as part of the sentencing process.

6.58 Some respondents offered a degree of qualification to their agreement. One individual suggested that this factor was particularly likely to be relevant in careless driving cases based on a negligent act, while a legal organisation offered a somewhat similar view stating that the factor would be less relevant in cases involving higher levels of culpability. One individual thought the factor should only be taken into account if the offender had attempted to help the victim.

6.59 The two judicial respondents indicating agreement made two points: one said that the sentencer's role would involve assessing relevance and the extent of mitigation, while the other suggested that 'these factors could nudge a case from one category to another'.

### **Views on the approach to listing the contributory actions of others as a mitigating factor**

6.60 A small number of respondents – including some who selected agree, some who selected disagree and some who did not answer the closed part of the question – commented in more detail on the approach to listing this mitigating factor in the draft guideline, as follows:

- The offences to which the factor should apply: While some respondents (including one legal organisation) said that the factor should be listed for all death by driving offences, others highlighted its application to particular offences. There was a particular view (expressed by one individual) that the factor should not be listed for dangerous driving or careless driving when under the influence of drugs or alcohol.
- The description of the factor: Two respondents thought the factor should relate to the contributory actions of others 'within or outside a vehicle'. A third respondent thought the wording of the factor should simply refer to 'contributed to' rather than 'significantly contributed to' – they thought that the inclusion of the word 'significantly' was unnecessary and could give rise to arguments about its definition.<sup>11</sup>

6.61 In a few cases, respondents discussed possible implications for those (other than the driver) whose actions may have contributed to the death. Two respondents (one third sector organisation and one individual) said that legal action should be taken against anyone

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<sup>11</sup> No other comments were received on the wording of this factor. However, it should be noted that, although the consultation paper highlighted the proposal to adopt different wording for each relevant offence – 'The actions of others contributed to the likelihood...' in the case of death by careless or inconsiderate driving and 'The actions of others contributed **significantly** to the likelihood...' in the case of death by careless driving when under the influence of drink or drugs – the draft guideline issued with the consultation paper erroneously included the same wording – 'the actions of others 'contributed **significantly**' – for both offences.



whose actions had contributed to the offence, while a third respondent (an individual) cautioned against ‘victim blaming’.

### **Disagreement with listing contributory actions of others as a mitigating factor**

6.62 Those respondents – all individuals – who indicated general disagreement with the listing of contributory actions of others as mitigating factors either stated that the driver (as the offender) should be held responsible and punished for the resulting death, or they repeated wider points about the need for tough(er) sentences for death by driving offences and their opposition to the consideration of mitigating factors or ‘excuses’ in deciding on sentences in such cases.

### **Voluntary surrender of a licence by an older driver (Q19)**

6.63 The consultation paper stated that the draft guideline does **not** include the voluntary surrender of a driving licence – something that was seen as most likely to be relevant in cases involving older drivers – as a mitigating factor. However, it also noted that the voluntary surrender of a licence could be seen to signify remorse and may therefore merit inclusion as a mitigatory factor. Question 19 invited views on this issue.

6.64 Table 6.4 shows that just under half of all respondents (26 out of 53) agreed that voluntary surrender of a licence by an older driver should be listed as a mitigating factor, and just over half (27 out of 53) disagreed.

**Table 6.4: Q19 – Do you agree or disagree that the voluntary surrender of a licence by an older driver should be listed as a mitigating factor?**

Respondent type	Agree	Disagree	Total
Organisations	4	3	7
Individuals	22	24	46
<b>Total (all respondents)</b>	<b>26</b>	<b>27</b>	<b>53</b>

6.65 Altogether, 26 respondents – 7 organisations and 19 individuals – commented at Question 19. The sections below present the views of those who agreed, and the views of those who disagreed, as well as the views of those who provided more general comments on this issue.

### **Agreement that the voluntary surrender of a licence by an older driver should be listed as a mitigating factor**

6.66 Some respondents (third sector organisations and individuals) who agreed that the voluntary surrender of a licence by an older driver should be listed as a mitigating factor argued that such action:

- Indicated remorse and showed acceptance of responsibility for the death caused
- Provided an incentive to offenders to surrender their licence

- Could potentially reduce future harm by keeping unsafe drivers off the road.

