Sentencing Council

Sentencing Council meeting:	**27 January 2023**
Paper number:	**SC(23)JAN08 – Motoring offences paper 1**
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1 ISSUE

1.1 Considering consultation responses on guidelines relating to:

- causing death by driving whilst disqualified;
- causing serious injury by driving whilst disqualified;
- causing death by driving whilst unlicensed/uninsured;
- driving/attempting to drive with a specified drug above the specified limit;
- being in charge of a motor vehicle with a specified drug above the specified limit.

1.2 There is a point raised in relation to the drug driving guidelines which has readacross to the draft guideline for causing death by careless driving whilst under the influence.

2 RECOMMENDATIONS

2.1 That Council makes amendments to the proposed guidelines, as set out below.

2.2 That where amendments to the drug driving guidelines would read across to the existing guidelines for excess alcohol and unfit through drink or drugs, these are flagged in a future consultation, either on motoring or miscellaneous amendments.

3 CONSIDERATION

Death and serious injury whilst disqualified

3.1 Given the nature of the offence, and assuming the question of quality of driving is dealt with via other offences or not at all, there are a limited number of factors which can come into play to make one offence more serious than another for this and the other “whilst disqualified/unlicensed/uninsured” offences. Many of the points raised in relation to these guidelines would also apply to causing death by driving whilst unlicensed or uninsured.

3.2 Various respondents suggested a high culpability factor relating to repeated breaches of the disqualification:

> "It might be added that where there is evidence that D frequently drove in contravention of the disqualification, this should fall within A High Culpability. This would be different to the aggravating factor of previous convictions, as it would not require the offender to have been convicted of driving whilst disqualified, but there would need to be evidence presented to the court that disqualified driving was habitual." – *Professor Sally Kyd*

> "We agree with the culpability factors. However we suggest adding a further 'high culpability' factor for cases where the driver is known to have driven on more than one occasion while disqualified." – *Cycling UK*

> "Agree but would believe high culpability should include cases of a recidivist nature." – *Transport for London*

3.3 We have proposed an aggravating factor of "history of disobedience to disqualification orders (where not already taken into account as a previous conviction)". The main argument against adding anything about disobedience to the current order is what the evidence would be to determine this, unless it came from the offender themselves. I therefore do not propose making this change.

3.4 Another theme of some responses was whether "driving shortly after disqualification imposed", and whether the time elapsed since imposition of a ban was relevant:

> "Driving whilst disqualified whether 1 day after disqualification or 6 months should increase culpability equally" – *Member of the public*

> "With driving shortly after being disqualified cited as a high culpability reason, there is a danger that someone who is close to the end of their driving ban will be regarded more leniently." – *Member of the public*

> "We consider that driving shortly after disqualification has been imposed will not always be a higher culpability factor. There will be situations as envisaged in the lower culpability factors proposed where driving takes place that could be immediately after disqualification is imposed but that nevertheless ought not to be aggravated by the driving taking place soon

after disqualification. We consider there is a tension between the two, for example between the second lower culpability factor (Decision to drive was brought about by a genuine and proven emergency) and driving again shortly after a disqualification is imposed. It may be useful for there to be some clarification on what "shortly after" would mean in this context." – *Kennedy's law firm*

3.5 We had discussed this question ahead of consultation, and concluded there was a difference in culpability at least between someone reaching the end of their (say, lengthy) disqualification and someone flouting a ban freshly imposed by the court – the latter showing a clearer snub to the court's authority. But as these responses show the point is debateable.

3.6 A key question is to what extent quality of driving is reflected at either step one or step two. We deliberately did not include any reference to this in these offences, as it should be the subject of separate charges, and therefore taken into account as part of totality, or otherwise irrelevant to the offence in question. Some challenged this approach:

"The question here is really whether the culpability and/or aggravating and mitigating factors should take account of the standard of driving. The statutory provision does not require that D's driving fell below the standard of the competent and careful driver but, following the Supreme Court's decision in *Hughes* [2013] UKSC 56, it is required that there is something to be criticised about D's driving. This offence is likely to be charged alongside other causing death by driving offences. The extent to which D's driving departed from the required standard should be reflected in sentence (that might include listing as a mitigating factor that there was little to criticise in relation to D's standard of driving at the time of the offence)" – *Professor Sally Kyd*

"Although the quality of driving does not affect culpability for the offence, I believe that some characteristics of dangerous or careless driving should be included as an aggravating factor." – *Member of the public*

3.7 I remain of the view that the factors in this guideline should relate closely to the offence itself and where the offender has also been convicted of careless or dangerous driving, those guidelines will apply. It is worth noting that this offence carries double the maximum penalty of causing death by careless driving, so may well be the lead offence of the two.

