Response ID ANON-WBWC-CN65-F

Submitted to **Changes to the Magistrates' Court Sentencing Guidelines and associated explanatory materials**
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Introduction

1 What is your name?

Name:
Duncan Dollimore, Head of Campaigns Cycling UK

2 What is your email address?

Email:
duncan.dollimore@cyclinguk.org

3 What is your organisation?

Organisation:
Cycling UK, Parklands, Railton Road, Guildford, Surrey, GU29JX

Drive whilst disqualified

4 Do you agree with the proposed change to the Drive whilst disqualified guideline? If not, please provide any alternative suggestions.

Do you agree with the proposed change to the Drive whilst disqualified guideline? :
The Council has acknowledged that sentencers do not always notice that current guidelines state that a disqualification imposed for this offence should be for a period 'beyond the expiry of the current ban'. It therefore seems sensible to include an additional note as proposed in the new guidelines, reminding sentencers to check the period remaining on the existing disqualification, and the expiry date. Cycling UK submits however that the note could go further, and provide further clarity. Given that sentencers do not always appear to comply with the existing guideline, Cycling UK would suggest that an additional sentence should be added to the note suggested by the Council as follows:

"As the guidelines state that a disqualification imposed for this offence should be for a period beyond the expiry of the current ban, you should give reasons to justify any decision not to do so, or to do so for a period shorter than would be appropriate for new offence if the existing disqualification had by then expired.".

An additional sentence such as this would further focus sentencers' minds, reminding them not only to check the expiration date for the existing ban, but also that the guidance states that disqualification for the new offence should extend beyond the expiry date for the current disqualification, and to give reasons for diverging from the guidance.

If someone is convicted for driving whilst disqualified and their disqualification period is not extended, that undermines confidence in the judicial process, and sends a message that driving whilst disqualified (and indeed breaching court orders) is not a serious matter with consequences. The additional sentence proposed by Cycling UK is designed to encourage sentencers to think about the purpose of the guidelines, and be prepared to justify any decision to proceed differently.

Breach of a community order and Totality (1 of 2)

5 Do you agree with the proposed change to the Breach of a community order guideline regarding extending the length of an order? If not, please provide any alternative suggestions.

Do you agree with the proposed change to the Breach of a community order guideline regarding extending the length of an order?:
Cycling UK does not have any view on this proposal.

Breach of a community order and Totality (2 of 2)

6 Do you agree with the proposed change to the Breach of a community order guideline and the Totality guideline regarding committal to the Crown Court? If not, please provide any alternative suggestions.

committal to Crown Court:
Cycling UK does not have any view on this proposal.

MCSG - explanatory materials (1 of 4)

7 Do you agree with the proposed changes to the references to the surcharge in the explanatory materials? If not, please provide any alternative suggestions.

Do you have any views on the application of the guideline to case 1?:
Cycling UK does not have any view on this proposal.

MCSG - explanatory materials (2 of 4)

8 Do you agree with the proposed change to the guidance on fines for high income offenders in the explanatory materials? If not, please provide any alternative suggestions.

Do you have any views on the application of the guideline to case 3? :
Cycling UK does not have any view on this proposal.

MCSG - explanatory materials (3 of 4)

9 Do you agree with the proposed changes to the guidance on totting up disqualifications and exceptional hardship in the explanatory materials? If not, please provide any alternative suggestions.

Do you agree with the proposed approach to the assessment of culpability? Please give reasons where you do not agree.:
Cycling UK agrees that clearer guidance on totting up disqualification and exceptional hardship, particularly the latter, is desperately needed, but submits that the proposed new guidance does not provide the clarity needed.

Before dealing with the proposed changes, we would however refer to the Council's Consultation Stage Resource Assessment, which indicates that in 2018, 31,000 offenders were disqualified from driving under the penalty point system (i.e.
disqualified through accumulating points on their driving licence).

In the past, Cycling UK has attempted through freedom of information (FOI) requests to ascertain how many offenders each year successfully argue exceptional hardship, and avoid a totting up disqualification. Unfortunately, no central record appears to be kept either by the Ministry of Justice or the Court Service. DVLA are however able to confirm how many drivers in England, Scotland and Wales have 12 penalty points or more on their licence. Each year, various organisations such as IAM RoadSmart submit FOI requests to DVLA to clarify that figure, which has increased steadily each year from around 6000 five years ago to over 11,000 in 2019 https://www.iam-bristol.org.uk/index.php/articles/450-points-on-licence-up-to-51-and-still-driving.