6.67 However, other respondents offered more qualified agreement, as follows:

- One judicial organisation and one individual commented on the practical effect of voluntary surrender of a licence. The judicial organisation suggested that the surrender of a licence should only be treated as a mitigating factor in circumstances in which the person would be able to reapply for their licence following a period of disqualification; the individual respondent thought the driver's licence should be automatically permanently revoked in death by driving cases, and the value of surrender would therefore be debatable.
- One individual said that this should only be accepted as a mitigating factor if the offender also surrendered their vehicle to the court.

#### **Disagreement that the voluntary surrender of a licence by an older driver should be listed as a mitigating factor**

6.68 Those explaining their reasons for disagreeing that the voluntary surrender of a licence by an older driver should be listed as a mitigating factor included legal and judicial organisations and individuals.

6.69 The organisations in this group made two points related to culpability and remorse:

- That the surrender of a licence does not reduce culpability, and should not therefore be treated as a mitigating factor
- That the surrender of a licence was not a reliable enough indicator of remorse to be included as a mitigating factor, given the person would be disqualified from driving anyway as part of their sentence.

6.70 The individuals in this group said that this action:

- Was 'too late' or like 'shutting the stable door after the horse has bolted'
- Would be of no interest or benefit to the victim or their family
- Was of limited practical value as the individual would be disqualified from driving as part of their sentence – and would also be able to reapply for their licence at a later date.

6.71 Additionally, there was a view amongst the individuals in this group that offenders should not be able to use age as an excuse for their actions or surrender their licence in an attempt to get a shorter sentence.

## Other views on the voluntary surrender of a licence

6.72 There were two other views expressed by respondents about how the voluntary surrender of a licence might be considered in the sentencing process:

- One legal organisation argued that, rather than being listed as a separate mitigating factor, the voluntary surrender of a licence should simply be considered in assessing remorse.
- Some respondents (including some who ticked disagree and some who ticked agree at Question 19) said the voluntary surrender of a licence should be treated as a mitigating factor for offenders of all ages. Those offering this view included third sector organisations and individuals.

## Additional aggravating and mitigating factors (Q20)

6.73 The final question in this section asked if respondents thought that any additional aggravating and mitigating factors should be listed.

6.74 Table 6.5 shows that around one-third of all respondents (18 out of 50) thought additional aggravating or mitigating factors should be listed in the guideline, and two-thirds (32 out of 50) did not think any further factors were necessary. There was a similar pattern of views among organisations and individuals.

**Table 6.5: Q20 – Should any additional mitigating or aggravating factors be listed?**

Respondent type	Yes	No	Total
Organisations	3	4	7
Individuals	15	28	43
<b>Total (all respondents)</b>	<b>18</b>	<b>32</b>	<b>50</b>

6.75 Altogether 21 respondents – 4 organisations and 17 individuals – provided comments at Question 20. Respondents were asked to provide reasons for their answers, with those answering ‘yes’ specifically asked to indicate the additional factors they thought should be listed and for what offences.

## Proposed additional aggravating or mitigating factors

6.76 Most of those who commented at Question 20 answered ‘yes’ – i.e. they thought there should be additional factors listed – and most in this group wished to see additional **aggravating** factors. Respondents did not always specify the offences that the additional factors should apply to. The suggestions included the following:

- Health-related factors: Three respondents suggested that undisclosed health conditions, or poor eyesight should be considered as **aggravating** factors. In contrast, two respondents (one third sector organisation and one individual)

suggested that evidence of health conditions (physical or mental) should be considered as **mitigating** factors.