3.8 There is an elegance to Professor Kyd's suggestion of reflecting the standard of driving as a mitigating factor in that it does not "intrude" too much into what should be the real substance of the guideline, but allows for the situation where the driver's actions have

not been a significant contributory factor to the death (alongside "actions of the victim or third party contributed significantly to collision or death").

3.9 I therefore propose "no evidence of careless or dangerous driving which contributed to the collision or death" as an additional mitigating factor across all the guidelines in this group (suitably amended for causing serious injury whilst disqualified).

Question 1: does the Council wish to add the mitigating factor "no evidence of careless or dangerous driving which contributed to the collision or death"?

3.10 On step two factors, several respondents raised the same sorts of general issues we considered in relation to standard of driving offences (for example, whether the victim being a close friend or relative was relevant, or whether "sole or primary carer" should mitigate).

3.11 HM Council of District Judges picked up on our note (copied from the existing driving whilst disqualified guideline) relating to the statutory aggravating factor of previous convictions:

> *"An offender convicted of this offence will always have at least one relevant previous conviction for the offence that resulted in disqualification. The starting points and ranges take this into account; any other previous convictions should be considered in the usual way."*

3.12 They point out that a disqualification may have been imposed for an offence using the general disqualification power in section 163 of the Sentencing Code (the common example they suggest is taxi touting, but it could be any offence). They also point out that a disqualification may be imposed for not paying child maintenance, though this is rare. Given the rarity, and the argument that if a disqualification has been imposed and still in force it is by definition recent and relevant, I do not propose amending the note.

3.13 On the other hand, several respondents, including the CPS, pointed out that the mitigating factor "No previous convictions or no relevant convictions" could not apply to this offence. This is almost correct, subject to the points made by HM Council of District Judges above.

3.14 Our breach guidelines do not contain this as a mitigating factor, although the magistrates' courts guideline for driving whilst disqualified does. One could argue that offenders who breach a disqualification, particularly where it results in death or serious injury, should not be afforded the mitigation of another offender who has not committed *any* previous offences. However, the strictly logical and just corollary of the note on the aggravating factor (see above) is that the previous conviction has been taken into account in setting the starting point, and the offender then has a right to the mitigation that any another

offender would have at step 2. We could therefore alter the factor to refer to any previous convictions *other* than that which gave rise to the disqualification.

3.15 If we did change this there would be a strong case to amend the mitigating factor as it appears in the driving whilst disqualified guideline. I suggest this can be done without consultation, although (as per below with the drink and drug driving guidelines) Council may wish to mention or consult on the change, either as part of the next motoring consultation (covering aggravated vehicle taking and other things) or as part of the next round of miscellaneous amendments.

Question 2: do you agree to amend the mitigating factor "No previous convictions or no relevant convictions" to "No previous convictions or no relevant convictions, other than that for which the current order for disqualification was imposed"?

Death whilst unlicensed/uninsured

3.16 There were further points made in relation to culpability and step two factors which specifically related to causing death whilst unlicensed or uninsured.

3.17 The West London Bench and an individual magistrate thought that never having passed a test should be a high culpability factor. I am not immediately clear why this should be the case. In any case the blame which could be attached to not ever having been qualified to drive would be matched by the culpability of having been at one stage but now knowingly driving (and killing someone) without a licence.

3.18 The West London Bench also proposed additional step two factors:

> "We propose an additional aggravating factor where the driver has been uninsured for a long period of time and is purposely avoiding paying for insurance. We therefore propose the addition of the following aggravating factor:
>
> - Evidence that the driver has been uninsured for a long period of time.
>
> On the flip side… we propose an additional mitigating factor where the driver has previously held insurance but has recently failed to renew that insurance. We therefore propose the following additional mitigating factor:
>
> - Recent failure to renew insurance where insurance was previously held."