We acknowledge that 11,000 drivers with more than 12 points on their licence does not directly equate to 11,000 drivers successfully having pleaded exceptional hardship. Some of them might, for example, have been convicted in their absence, having not been located or brought before the court for sentencing. However, in the absence of an exact figure of successful exceptional hardship pleas, it is still reasonable to conclude that:

1. The vast majority of the people with 12 or more points on their licence will be people who have successfully argued exceptional hardship.
2. The number of people avoiding disqualification by arguing exceptional hardship is increasing.
3. The number of people with more than 12 points on their licence is increasing.
4. It is becoming easier to succeed with an exceptional hardship plea every year.

Cycling UK believes one reason for this is that, too often, road traffic crime is not treated as real crime. It is trivialised by society, and sadly sometimes by the courts. Unfortunately, the following paragraph of the revised guidance unwittingly does the same thing:

"The fact that the current offence is relatively trivial is not something to which the Court can have regard in deciding whether there are grounds to reduce or avoid a totting up disqualification. (s.35(4)(a) RTOA 1988)"

Respectfully, that is not what S.35(4)(a) of the RTOA 1988 says. It states that:

"No account is to be taken under subsection (1) above of .....any circumstances that are alleged to make the offence or any of the offences not a serious one."

The legislation does not categorise or define what is a serious offence and what is not, and neither does it mention the word "trivial", which has been inserted by the Council.

The clear legislative intent was to make it clear that a defendant's arguments that his or her offence was not serious are irrelevant to the question of a totting up disqualification and whether exceptional hardship is proven. The proposed guidance implicitly accepts that there are trivial road traffic offences, which is unhelpful and undermines the enforcement of and sentencing for road traffic offences. The words "trivial offence" should not be used.

Cycling UK submits that this paragraph should be replaced, substituting the words used in the statute, namely that no account is to be taken of any circumstances that are alleged to make the offence or any of the offences not a serious one. This would make it clear that for the purposes of any exceptional hardship plea, the defendant's contention that the offence was not serious is irrelevant, without any implication road traffic offences can be trivial in nature.

The revised guidance also refers to the legal position when an offender pleading exceptional hardship has, within the three years prior to conviction for the current offence, successfully argued that exceptional hardship would be suffered if they were disqualified. The guidance states that "that argument (the one used successfully in the first case) cannot be relied upon in the current case".

The words used in the legislation (S.35(4) (c) RTOA 1988) are that in determining whether exceptional hardship is proven "no account is to be taken ..... of any circumstances which, within the three years immediately preceding the conviction, have been taken into account ..... in ordering the offender to be disqualified for a shorter period or not ordering him to be disqualified."

In summary, the legislation states that no account is to be taken of any circumstances taken into account previously, whereas the revised guidance states that an argument previously relied upon cannot be relied upon again. There is a subtle but important difference between the legislation and the guidance.

Prior to submitting this consultation response, Cycling UK undertook a desk top review of cases reported in the press where defendants had argued that

exceptional hardship applied. This was by its nature not a detailed factual analysis of each case, because Cycling UK were reliant upon press reports form each case. As there are virtually no law reports involving exceptional hardship cases, because such cases rarely proceed to appeal, a desk top analysis was the only method available to gather information about the nature of some of the successful exceptional hardship pleas both submitted and allowed by the courts.

That desk top survey confirmed Cycling UK's concerns that the statutory restriction prohibiting reliance on circumstances relied on previously was being stretched almost to absurdity, with offenders successfully arguing exceptional hardship where the argument submitted was slightly different to that successfully pleaded before, but in essence, the circumstances put forward by the offender had not materially changed.

An example of this concerns those case where the offender succeeds with an exceptional hardship plea, arguing that disqualification would lead to the failure of their business and exceptional personal hardship, and then on a subsequent occasion argues again that disqualification would have the same result, namely the loss of their business, but that exceptional hardship would be caused not just to themselves (the argument in the first case) but to either members of their family or their employees (the new argument).

The test that now seems to be applied in determining whether exceptional hardship can be pleaded successfully on a subsequent occasion within three years appears to be based on the guidance rather than the words of the statute. Sentencers accordingly ask themselves "is there a new argument?", rather than asking themselves whether there are new circumstances. In the example provided in the previous paragraph there is technically a new argument, and arguably there could be infinite variations of the same argument with reference to different family members, employees, sub-contractors etc who might be affected by the failure of the offender's business, but the circumstances wouldn't really have changed. Each of those nuanced arguments arise from the same set of circumstances, namely that disqualification in the particular case would lead to the loss of the offenders business with serious consequences. That may be an argument which an offender should be able to plead once, but it shouldn't be an argument that can be slightly tweaked and represented on multiple occasions.