- Attitudes and behaviours **leading up** to the offence: A range of suggested factors relating to attitudes and behaviours leading up to an offence were put forward, with each suggestion offered by just one or two respondents. These included:
  - The recording of the driving for social media purposes – this was said to indicate the deliberate nature of the danger created, and to encourage similar dangerous driving by others
  - In cases involving drink or drugs, the offender carrying on driving despite others trying to dissuade them from this
  - The pursuit of any activity (using a mobile phone, applying make-up, talking to passengers) that means the driver is not fully concentrating on the road, and/or that leads to unsafe driving
  - Evidence of deliberate conduct and ‘intent’ (said to be mentioned only in relation to dangerous driving Level A cases offences) – the presence of intent as an aggravating factor was mentioned by two respondents with the examples given including sounding the car horn at a cyclist and then very intentionally close passing them, or pushing a cyclist or driver off the road or into an object
  - Poor knowledge of road signs, speed limits and on-road driving standards and regulations (especially in relation to people who learnt to drive in other countries)
  - Involvement in previous incidents where there had not been enough evidence to prosecute.
- Attitudes and behaviours **following** the offence: Three respondents (one legal organisation and two individuals) suggested that a number of different attitudes and behaviours demonstrated by the driver in the wake of an accident should be listed as additional aggravating factors. These included:
  - Not attempting to help or get help for the victim
  - Irresponsible behaviour (failing to stop, falsely claiming that one of the victims was responsible for the collision, or trying to throw the victim off the car by swerving in order to escape) and driving off in an attempt to avoid detection or apprehension – both of these were noted as being included as additional factors in the guideline for England and Wales, although it was suggested that the former, ‘irresponsible behaviour’, might be reworded
  - Refusing to provide a sample or refusing to cooperate with an investigation
  - Not acknowledging the devastation caused to the victim's family.

6.77 One respondent suggested that ‘the type of road or place where the accident occurred’ should be listed, but did not explicitly state if this should be included as an aggravating or mitigating factor.

6.78 Additionally, two individuals who ticked ‘yes’ made comments of a more general nature:

- One used their comments to argue for the list of aggravations to be ‘more detailed’. However, they cautioned against making the list of mitigations more detailed on the grounds that this could help the defence to tailor their pleas accordingly.
- One said that each case should be assessed on its merits.

### **The views of those who did not wish to see additional factors listed**

6.79 Some respondents who did not wish to see additional factors listed explained their views. One judicial organisation thought the current list offered brevity and simplicity, and was sufficient given that the guideline also made it clear that sentencers should consider all the circumstances of a case in reaching their decision. The other respondents who explained why they did not wish to see additional aggravations or mitigations were all individuals. These respondents generally stressed the need for tough(er) sentences to be imposed in death by driving cases and did not think that mitigation or ‘excuses’ should be considered as part of the decision-making process.

## 7 Potential impacts of the guideline (Q21–Q25)

7.1 The final set of consultation questions asked about the potential impacts of the guideline. The consultation paper explained that the Council must carry out an assessment of the likely costs and benefits of guidelines and their likely effects on the criminal justice system generally which must be published along with any draft guidelines. Additionally, the consultation paper stated that the main anticipated benefits of the guideline were increased public understanding of the sentencing of death by driving cases and increased consistency in the sentencing of such cases, and that no significant costs were anticipated.

7.2 The views of respondents were invited to assist with the further assessment of costs and benefits and with further development of the guideline. Five questions addressed this issue as follows:

**Question 21:** Do you think the guideline will influence sentencing practice in Scotland? [Yes/No]

Please provide any reasons for your response.

**Question 22:** Do you agree or disagree that the guideline will lead to an increase in public understanding of how sentencing decisions in death by driving cases are made? [Agree/Disagree]

Please provide any reasons for your response.

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

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

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

### Influence of the guideline on sentencing practice (Q21)

7.3 Question 21 asked respondents if they thought the guideline would influence sentencing practice in Scotland. Table 7.1 shows that two-thirds of all respondents (35 out of 52) answered 'yes' to this question, and one-third (17 out of 52) answered 'no'. All but one of the organisational respondents answered 'yes'.

**Table 7.1: Q21 – Do you think the guideline will influence sentencing practice in Scotland?**

Respondent type	Yes	No	Total
Organisations	6	1	7
Individuals	29	16	45
<b>Total (all respondents)</b>	<b>35</b>	<b>17</b>	<b>52</b>

7.4 Altogether, 28 respondents – 7 organisations and 21 individuals – commented at Question 21.

## **Views of those who thought the guideline would influence sentencing practice**

7.5 There was a common view amongst respondents, and organisations in particular, that the guideline would influence sentencing practice by bringing clarity and promoting greater consistency in this area of judicial decision making. It was also noted by some respondents that there would be an expectation that the guidelines would be followed and used to justify sentencing decisions. The response from one legal organisation noted that research on the impact of sentencing guidelines in other jurisdictions had found a 'modest but detectable' increase in sentencing consistency. However, this respondent noted two points that suggested that the effect of the guideline might be limited in Scotland: the absence of 'starting points' in the guideline; and the reportedly limited impact of the English and Welsh guideline on sentencing practice.