3.19 There may be a case for these factors, particularly as the equivalents of the previously-mentioned culpability factor relating to a recently imposed disqualification. However, the aggravating factor would need the qualification that the offender was *driving* whilst uninsured and that creates the same evidential problems as for someone who has been previously driving whilst disqualified (see para 3.3 above).

3.20 The suggested mitigating factor does seem more convincing, and could capture that offender who didn't have a genuine belief they were insured, but who has a history of being insured and may credibly have been planning to again. We may, though, want to add a warning against double mitigation for the person who had a genuine belief they were insured to drive (being categorised as low culpability).

Question 3: do you agree to add the mitigating factor "recent failure to renew insurance where insurance was previously held (where not taken into account at step one)".

3.21 The Motor Insurers Bureau, which has a particular interest in deaths caused by uninsured drivers, wanted to see two additional aggravating factors:

> "We agree with the proposed guidelines and suggest adding the following:
>
> - Vehicle itself uninsured as opposed to an insured vehicle being driven by an uninsured person. This can indicate a conscious choice to break the law over a prolonged period.
>
> - Evidence of previous knowledge that vehicle was uninsured – e.g. a Continuous Insurance Enforcement (CIE) or police warning letter sent to the registered keeper if they are the offender being sentenced."

3.22 On the former, I am not sure about creating a hierarchy between those who are personally uninsured set against those whose vehicles are. The issue of long term offenders is caught more broadly (and more directly) by the proposal above from the West London Bench.

3.23 For the latter we already include "disregarding warnings of others about driving whilst unlicensed or uninsured", although we could add "for example, a Continuous Insurance Enforcement (CIE) or police warning letter" to provide some help.

Question 4: do you want to add to the current aggravating factor so it reads: "disregarding warnings of others about driving whilst unlicensed or uninsured (for example, a Continuous Insurance Enforcement (CIE) or police warning letter)?

Drug driving guidelines

3.24 Our proposed drug driving (drive/attempt to drive and in charge) were based on the existing equivalents for unfit through drink or drugs, and we should bear in mind that any changes we make in response to this consultation may well have readacross to these guidelines and those for drive/attempt to drive and in charge over the alcohol limit.

3.25 Most respondents were content with our approach to culpability, working within the current limitations of understanding of how different amounts of different drugs affect driving. However, despite our explanation, two magistrates did want to see different amounts of drug reflected in the culpability table (as with alcohol) and felt our proposed guidance was too vague.

3.26 An issue arose in road testing related to the high culpability factor "evidence of another specified drug or of alcohol in the body". In a drop down explanation we say (among other things), "This factor may apply whether or not the 'other' specified drug or alcohol is present at a level that could give rise to separate charges." However, magistrates were unclear on whether a small level of drink not proven to be above the legal limit (taken alongside cocaine) met this factor.

3.27 Taking the wording at face value, with the explanation, this does capture another drug or alcohol present even if not above the legal limit. But should it? I put the question to Professor Kym Wolff from the Department for Transport's Advisory Panel on Alcohol, Drugs & Substance Misuse & Driving. She said

> *"The interpretation of the magistrates is probably correct [i.e. only to apply the factor where each drug/alcohol is over the limit] – certainly for the highest tariff offences. Whilst it is also true that a combination of drugs and alcohol when not every substance is above the legal limit should also be recognised as very unsafe for drivers.*
>
> *Generally, it would be better to use the legal cut-off for drugs and alcohol and consider that the higher the concentration of alcohol or drug detected above the limit the greater, the degree of impairment and risk of a RTC.*
>
> *So, alcohol and drugs used alone have a certain risk associated with their use when driving. When drugs are combined with other drugs or with alcohol that risk is multiplicative."*

3.28 This question has a readacross to the guideline for causing death by careless driving whilst under the influence, where we propose "mixing" as a high culpability factor. For this guideline, Professor Wolff recommends that the top level include mixing above the legal limits, and medium include mixing drugs and alcohol *below* the legal limits.