Cycling UK therefore submit that the guidance should not refer to arguments, but should use the words in the statute, namely circumstances taken into account previously. We would further submit that there needs to be clearer guidance to sentencers to make it clear that a minor factual change, or nuance to the argument previously presented, does not amount to a new set of circumstances. We would propose guidance as follows:

"Note, where an offender has, within the three years prior to conviction for the current offence, successfully argued that exceptional hardship would be suffered, no account is to be taken of any circumstances taken into account previously. In determining whether the circumstances relied upon are different to those previously taken into account, sentencers should consider not simply whether the argument put forward by the offender is different, or whether the offenders' personal circumstances have changed, but rather whether the circumstances put forward to prove exceptional hardship are substantively different to those relied upon previously."

In relation to the factors that the court should have regard to when considering whether there are grounds to reduce or avoid a totting up disqualification, the guidance suggests that these include the following factors:

1. The test is not inconvenience, or hardship, but exceptional hardship for which the court must have evidence – which may include the offender’s sworn evidence.

2. Some hardship is likely to occur in many if not most orders of disqualification.

3. Courts should be cautious before accepting assertions of exceptional hardship without evidence that alternatives (including alternative means of transport) for avoiding exceptional hardship are not viable.

4. Loss of employment will not in itself necessarily amount to exceptional hardship; whether or not it does will depend on the circumstances of the offender and the consequences of that loss of employment on the offender and/or others.

5. The more severe the hardship suffered by the offender and/or others as a result of the disqualification, the more likely it is to be exceptional.

Notwithstanding the proposed guidance, Cycling UK is concerned that:

1. Pressures on court time are such that offenders assertions that disqualification will cause loss of employment or other consequences are, and will continue to be, routinely accepted without adequate supporting evidence, and without robust challenge.

2. That the requirement for hardship caused to be exceptional, and the test for such, is not made clear.

3. That the guidance focuses on the consequences of the loss of a licence, as though the licence to drive is an entitlement, without making it clear that the licence to drive is a privilege not a right.

Consequently, Cycling UK would propose amendments / additions to the guidance to include the following factors:

1. It is for the offender to prove that exceptional hardship would be caused by disqualification. In the absence of independent evidence to substantiate the offender's evidence, the court is entitled to and should ask whether independent evidence could and should have been provided, and draw any inference from the absence of such evidence.

2. Assertions of exceptional hardship should be robustly questioned by the court, and not accepted without challenge. This should include full consideration of the alternative travel options available to the offender following disqualification, including active travel (cycling and walking), public transport, taxi or private hire vehicle use, family assistance, employee assistance, and in the case of wealthy offenders the use of a private chauffeur.

3. Before deciding not to disqualify or to disqualify for a shorter period due to exceptional hardship, the court should bear in mind that: driving is not an entitlement or right, but something people are licensed to do; the loss of a licence through disqualification is not merely a punishment for offending, but also a road safety

measure which focuses the attention of those who drive on the consequences of irresponsible driving.

4. In determining whether the hardship suffered by disqualification is likely to be exceptional, the court should accept that most people who are disqualified from driving
will suffer some form of hardship, in the sense that it will impact on their usual routine and daily lives. That is one of the intended consequences of the punishment provided for by the legislation. For that hardship to be exceptional however, it must be of a nature and extent which is rare, unusual, extraordinary and something which by its very nature forms an exception which justifies a decision not to impose the minimum disqualification provided by the statute.

MCSG - explanatory materials (4 of 4)

10 Do you agree to adding a reference to the Equal Treatment Bench Book to relevant pages in the explanatory materials? If not, please provide any alternative suggestions.

Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.:
Yes.

General observations

11 Are there any other comments you wish to make on the proposals?

Are there any other comments you wish to make on the proposals?:
Cycling UK has set out its views in response to questions four and nine, explaining how the sentencing guidelines could and should be strengthened.

Cycling UK is concerned that the exceptional hardship plea has become a "loophole", which increasing numbers of offenders each year have exploited.

We have made proposals to strengthen the current sentencing guidelines to close that loophole, in so far as it is possible to do so within the framework of the existing legislation.

If the guidance cannot be strengthened to prevent exceptional hardship being routinely pleaded by offenders to avoid disqualification, and the predictable consequences of their own offending, then a review of the legislation will be required. Cycling UK acknowledge however that this is outwith the remit of the Sentencing Council.