7.6 Several respondents said that past reliance on the English and Welsh guidelines indicated the need for a Scotland-specific guideline and suggested that its introduction would be beneficial.

7.7 Some individuals said that they 'hoped' the guideline would influence practice and queried the point of introducing the guideline if it did not.

## **Views of those who did not think the guideline would influence sentencing practice**

7.8 As shown in Table 7.1, all but one of the respondents who did not think that the guideline would influence sentencing practice were individuals. These individuals typically expressed the view that nothing would change as a result of the guideline, and that sentencers would continue to impose sentences that were regarded as too lenient, and continue to prioritise the interests of offenders over victims. One respondent suggested that change would only come about if the guideline were clearly communicated and enforced, and if sentencing practice were monitored and reviewed following its introduction.

7.9 The one organisational respondent that answered 'no' at the closed part of Question 21 (a judicial body) did so on the basis that a guideline that reflected current practice would not have a significant impact on sentencing decisions going forward.

## **Impact on public understanding of sentencing decisions (Q22)**

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

7.11 Table 7.2 shows that just over half of all respondents (28 out of 54) agreed and just under half (26 out of 54) disagreed at this question. Organisations (six out of eight) were more likely than individuals to agree.



**Table 7.2: Q22 – Do you agree or disagree that the guideline will lead to an increase in public understanding of how sentencing decisions in death by driving cases are made?**

Respondent type	Agree	Disagree	Total
Organisations	6	2	8
Individuals	22	24	46
<b>Total (all respondents)</b>	<b>28</b>	<b>26</b>	<b>54</b>

7.12 Altogether, 29 respondents – 8 organisations and 21 individuals – commented at Question 22.

### **Agreement that the guideline will lead to an increase in public understanding**

7.13 Respondents who thought the guideline would lead to an increase in public understanding of sentencing decisions made a range of different comments.

7.14 Some respondents commented positively on the guideline saying that it was clear and well structured, and – coupled with greater consistency in the sentences imposed – would help bereaved families and the wider public understand the sentencing decisions made.

7.15 However, it was more common for respondents to qualify their agreement in a range of different ways, by saying:

- Any increase in public understanding was likely to be modest and would not automatically lead to agreement with the sentences imposed.
- Any increase in public understanding would depend on effective communication and awareness raising activities, and accurate and informative reporting of sentences and sentencing decision-making in the media.
- Further development of the guideline – such as the inclusion of worked examples and a glossary, or additional information on disqualification periods – would further increase public understanding.

7.16 Indeed, some respondents who answered ‘yes’ at the tick-box part of the question nevertheless expressed concerns that the guideline would not be accessed and read by members of the public, and/or that the current discrepancy between public expectations and understanding and judicial practice would persist.

7.17 In a few cases, individuals said that they ‘hoped’ the guideline would lead to increased understanding if it were implemented as intended or if it resulted in greater consistency in sentencing.

## **Disagreement that the guideline will lead to an increase in public understanding**

7.18 Respondents (mostly individuals) who did **not** think the guideline would lead to an increase in public understanding of sentencing decisions made points similar to those made by respondents (above) who qualified their view that the guideline **would** increase public understanding:

- They did not think the guideline would be easily read and understood by lay people – respondents described it as ‘verbose’, and ‘too long, too complex, too inaccessible’.
- They did not think people would know about (or care about) the guideline unless steps were taken to promote it via different channels. It was suggested that those involved in cases as families of victims should be provided with a copy of the guideline.
- They suggested that public understanding would depend on accurate reporting of cases and sentences in the media.
- They thought the public would continue to be ‘disappointed’ in the sentences imposed.

## **Perceived benefits and negative impacts (Q23 and Q24)**

7.19 Questions 23 and 24 asked respondents for their views on the benefits and negative impacts that might arise from the introduction of the guideline. Both were open questions (i.e. there were no tick-box questions for respondents to complete). The themes identified in the comments made at each question were similar and so the views expressed are reported together in this section.

7.20 Altogether, 36 respondents – 8 organisations and 28 individuals – commented at Question 23 and 28 respondents – 6 organisations and 22 individuals – commented at Question 24. There was a broad consensus among organisational respondents in their responses to these questions, while individuals were more mixed in their views. Thus, the views of organisations and individuals are discussed separately in the sections below.