3.29 There may be a case for constructive ambiguity here: by leaving the explanation as "This factor may apply…" we are letting magistrates consider whether the mixing merits higher culpability on the facts of the case (or whether (eg) a can of lager drunk the night before can be ignored for these purposes). But given the confusion in road testing and the

significant consequences attaching to categorisation in the causing death by careless under the influence guideline, we should probably provide a clear steer.

3.30 For the drug driving guidelines I propose that the culpability factor be amended to "evidence of another specified drug or of alcohol in the body above the legal limit", amending the relevant line in the explanatory dropdown to "this factor applies even where the presence of the 'other' specified drug or alcohol is the subject of separate charges".

3.31 For the causing death by careless under the influence guideline, I have slightly adapted Professor Wolff's proposal where it contained some internal inconsistencies. Also adding in the blood and urine measurements as discussed ahead of consultation, I propose (with additions/amendments to the version consulted on in red bold):

The legal limit of alcohol is 35µg breath (80mg in blood and 107mg in urine)	High culpability	Medium culpability	Lesser culpability
71µg**/163mg/216mg** or above of alcohol OR Deliberate refusal to provide specimen for analysis OR Evidence of substantial impairment and/or multiple drugs **above legal limit** or combination of drugs and alcohol **above the legal limit**	Starting point: 12 years Sentencing range: 8 – 18 years	Starting point: 9 years Sentencing range: 6 – 12 years	Starting point: 6 years Sentencing range: 5 – 10 years
51- 70µg**/117-162mg/156-215mg** of alcohol OR A single drug detected **above the legal limit** **OR both alcohol and drugs detected together, one or both being below the legal limit**	Starting point: 9 years Sentencing range: 6 – 12 years	Starting point: 6 years Sentencing range: 4 – 9 years	Starting point: 4 years Sentencing range: 3 – 7 years
36-50µg**/81-116mg/108-155mg** of alcohol	Starting point: 6 years	Starting point: 3 years	Starting point: 1 year 6 months

OR **A single drug detected below the legal limit**	Sentencing range: 4 – 9 years	Sentencing range: 2 – 5 years	Sentencing range: 26 weeks - 4 years

3.32 On the other hand, as Professor Wolff herself points out, there is an inherent danger and unpredictability in any level of mixing, so Council may want to consider taking a more "zero-tolerance" approach whereby any level of alcohol and/or drug mixing is considered at the highest level.

Question 5: do you agree that the high culpability factor in the drug driving guidelines related to "mixing" be engaged when both substances are above the legal limit?

Question 6: on the same principle, do you agree with the revised table for causing death by careless driving whilst under the influence?

3.33 Various discrete points were made about culpability. Benjamin Damazer, a magistrate with experience in pharmaceuticals questioned our proposed note on not "double counting" certain drugs which may be present as the result of taking one drug. Our explanatory note reads:

"For these purposes where the following pairs of drugs appear together they shall be treated as one drug as they may appear in the body as a result of a single drug use: Cocaine and benzoylecgonine (BZE); 6-Monoacteyl-morphine and morphine; or Diazepam and Temazepam."

Mr Damazer said:

> "Diazepam and Temazepam (and Lorazepam) are three different chemical compounds in the same family. To allow them to be linked as proposed is akin to saying whisky and beer don't both count towards a total alcohol consumption or that skunk and leaf cannabis should not both be considered.
>
> The indications are erroneous. All part of benzodiazepine group but different. Temazepam (Normison, normies) is a short acting drug properly prescribed for very short medical procedures (eg tooth extraction) or to assist inability to get to sleep. Diazepam (Valium) is a longer acting drug. Lorazepam (Ativan) is used for longer surgical procedures to assist memory loss (eg colonoscopy). None of these products is the derivative of any other (unlike the cocaine and heroin examples)."

3.34 Although the comparison with whisky and beer isn't quite right (both contribute to a higher alcohol reading but we would not treat them as different drugs for these purposes), I have checked with Professor Wolff on the point. She agrees that Diazepam and Temazepam can be prescribed in their own right, have different effects and it would be best to remove the reference to them from the note.

Question 7: are you content to remove the reference to Diazepam and Temazepam in the note on mixing drugs?

