Sentencing Council

Sentencing Council meeting:	**3 March 2023**
Paper number:	**SC(23)MAR04 – Motoring offences**
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1 ISSUE

1.1 Consultation responses received on proposed driving disqualification guidance.

2 RECOMMENDATIONS

2.1 That:

- Council produces disqualification guidance now, in line with that consulted on, even though it may be replaced or supplemented following further work on disqualification;
- the language about lengthy driving bans is tempered in light of consultation responses;
- we add some more text to clarify the situation for extending a disqualification where an offender is already serving a custodial sentence.

3 CONSIDERATION

3.1 We consulted on overall principles related to imposing disqualification to appear at the ancillary orders stage of each proposed motoring guideline. These would be tailored to the specific offence so the information would vary from guideline to guideline, but a full version is included at **Annex A**. The proposed guidance covers:

- Principles
- Minimum disqualification periods
- Special reasons (not to impose a disqualification or a required minimum period)
- Interaction with a custodial period (same offence)

- Interaction with a custodial period (different offence)

3.2 At November's meeting Council agreed we should do further work on disqualification as part of a separate motoring project, in light of the strength and breadth of feeling in responses urging the Council to look at greater use of disqualifications, including as a more appropriate alternative to time in custody. I propose to undertake that work in parallel with finalising the draft guidelines on aggravated vehicle taking. Subject to a fuller scoping exercise which may identify further motoring-related issues, these would be combined into one follow-up motoring consultation.

3.3 Council may feel in the meantime that we should hold back the disqualification guidance we had proposed, pending a fuller exploration of the issues surrounding disqualification and consultation. However, subject to the points discussed below, I believe there is merit in providing this guidance now, as it provides a helpful steer on matters which can trip sentencers up. We could look to revise, expand or replace it following the next consultation.

Question 1: do you agree to provide the guidance we consulted on now (subject to the discussion points below), on the understanding that further work on disqualification will take place?

3.4 Subject to that decision, we may nonetheless wish to revisit some aspects of our proposed disqualification guidance following consultation responses.

3.5 Many respondents were content with the guidance, welcomed it and offered no suggestions for change. Whilst most judges and magistrates involved road testing did not find the guidance without prompting, when they did access it they generally agreed it was helpful. There were some suggestions, both from road testing and written responses that the guidance was too long. I have sympathy with this, but I believe we have presented the guidance we need to present in a complicated area in the most concise way we can.

3.6 We did receive some more specific recommendations for change.

3.7 There were strong views amongst many consultees about two of the principles set out in the first section of the guidance:

- In setting the length of any disqualification, sentencers should not disqualify for a period that is longer than necessary and should bear in mind the need for rehabilitation (for example, by considering the effects of disqualification on employment or employment prospects).
- Sentencers should also be mindful of the risk of long disqualifications leading to further offences being committed, by reason of a temptation to drive unlawfully.

The latter in particular provoked strong criticism from several members of the public. Some typical responses:

> "That sentence is embarrassing as it seems to place emphasis on there not being further crimes rather than trying to reduce dangerous drivers on the roads."

> "This seems to bias disqualification periods lower inappropriately. Driving vehicles inappropriately is dangerous and should not be treated as a "semi-crime". Would a judge reduce the length of a custodial sentence because a long sentence may tempt the offender to abscond from prison? I think not?"

> "Why on earth should long sentences not be used as the offender might be tempted to drive while disqualified? Do we limit prison sentences because a felon with a long sentence might be more likely to attempt escape? Of course not. Who formulated this point? What an extraordinary and wrong headed suggestion."

> "This is tantamount to blackmail of society by offenders – 'give me a short ban or I'll just drive anyway'. The point being that long bans cause serious thought in would-be offenders and during the duration of the ban, increases the jeopardy of being caught whilst banned leading to custodial punishments."

3.8 The London Cycling Campaign echoed the views of others:

> "The Sentencing Council advises against using longer driving bans because offenders may choose to disregard them and drive without the authority to do so. Enforcement is matter for the police and legislators and we are concerned that the Sentencing Council's perception of ineffective enforcement should then be considered a factor in determining penalties. The Sentencing Council may wish to advise police and legislators to consider new technologies to monitor and enforce against disqualified drivers using vehicles instead of suggesting more lenient penalties because it considers enforcement is inadequate."