### **Views of organisations**

7.21 Organisational respondents all provided broadly similar responses at Questions 23 and 24, describing benefits at Question 23 and identifying no negative effects at Question 24 (some provided no response to this latter question).

7.22 In general, respondents saw the introduction of the guideline as being of benefit to a range of parties with regard to a complex and emotive issue – sentencers, legal professionals, the public, bereaved families, offenders and students were all mentioned. More specifically, respondents thought the guideline would:

- Provide useful guidance for sentencers – e.g. in terms of the sentencing range tables – and result in greater consistency (and predictability) in sentencing for death by driving offences
- Increase openness and transparency in sentencing decision-making
- Be helpful to legal professionals in advising clients – with the document providing a useful resource in explaining the process and likely outcomes
- Remove reliance on the England and Wales guideline, and allow for better ‘codification’ of decisions in the Scottish courts
- Increase awareness and understanding of sentencing and sentences for bereaved families and the wider public – one judicial organisation described what they saw as the real benefit of increasing awareness and understanding of ‘the realistic range of outcomes where a person tragically loses their life in a situation where the culpability level is relatively low when compared with that outcome’
- Potentially reduce the number of appeals of sentence and increase confidence in the sentencing process.

7.23 These points largely reflected the points listed in the draft impact assessment issued along with the consultation paper.

7.24 Additionally, some respondents suggested that greater awareness of the guideline and the likely penalties for death by driving cases may act as a deterrent against poor or dangerous driving.

### **Views of individuals**

7.25 As noted above, individuals expressed a wider range of views on the likely benefits and negative impacts of the proposed guideline. There were two main perspectives, as described below.

7.26 Some individuals thought the guidance would bring benefits without having any negative effects. These respondents often echoed the views of organisations in identifying benefits in terms of transparency, clarity and consistency in sentencing of death by driving cases, increased understanding for bereaved families and the wider public, safer roads, and improved public confidence in the justice system. In a few instances, individuals anticipated benefits in terms of offenders being held responsible for their actions and receiving more appropriate (or tougher) sentences. Some in this group did, however, qualify their views by saying that the realisation of any potential benefits:

- Would depend on the guideline being effectively implemented and consistently followed, and effectively communicated to the public
- Would not mean that everyone agreed with the approach, or the sentences imposed.

7.27 In contrast, other respondents saw no benefits accruing from the introduction of the guideline. Instead, they thought – or were concerned – that (i) the guideline lacked clarity and could lead to confusion for the public and families, (ii) sentencers would not adhere to the guideline, (iii) the justice system would continue to favour the interests of offenders and sentences would continue to be too lenient, (iv) bereaved families and the public would remain dissatisfied with the sentencing process and outcome, and (v) drivers would continue to disregard the law and drive dangerously.

### Perceived costs (Q25)

7.28 Question 25 (another open question with no preceding tick-box) asked about the costs (financial and other) that respondents saw arising from the introduction of the guideline. Altogether, 29 respondents – 7 organisations and 22 individuals – commented at this question, although not all directly addressed the issue of costs.

7.29 Around half of those who commented directly on the issue of costs did not anticipate any costs arising from the introduction of the guideline. In a few cases, respondents suggested that there may be cost savings if the guideline resulted in greater transparency and consistency in sentencing which then led to a reduction in the number of appeals against sentence. All the organisations that commented at this question expressed views of this type.

7.30 The other half of the respondents who directly addressed the question identified potential costs of various types related to the introduction of the guideline. The respondents – all individuals – thought costs would arise in relation to:

- The production, administration and dissemination of the guideline, and related publicity activity – the costs incurred in developing the guideline to the current draft stage were also noted
- Lengthier and more complex court proceedings
- Greater use of (longer) custodial sentences – although there was also a view that such a change in sentencing practice would not come about *because of* the cost implications (the comment from the respondent making this point suggested that they believed that sentencing policy and practice was inappropriately driven by cost considerations).

7.31 One respondent argued that financial costs should not be seen as an issue in a context in which people have lost their lives.

7.32 Finally, a small number of respondents used their comments at Question 25 to restate their views that the criminal justice system should take a harder line in dealing with offenders, including those involved in driving offences, or to say that they did not understand the question or were unsure about possible costs.