3.35 The West London Bench wondered whether "passengers in vehicle" should place an offender in high culpability (where we have proposed it as an aggravating factor). There may be some force in this, but I suspect it is such a common occurrence that it would place too many cases in high culpability, and we need to reflect the particular culpability of driving larger vehicles for commercial purposes.

3.36 On that point, two members of the public queried our wording of "driving for hire or reward", taken from the existing drink/drug guidelines but different to "driving for commercial purposes" standard across the other motoring guidelines on which we consulted. I agree that "commercial purposes" is clearer, potentially broader and in any case consistent with the other guidelines. If we were to change it here we will want to consider amending it for the existing drink/drug driving magistrates' guidelines.

Question 8: do you agree to change the culpability factor from "driving for hire or reward" to "driving for commercial purposes"?

3.37 HM Council of District Judges (Magistrates' Courts) thought it would be helpful to "make clear whether the higher culpability factors apply to driving or attempting to drive." I do not think we should legislate by the back door for a different penalty between the two, but for absolute certainty we could amend the factors as follows (additions in bold):

- Driving **(or attempting to drive)** an LGV, HGV or PSV etc
- Driving **(or attempting to drive)** for hire or reward

Again, if you were minded to make this change we would want to make the change for the guideline for driving/attempting to drive while unfit.

Question 9: do you want to add "or attempting to drive" to the relevant culpability factors?

3.38 Under harm, the West London Bench proposed assistance to magistrates in what counts as "obvious signs of impairment". They suggested a list of descriptors, potentially as a drop down with what these signs may be, including,

- Signs of poor driving / road use, such as deviating from lanes, late braking, not using headlights, inability to notice hazards, inability to maintain a constant speed, aggressive or erratic driving, excessive risk taking.
- Pupil dilation / reddening of eyes.
- Slurred speech.
- Slow physical reaction times.
- Unsteady on feet / unable to walk in a straight line.
- Poor physical co-ordination skills.
- Mental confusion – such as strange / inappropriate answers to simple questions.
- Lack of concentration.
- Dizziness.
- Appearance of drowsiness / sleepiness / fatigue.
- Nausea / vomiting / cramps.
- Aggression, panic attacks or paranoia.

This may go some way to providing the extra guidance which magistrates sought in road testing about what "obvious signs of impairment" means (and to whom the impairment should be obvious).

3.39 However, as ever with particularisation this runs the risk of opening up a checklist exercise, and omitting other signs that could result from drug use. On balance, I recommend leaving the harm factor "obvious signs of impairment" open to interpretation.

3.40 A more general issue with harm raised by a few respondents is that in these guidelines (as in simple dangerous driving) it arguably bleeds across from culpability – where any harm which has been caused is not an element of the offence. Unlike other guidelines, in other words, the focus remains on what the offender has done and not the impact on victims (if any). Further, for the offence(s) of being over the specified limit, the only thing that needs to be evidenced is the specimen reading and the fact someone was driving, attempting to drive, or in charge of the vehicle.

3.41 However, that does not mean we are precluded from saying more on harm caused or risked, as we do in the dangerous driving guideline. We have an aggravating factor "*involved in accident (where not taken into account at step 1)"* and this could be brought forward to be

a harm factor (proposed by the West London Bench and Professor Sally Kyd). Or indeed we could go further and reflect some of the harm factors in dangerous driving: “offence results in injury to others”, “circumstances of offence created a [high] risk of serious harm to others” and “damage caused to vehicles or property”.

3.42 Against this, one could argue that if injury caused to others, damage caused to property, and/or the quality of the driving were not such as to attract separate charges or convictions, then they do not merit being counted at step one. There also may be problems of evidence presented to the court if the Police have simply relied on the levels of drug present.

3.43 Additionally, bearing in mind this is a high volume offence, there is a risk that a large number of cases involving minor prangs and collisions would be pushed up into higher harm with the risk of a significant number of short custodial sentences. On balance I would <u>not</u> recommend moving this factor forward.

3.44 In any case, whether we retain “involved in accident” at step two or move it to step one, we were rightly pulled up for our use of the word “accident” by Prof Kyd, Action Vision Zero, Transport for London and Cycling UK:

> “This should refer to crash or collision as accident implies unfortunate if not inevitable. Given the guidelines are for cases where criminal culpability has been proven, this language should be updated. It has been over 15 years since the CPS adopted the policy of referring to crash or collision, not accident. The DfT has recently announced it too will refer to collision and not accident.” – *Action Vision Zero*

Question 10: do you want to move “involved in accident” forward to become a harm element (<u>not</u> recommended)?