3.9 On the related, but distinct, subject of rehabilitation some members of the public questioned the extent to which this was a relevant factor:

> "In my view, as a non-essential activity that requires training and licensing to legally undertake, longer terms of disqualification should be considered. Part of the problem with the danger on our roads is the false assumption that driving a motor vehicle is a fundamental right, not a privilege or responsibility, leading to instances of aggression against vulnerable

road users, disqualified drivers continuing to drive and cases where those convicted of a driving offence who were able to continue driving legally then go on to cause death or injury at a later date.

There are many people in the UK that are unable to drive a motor vehicle due to disability or poverty that are not excluded from society, and instead must use public transport or active travel such as walking, yet the guidelines here would suggest that those people who have committed an offence would be unfairly hindered by a lack of access to a private, personal motor vehicle"

"Individuals are capable of making decisions regarding the way they conduct themselves in society and also of calculating the risks involved in breaking the law, for example by driving dangerously. Allowing defendents to rely (often repeatedly) on mitigation due to the impacts of disqualification on employment is egregious and undermines the public's confidence in the judiciary. If the defendent needs to drive for employment purposes, they should exercise greater caution when driving and should not expect to receive a lesser or no disqualification merely because they need to drive for work."

3.10 These principles reflect long-established case law, as rehearsed in cases such as Backhouse [2010] EWCA Crim 1111, Needham [2016] EWCA Crim 455 and Mohammed [2016] EWCA Crim 1380. The origins of the principles are worth considering. The case of Cooksley [2003] 996 EWCA Crim 996 borrowed heavily from advice provided by the Sentencing Advisory Panel (SAP). At paragraph 43 the then Lord Chief Justice, referring to the SAP advice, said:

"we accept that to extend the ban for a substantial period after release can be counter−productive particularly if it is imposed on an offender who is obsessed with cars or who requires a driving licence to earn his or her living because it may tempt the offender to drive while disqualified."

The relevant SAP advice from February 2003 in context was:

"There is some authority, in Thomas *and* Matthews *that a ban which will extend for a substantial period after release is likely to be counterproductive if it is imposed on an offender who is obsessed with cars, or who requires a driving licence to earn his or her living, because it may tempt the offender to drive while disqualified. Other cases, such as* Gibbons*, suggest that the safety of the public should outweigh these considerations.*

Despite the observations in Gibbons *the prevailing view, with which the Panel agrees, is that expressed in the other two cases. The argument there may well be the stronger now since the introduction of the requirement to pass an extended driving test."*

3.11 The cases referred to here date from the 1980s and themselves follow case law dating back further. The language used in them is striking:

"[The sentencing judge] was influenced….[by] accepted sentencing policy in this type of case, that is with persons like the present appellant, who seem to be incapable of leaving motor vehicles alone, to impose a period of disqualification which will extend for a substantial period after their release from prison may well, and in many cases certainly will, invite the offender to commit further offences in relation to motor vehicles. In other words a long period of disqualification may well be counter-productive and so contrary to the public interest" (Thomas)

"We are impressed that given the history of this particular applicant, the likelihood that he would be able to keep his hands off other people's motor cars during such a period [five and a half years after release] is so remote that it is undesirable that this Court should in any way increase the probability of the commission of any further similar offence" (Matthews)

3.12 Some observations:

- The cases of Matthews, Thomas and similar cases from the period do not tend to involve egregiously bad driving – unlike Gibbons, also referred to by the SAP – but rather petty offenders who repeatedly drive whilst disqualified and/or refuse to pass a test. In that light, the Court of Appeal may have been instructing the courts not to keep persisting in a disposal that is clearly ineffective.
- The SAP advice conflates this with the related, but separate, issue of rehabilitation in general. The case of *Wright* from 1979 cited in these cases involved a taxi driver who had driven his car to steal some sheet metal and received a disqualification. The Court of Appeal thought it would be more helpful if his disqualification was short so that he could pursue a legitimate enterprise.
- Even in giving that advice, the SAP foresees disqualifications of 5-10 years for bad cases of causing death by dangerous driving, and acknowledges that lifetime bans will be appropriate on occasion.

- Attitudes have moved on, as have the statute and case law: disqualification is now seen as a backwards-looking, punitive measure, as much as a forwards-looking protective one, which was only just beginning to be the case in 2003.