## 8 Other comments (Q26)

8.1 The consultation concluded with a question inviting respondents to make any other comments about matters arising from the consultation.

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

8.2 Altogether, 34 respondents – 3 organisations and 31 individuals – commented at Question 26.<sup>12</sup> This chapter presents a brief summary of the points made. It also includes comments made in response to earlier consultation questions that have not been covered elsewhere in the report. For the most part, although a few specific points were noted, the comments were of a general nature and reflected views expressed at other questions.

### Comments on the guideline

8.3 Some respondents offered positive comments on the draft guideline describing it as an ‘excellent idea’, ‘long overdue’, and helpful in providing a Scotland-specific reference point for those involved in, or with an interest in, sentencing of death by driving cases.

8.4 However, it was more common for respondents – individuals in particular – to be critical of the guideline and perceived sentencing practice. Respondents reiterated points made at earlier questions about the perceived leniency of sentencing in death by driving cases, opposition to the inclusion of mitigatory factors and the need for greater use of custodial sentences (for dangerous driving offences in particular). Additionally, respondents disagreed with the approach to treating young drivers differently from other drivers. These respondents thought the guideline (and the justice system more widely):

- Prioritised the interests of offenders over those of victims and their families who were dealing with the significant and lifelong impact of death by driving offences
- Gave too much emphasis to rehabilitation as a sentencing objective (particularly with regard to young people) and not enough to punishment and deterrence, and the need to protect the public, including cyclists and other vulnerable road users – one respondent called for the deterrent effect of the new guideline to be monitored.
- Needed to take more account of public opinion on sentencing.

### Other comments

8.5 Other comments from respondents on aspects of the prosecution and sentencing of road traffic (or other) offences included calls for:

- Monetary compensation to be included as part of sentences

<sup>12</sup> This excludes four respondents who simply stated that they had no comments.

- Road safety awareness training (with respect to cyclists in particular) to be included as a sentencing option
- Consideration of the use of 'exceptional hardship' as a mitigatory factor
- Disqualification from driving to be used as a bail condition
- Consideration of the sentencing of serious injury as well as death by dangerous driving
- The introduction of an offence of death by dangerous cycling
- The introduction of a specific guideline for the sentencing of older people.

8.6 Some respondents raised more general issues relating to ensuring safety on the roads. Their comments related to licensing and retesting arrangements for older people, those with certain health conditions, and those who gained their licence outwith the UK.

8.7 Finally, a few respondents raised issues about the consultation process stating that the questions had been too difficult for lay people, or that completing the questionnaire had been too time consuming.

## Annex 1: Organisational respondents

Nine organisations submitted responses to the consultation.

### Judicial organisations (2)

- Part Time Sheriffs Association
- Sheriffs and Summary Sheriffs Association

### Legal professional and academic organisations (3)

- Faculty of Advocates
- Law Society of Scotland
- Sentencing Academy

### Other organisations (4)

- Cycling Scotland
- RoSPA (Royal Society for the Prevention of Accidents) Scotland
- Scotland's Campaign Against Irresponsible Drivers
- Victim Support Scotland



## Annex 2: Responses to individual questions

The table below provides a summary of the response rates to individual questions.

Question number	Question text	Individuals* (out of 49)	Organisations (out of 9)	All (out of 58)
Q1	Do you agree or disagree that the general structure of the guideline, providing guidance in line with steps 1 to 3 of the sentencing process guideline, is appropriate? [Agree/Disagree]	46 (94%)	8 (89%)	54 (93%)
	Please provide any reasons for your response.	25 (51%)	6 (67%)	31 (53%)
Q2	Do you agree or disagree that the style of the guideline, employing narrative and tables, is helpful? [Agree/Disagree]	45 (92%)	9 (100%)	54 (93%)
	Please provide any reasons for your response.	18 (37%)	8 (89%)	26 (45%)
Q3	Do you agree or disagree that the draft guideline makes the relationship between this guideline and other applicable guidelines clear? [Agree/Disagree]	42 (86%)	9 (100%)	51 (88%)
	Please provide any reasons for your response.	15 (31%)	7 (78%)	22 (38%)
Q4	Is there anything that can be done to make the relationship between this guideline and other applicable guidelines clearer? [Yes/No]	42 (86%)	7 (78%)	49 (84%)
	Please provide details along with any reasons for your response.	14 (29%)	4 (44%)	18 (31%)
Q5	Do you consider that the offences should be listed within the guidelines by order of seriousness, the order they appear in the Road Traffic Act 1988, or in any other order? [Seriousness / Statute / other order (please specify below)]	45 (92%)	8 (89%)	53 (91%)
	Please provide any reasons for your response.	17 (35%)	7 (78%)	24 (41%)
Q6	Do you agree or disagree that the draft guideline should not emphasise any particular purpose or purposes of sentencing? [Agree/Disagree]	44 (90%)	7 (78%)	51 (88%)
	Please provide any reasons for your response.	27 (55%)	7 (78%)	34 (59%)
Q7	Do you agree or disagree that the approach to the assessment of seriousness set out at step 1 for each of the offences covered by the	42 (86%)	8 (89%)	50 (86%)

