

RESPONSE ON BEHALF OF THE FACULTY OF ADVOCATES

To

CYCLING AND WALKING INVESTMENT STRATEGY SAFETY REVIEW: PROPOSALS FOR NEW CYCLING OFFENCES

Question 1

Our consultation proposes that there should be an offence of causing death by dangerous cycling. Do you agree with this proposal?

We consider that the question of whether there should be an offence of causing death by dangerous cycling is ultimately a matter of policy. The Faculty does not intend to comment on the policy aspects of the consultation. The Faculty's comments in relation to the criminal law of Scotland are found in its response to question 8 of the consultation.

Question 2

Do you think that there should be an offence of causing death by careless or inconsiderate cycling?

We consider that the question of whether there should be an offence of causing death by careless or inconsiderate cycling is ultimately a matter of policy. The Faculty's comments in relation to the criminal law of Scotland are found in its response to question 8 of the consultation.

Question 3

The consultation also proposes that there should be an offence of causing serious injury by dangerous cycling. Do you agree with this proposal?

We consider that the question of whether there should be an offence of causing serious injury by dangerous cycling is ultimately a matter of policy. The Faculty's comments in relation to the criminal law of Scotland are found in its response to question 8 of the consultation.

Question 4

The Ministry of Justice consulted on bringing forward a new offence of causing serious injury by careless driving. This consultation proposes that there should be an offence of causing serious injury by careless or inconsiderate cycling. Do you agree with this proposal?

We consider that the question of whether there should be an offence of causing serious injury by careless or inconsiderate cycling is ultimately a matter of policy. The Faculty's comments in relation to the criminal law of Scotland are found in its response to question 8 of the consultation.

Question 5

If there were a new offence of dangerous or careless cycling, do you think the sentences should match the sentences for dangerous or careless driving (current driving sentences shown in brackets)?

- a. Causing death by dangerous cycling (currently 14 years for driving)*
- b. Causing death by careless cycling (currently 5 years for driving)*
- c. Causing serious injury by dangerous cycling (currently 5 years for driving)*

The Faculty considers that the question of the appropriate maximum sentence for any proposed new offence is a matter of policy.

Question 6

The report from the independent expert concluded there is a gap in the law regarding dangerous or careless cycling. Do you feel that existing laws adequately cover circumstances where a person's cycling causes harm or injury (sic) others?

We note that the report from Laura Thomas is concerned, other than in relation to the Road Traffic Act 1988, with the criminal law only as it applies in England and Wales. The Faculty has no comment to make in that regard. Please see the Faculty's response to question 8 for its position in relation to Scottish criminal law.

Question 7

Do you have any comments on any laws not covered in this consultation which could apply when trying to prosecute for this cycling behaviour?

Please see the Faculty's response to question 8.

Question 8

Do you have any other comments that you wish to make in relation to how existing laws apply in Scotland?

The Faculty commends the [supplementary report](#) relating to the consultation by Hugh Olson, advocate, dated 31 August 2018. It is not our intention to repeat here Mr Olson's discussion of the essential elements of the crimes of culpable homicide and culpable and reckless conduct. We agree with Mr Olson that currently in Scotland the common law offences do not allow for the prosecution of those who cause death or serious injury by careless cycling.

We agree that it may be possible to use, in certain circumstances, the common law offences of culpable homicide or culpable and reckless conduct to prosecute cyclists who cause death or serious injury to others. We further consider that the common law offence of culpable and reckless conduct may apply to those who cycle dangerously to the danger of the public, there being no need for actual injury to have been caused. We note, however, that this applies equally to drivers of motor vehicles. It is the experience of Faculty that, in relation to driving offences (whether involving a fatal incident or not), the Crown invariably choose to libel charges under the Road Traffic Act 1988 rather than at common law. It may be that this is as a result of difficulties faced by the Crown in proving the necessary *mens rea* on the part of the accused to bring home a conviction of either of the common

law offences. We consider that these difficulties would also apply in relation to the prosecution of cyclists for either culpable homicide or culpable and reckless conduct. It seems likely that, were proposed cycling offences drafted in a similar manner to those currently provided for under the Road Traffic Act 1988, the Crown would choose to libel charges under the new statutory provisions.

The areas for discussion identified by Mr Olson in his report as to whether there is a need to modernise the criminal law in Scotland to create new cycling offences are matters of policy.

Question 9

This consultation proposes that new offences should apply to public places as well as roads. Do you agree with this proposal?

We consider that the question of whether any proposed new offences should apply to public places as well as roads is a matter of policy.

Question 10

The current offences of dangerous or careless cycling apply to a road. This consultation proposes it should also extend to a public place. Do you agree with this proposal?

As above, we consider that this is a matter of policy.

Question 11

Are there any other comments that you wish to make about where laws should apply?

No.

Question 12

Drivers may be banned from driving for committing a current cycling offence. Minimum driving disqualification periods currently apply under the Road Traffic Offenders Act 1988. For drivers this is currently 2 years for causing death or serious injury, 1 year for causing death by careless driving. Do you think this should also apply to any of the new offences proposed in this consultation?

We consider that this is a policy matter.

Question 13

If not please explain why? If so, do you have any views on how long the minimum disqualification period should be?

N/A

Question 14

There is currently an offence of dangerous cycling (with a fine of up to £2,500) and for careless cycling (with a fine of up to £1,000). This consultation proposes that the penalties for these offences should remain unchanged. Do you agree with the proposal?

We consider that this is a policy matter.

Question 15

If not, please explain why. Are there any other comments you wish to make on the level of penalty?

No

Question 16

This consultation proposes that there should not be a new offence of causing death by careless cycling when under the influence of drink or drugs. Do you agree with the proposal?

We consider that this is a policy matter.

Question 17

The current fine for riding a cycle when unfit to ride through drink or drugs is £1,000. Do you think we should consider increasing the fine?

As stated above, the Faculty considers the level of the maximum fine it is possible to impose in relation to an offence is a policy matter. We would note, however, that it is inherently less dangerous to ride a cycle when unfit to ride through drink or drugs than it is to drive a motor vehicle when unfit to drive through drink or drugs.

Question 18

Do you think we should consider making it an attempt to cycle (as well as actually cycling) when unfit to do so through drink or drugs?

We note that under and in terms of Section 294 of the Criminal Procedure (Scotland) Act 1995, it is currently an offence in Scotland to attempt to commit an offence under Section 30 of the Road Traffic Act 1988.

Question 19

Are there any further comments you wish to make?

No