3.13 There appears at least a question to be asked over the received wisdom about not imposing lengthy disqualifications, and I believe this will be worth considering as part of the next project on disqualification. At this stage I do not propose removing it from the advice we proposed (it would stand as case law in any case), but we could temper it in the following way (changes in **bold**):

> In setting the length of any disqualification, sentencers should not disqualify for a period that is longer than necessary and should bear in mind the need for rehabilitation (for example, by considering the effects of disqualification on employment or employment prospects).
>
> **It is also a well established principle that s**entencers should ~~also~~ be mindful of the risk of long disqualifications leading to further offences being committed, by reason of a temptation to drive unlawfully. **These considerations should be balanced against the need to protect the public, and to provide punishment which is just to the offender and proportionate to the offence.**

Question 2: do you want to amend the text on principles as set out above?

3.14 HM Council of District Judges made two suggestions to clarify the situation where a disqualification needs to take account of time spent in custody. First, they pointed out a variant of the scenario where the custodial sentence is not for the offence for which disqualification is being imposed and suggested this addition (new text in bold):

> "The Court may be imposing a custodial sentence on the offender for another offence, which is not the one for which they are being disqualified **or the offender may already be serving a custodial sentence for another offence. In either of these circumstances**, under section 35B of the Road Traffic Offenders Act 1988, **the Court** should have regard to "the diminished effect of disqualification as a distinct punishment if the person who is disqualified is also detained in pursuance of a custodial sentence".

3.15 They also suggested that:

> "the guidance should also make clear that when ordering an extended disqualification mentioned in the circumstances indicated in D and/or E, [the court] should announce:
> - The discretionary period it would have imposed had the defendant not been serving a custodial sentence

- Any extension under D
- Any uplift under E”

I am less convinced by this suggestion, simply because based on transcripts I have seen, explaining the calculation is second nature and I am mindful of adding to the length of the guidance. However, I do see the case for clarifying the first point made by HM Council of District Judges.

Question 3: do you agree to add wording to cater for the scenario where the offender is already in custody for another offence?

3.16 The West London Magistrates Bench believed the information provided was useful, and had suggestions for additional guidance. They asked for additional guidance on “special reasons” not to impose a disqualification, or not to impose a minimum. They suggest:

“The most common examples of what might constitute special reasons include:

• Very short distance driven (for example, moving a car a few yards to safety).

• Driving due to an emergency (medical or otherwise) – if this falls short of a defence.

• A drivers’ drink being laced or spiked without their knowledge.”

3.17 I would be worried about hinting too much at what may or may not constitute special reasons. From the case law, even though the bar is a high one, there may be a variety of special reasons and they are fact-sensitive. On the one hand, we would not want the fact of (say) a short distance driven automatically to amount to special reasons (location and further intention would be just two elements which could negate this). On the other hand, there may be a variety of – by definition, unusual – circumstances which we cannot envisage but that could reasonably amount to special reasons. We are also looking at a range of offences which go beyond those seen commonly in the Magistrates’ courts and I am not confident that these are the “most common examples” of special reasons across all offending.

3.18 The West London Bench then sought more information about “totting-up” disqualifications. For most of the offences in scope, disqualification is mandatory and totting up points should not be an issue. I therefore propose keeping this issue separate as part of the magistrates’ explanatory materials.

3.19 Finally, they sought further guidance on offering a reduction in sentence for taking part in a drink drive rehabilitation scheme. The only offence in scope of this consultation to which this is relevant is causing death by careless driving whilst under the influence. We

could provide a pointer to this possibility by recycling material already in the explanatory materials, but there is a potential handling issue with providing guidance on disqualification reductions in relation to what may be very serious cases of drink driving where a death has been caused. I therefore think we should be silent and let defence teams argue the case for this where they believe it appropriate.

Question 4: do you agree <u>not</u> to add the extra information proposed by the West London Bench?

4 IMPACT AND RISKS

4.1 The disqualification guidance will not have a direct impact on probation and prison resources. A move to greater use of disqualification over custody or even community orders could reduce the impact on prisons and probation, although it could also lead to more offending if those subject to a ban do go on to breach it.

4.2 There may be a handling issue if we present guidance now which is regarded as inadequate, given the strength of feeling about disqualification from consultation responses. We can explain in response to this that we are working on further guidance, but it remains a risk that whatever guidance we produce now is fairly quickly superseded.

4.3 As discussed before, 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. We aim to present Council with a revised version of the resource assessment at the 31 March meeting.

Annex A

Disqualification

A Principles

Disqualification is part of the sentence. Accordingly when setting the "discretionary" element of the disqualification (i.e. disregarding any period being spent in custody – see below) the court must have regard to the purposes of sentencing in section 57 of the Sentencing Code, which include: the punishment of offenders, the reduction of crime, the reform and rehabilitation of offenders and the protection of the public, when deciding the length of any disqualification.