	guidelines is appropriate? [Agree/Disagree]			
	Please provide any reasons for your response.	17 (35%)	5 (56%)	22 (38%)
Q8	Are there any changes that should be made to the features of seriousness listed at step 1 of each offence? [Yes/No]	43 (88%)	9 (100%)	52 (90%)
	Please provide any reasons for your response.	21 (43%)	7 (78%)	28 (48%)
Q9	Do you agree or disagree that the difference between the quality of driving under Level B seriousness and Level C seriousness for death by dangerous driving offences is sufficiently clear? [Agree/Disagree]	44 (90%)	8 (89%)	52 (90%)
	Please provide any reasons for your response.	17 (35%)	7 (78%)	24 (41%)
Q10	Do you agree or disagree that the feature of seriousness regarding the quality of driving for Level B offences should instead refer to 'driving that created a <u>very significant</u> risk of danger' to make the distinction more clear? [Agree/Disagree]	43 (88%)	7 (78%)	50 (86%)
	Please provide any reasons for your response.	15 (31%)	6 (67%)	21 (36%)
Q11	In relation to the categorisation of racing in death by dangerous driving offences, which of the options presented at paragraph 60 of the consultation do you consider the most appropriate? <ul style="list-style-type: none"> <li>• Option 1 (include racing in Level A only)</li> <li>• Option 2 (including racing in both Level A and Level B seriousness, with suitable descriptions)</li> <li>• Option 3 (include racing in either Level A or Level B with an indication that it could move into another level of seriousness depending on the nature of the racing)</li> <li>• Option 4 (include racing in Level B, noting that application of the guideline as presently drafted provides the option for moving a driving case from level B to A: a particularly bad racing case could be regarded as possessing a combination of Level B features)</li> </ul>	43 (88%)	6 (67%)	49 (84%)
	Please provide any reasons for your response.	17 (35%)	7 (78%)	24 (41%)

Q12	Do you agree or disagree with the non-inclusion of starting points within the sentencing ranges? [Agree/Disagree]	43 (88%)	7 (78%)	50 (86%)
	Please provide any reasons for your response.	14 (29%)	8 (89%)	26 (45%)
Q13	Do you agree or disagree that the ranges set out within the guideline should reflect current sentencing practice? [Agree/Disagree]	43 (88%)	8 (89%)	51 (88%)
	Please provide any reasons for your response.	24 (49%)	8 (89%)	32 (55%)
Q14	Do you agree or disagree that the sentencing ranges specified out within the guideline are appropriate for each offence? [Agree/Disagree]			
	<ul style="list-style-type: none"> <li>Causing death by dangerous driving (pages 4–7)</li> </ul>	44 (90%)	8 (89%)	52 (90%)
	<ul style="list-style-type: none"> <li>Causing death by careless driving when under influence of drink or drugs (pages 8–12)</li> </ul>	42 (86%)	8 (89%)	50 (86%)
	<ul style="list-style-type: none"> <li>Causing death by careless, or inconsiderate, driving (pages 13–16)</li> </ul>	41 (84%)	8 (89%)	49 (84%)
	<ul style="list-style-type: none"> <li>Causing death by driving: unlicensed, uninsured, or disqualified drivers (pages 17–20)</li> </ul>	42 (86%)	8 (89%)	50 (86%)
	Please provide any reasons for your response	27 (55%)	7 (78%)	34 (59%)
Q15	Do you agree or disagree with the non-inclusion of guidance on disqualification periods, the young driver scheme, or the drink driver rehabilitation scheme? [Agree/Disagree]			
	<ul style="list-style-type: none"> <li>Disqualification periods</li> </ul>	44 (90%)	7 (78%)	51 (88%)
	<ul style="list-style-type: none"> <li>Young driver scheme</li> </ul>	43 (88%)	7 (78%)	50 (86%)
	<ul style="list-style-type: none"> <li>Drink driver rehabilitation scheme</li> </ul>	43 (88%)	7 (78%)	50 (86%)
	Please provide any reasons for your response. If you selected 'disagree', please indicate what guidance should be included within the guideline.	27 (55%)	7 (78%)	34 (59%)
Q16	Do you agree or disagree that the aggravating and mitigating factors listed in the table at step 3 for each offence are appropriate? [Agree/Disagree]			
	<ul style="list-style-type: none"> <li>Causing death by dangerous driving (pages 4–7)</li> </ul>	44 (90%)	7 (78%)	51 (88%)
	<ul style="list-style-type: none"> <li>Causing death by careless driving when under influence of drink or drugs (pages 8–12)</li> </ul>	43 (88%)	7 (78%)	50 (86%)