Question 11: wherever it is placed, are you content to change the word “accident” to the word “collision”?

3.45 Some respondents questioned the mitigating factor “very short distance driven”. As well as the question of subjectivity raised in road testing, several respondents said it was irrelevant whether the journey was a short or a long one given the potential for harm. Another person suggested that it was the *intention* to drive a long journey that was the critical aggravation.

3.46 A member of the public made the following suggestion:

I recommend splitting the "High level of traffic or pedestrians in the vicinity" factor into two parts: "High level of traffic," and "Vulnerable road users in the vicinity, including pedestrians, cyclists and horse riders".

I agree that there are two distinct elements here and we should be promoting the idea of the broader class of vulnerable road users (including motorcyclists).

Question 12: do you agree to create two separate aggravating factors:

- **High level of traffic**
- **Vulnerable road users in the vicinity, including pedestrians, cyclists, horse riders, motorcyclists etc?**

3.47 The West London Bench proposed a mitigating factor to match “spiked drinks” which appears in the guidelines for excess alcohol:

“We believe there should be an equivalent for drugs of the mitigating factor “Spiked drinks” for alcohol. It is possible that certain illegal drugs may be placed in drinks or food for criminal purposes – for example GHB (gamma hydroxybutyric acid – also known as liquid ecstasy). Since many of these types of drugs lead to symptoms such as mental confusion and loss of inhibitions, it is quite possible that an otherwise innocent person might try and drive after consuming such substances unknowingly. We suggest an additional mitigating factor here:

- Illegal drugs consumed unknowingly”

3.48 This seems an unobjectionable proposal, especially as it reflects what is in the equivalent alcohol guidelines. I cannot improve on the wording the West London Bench suggest, given that there is no generic equivalent of “spiked drinks” for drugs.

Question 13: do you agree to add the mitigating factor “illegal drugs consumed unknowingly”?

3.49 As mentioned above, many of these changes could and arguably should be made to the existing equivalent guidelines for excess alcohol and unfit through drink or drugs, although some will be relevant only to guidelines for driving/attempting to drive rather than in charge, and some may be relevant only to unfit or excess.

3.50 We could make those changes without further consultation, if we believe they are appropriate, and assuming that those interested parties who have responded to this consultation value consistency across guidelines. However, some of the changes proposed are more than wording tweaks and do make substantive changes. This would argue in favour of them being either consulted on (or at least mentioned) either in the next motoring consultation or in this year’s round of miscellaneous amendments, so that they can be well

publicised in advance of being made and coming into force. Alternatively, Council may want to look at the changes on a case by case basis. I recommend (if Council agree the consequential changes are appropriate) that we do not make the changes now, but that they be mentioned, not consulted on, in a future consultation.

Question 14: do you agree to make these amendments, as appropriate, to the current drink/drug drive magistrates' guidelines, but only after being included in either the next motoring consultation or in this year's round of miscellaneous amendments?

4 IMPACT AND RISKS

4.1 As set out in the draft resource assessment published alongside the consultation, the revised guidelines as consulted on may result in a requirement for additional prison places running into the hundreds. The new causing death by dangerous driving guideline could result in a requirement for up to around 260 additional prison places, with around 20 additional prison places for causing death by careless driving when under the influence of drink or drugs, and around 80 additional prison places for causing serious injury by dangerous driving.

4.2 These assessments are far different to the assessment the Government made at the point of introducing the legislation that a "high" scenario for raising the penalty for causing death by dangerous driving would involve 30 more prison places. That assessment appears to be based on the assumption that only the worst cases would see an increase in sentencing severity. By contrast, as the Justice Select Committee highlight, we are proposing to increase sentencing levels across most categories. This is an especially live consideration bearing in mind current prison capacity issues.

4.3 The decisions that the Council makes post-consultation may affect the final resource assessment. Depending on how consideration of consultation responses proceeds, we aim to present Council with a revised version of the resource assessment at the 31 March meeting.