In setting the length of any disqualification, sentencers should not disqualify for a period that is longer than necessary and should bear in mind the need for rehabilitation (for example, by considering the effects of disqualification on employment or employment prospects).

Sentencers should also be mindful of the risk of long disqualifications leading to further offences being committed, by reason of a temptation to drive unlawfully.

B Minimum disqualification period

The minimum disqualification period for this offence is x years.

An offender must be disqualified for at least two years if he or she has been disqualified two or more times for a period of at least 56 days in the three years preceding the commission of the offence. The following disqualifications are to be disregarded for the purposes of this provision:

- interim disqualification;
- disqualification where vehicle used for the purpose of crime;
- disqualification for stealing or taking a vehicle or going equipped to steal or take a vehicle.

An offender must be disqualified for at least three years if they have been convicted of any of the following offences once or more in the 10 years preceding the commission of the current [drink/drug-drive] offence

- causing death by careless driving under the influence of drink or drugs
- driving or attempting to drive while unfit;
- driving or attempting to drive with excess alcohol;
- driving or attempting to drive with concentration of specified controlled drug above specified limit;
- failing to provide a specimen (where that is an offence involving obligatory disqualification); or
- failing to allow a specimen to be subjected to laboratory test (where that is an offence involving obligatory disqualification).

C Special reasons

The period of disqualification may be reduced or avoided if there are special reasons. These must relate to the offence; circumstances peculiar to the offender cannot constitute special reasons. To constitute a special reason, a matter must:

- be a mitigating or extenuating circumstance;
- not amount in law to a defence to the charge;
- be directly connected with the commission of the offence;
- be one which the court ought properly to take into consideration when imposing sentence.

D Interaction with custodial period – same offence

Under section 35A of the Road Traffic Offenders Act 1988 where a court imposes a disqualification in addition to a custodial sentence or a detention and training order for this offence, it must extend the disqualification period to take account of the custodial term imposed by:

- one half of the custodial term imposed for an immediate standard determinate sentence; no extension period should be imposed where a sentence is suspended.
- two thirds of the custodial term for an extended sentence;
- the custodial element of a serious terrorism sentence or extended sentence for a serious terrorism offence (i.e. one which carries a maximum of life imprisonment); or
- the term specified in the minimum term order of a life sentence.

This will avoid the disqualification expiring, or being significantly diminished, during the period the offender is in custody. The table at section 166 of the Sentencing Code provides further detail. (Note: this table applies to disqualification for non-Road Traffic Act 1988 offences but the principles apply to disqualifications imposed under that Act as well.)

Periods of time spent on remand or subject to an electronically monitored curfew are generally ignored. However, If the time spent on remand would lead to a disproportionate result in terms of the period of disqualification, then the court may consider setting the discretionary element (i.e. the period which would have been imposed but for the need to extend for time spent in custody) to take account of time spent on remand. This should not reduce the discretionary term below the statutory minimum period of disqualification.

E Interaction with custodial period – different offence

The court may be imposing a custodial sentence on the offender for another offence, which is not the one for which they are being disqualified. In this instance, under section 35B of the Road Traffic Offenders Act 1988, it should have regard to "the

diminished effect of disqualification as a distinct punishment if the person who is disqualified is also detained in pursuance of a custodial sentence".

Where the court is intending to impose a disqualification and considering a custodial sentence for that and/or another offence, the following checklist may be useful:

- Step 1 – does the court intend to impose a custodial term for the offence for which they are imposing a disqualification?

  YES – the court must impose the appropriate extension period and consider step 2.

  NO – go to step 3.

- Step 2 – does the court intend to impose a custodial term for another offence (which is longer or consecutive) or is the defendant already serving a custodial sentence?

  YES – consider what uplift in the period of discretionary disqualification (i.e. the period which would have been imposed but for the need to extend for time spent in custody) is required, having regard to the diminished effect of disqualification as a distinct punishment. Ignore any custodial term imposed for the offence for which disqualification is being imposed. Discretionary period + extension period + uplift = total period of disqualification

  NO – no further uplift required. Discretionary period + extension period = total period of disqualification

- Step 3 – does the court intend to impose a custodial term for another offence or is the defendant already serving a custodial sentence?

  YES – then consider what uplift in the period of discretionary disqualification is required, having regard to the diminished effect of disqualification as a distinct punishment. Discretionary period + uplift = total period of disqualification

  NO – no increase is needed to the discretionary period.

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