	<ul style="list-style-type: none"> <li>Causing death by careless, or inconsiderate, driving (pages 13–16)</li> </ul>	42 (86%)	7 (78%)	49 (84%)
	<ul style="list-style-type: none"> <li>Causing death by driving: unlicensed, uninsured, or disqualified drivers (pages 17–20)</li> </ul>	40 (82%)	7 (78%)	47 (81%)
	Please provide any reasons for your response.	18 (37%)	6 (67%)	24 (41%)
Q17	Do you agree or disagree that the guideline should provide further guidance on the following aggravating and mitigating factors? Previous convictions / Remorse / The relationship between the offender and the victim(s)? [Agree/Disagree]			
	<ul style="list-style-type: none"> <li>Previous convictions</li> </ul>	43 (88%)	8 (89%)	51 (88%)
	<ul style="list-style-type: none"> <li>Remorse</li> </ul>	42 (86%)	7 (78%)	49 (84%)
	<ul style="list-style-type: none"> <li>The relationship between the offender and the victim(s)</li> </ul>	42 (86%)	8 (89%)	50 (86%)
	Please provide any reasons for your response.	18 (37%)	7 (78%)	25 (43%)
Q18	Do you agree or disagree with the approach to listing contributory actions of others as mitigating factors? [Agree/Disagree]	42 (86%)	7 (78%)	49 (84%)
	Please provide any reasons for your response.	16 (33%)	7 (78%)	23 (40%)
Q19	Do you agree or disagree that the voluntary surrender of a licence by an older driver should be listed as a mitigating factor? [Agree/Disagree]	46 (94%)	7 (78%)	53 (91%)
	Please provide any reasons for your answer.	19 (39%)	7 (78%)	26 (45%)
Q20	Should any additional mitigating or aggravating factors be listed?	43 (88%)	7 (78%)	50 (86%)
	Please provide any reasons for your answers. If answering 'Yes', please indicate what additional factors should be listed and for what offences.	17 (35%)	4 (44%)	21 (36%)
Q21	Do you think the guideline will influence sentencing practice in Scotland? [Yes/No]	45 (92%)	7 (78%)	52 (90%)
	Please provide any reasons for your answers.	21 (43%)	7 (78%)	28 (48%)
Q22	Do you agree or disagree that the guideline will lead to an increase in public understanding of how sentencing decisions in death by driving cases are made? [Yes/No]	46 (94%)	8 (89%)	54 (93%)
	Please provide any reasons for your response.	21 (43%)	8 (89%)	29 (50%)

Q23	What benefits do you see arising from the introduction of this guideline, if any?	28 (57%)	8 (89%)	36 (62%)
Q24	What negative impacts do you see arising from the introduction of this guideline, if any?	22 (45%)	6 (67%)	28 (48%)
Q25	What costs (financial or otherwise) do you think will come from the introduction of this guideline, if any?	22 (45%)	2 (22%)	29 (50%)
Q26	Would you like to make any other comments in relation to any matter arising from this consultation?	31 (63%)	3 (33%)	34 (59%)

Note: The numbers of responses shown for the closed [Agree/Disagree] questions include a small number of responses imputed on the basis of text comments.

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