

Summary

This study, commissioned by the Netherlands Research and Documentation Centre (WODC) and requested by the Ministry of Security and Justice, was conducted following a discussion in the House of Representatives about the sentencing of serious road traffic offences and the legal framework that exists for that purpose. In a parliamentary debate on 28 May 2015, a number of members of the House of Representatives called for attention to be given to the sentencing of road traffic offences. The Minister of Security and Justice announced in a letter sent to the President of the House of Representatives on 18 February 2015 that WODC would be commissioned to study the sentencing practice for serious road traffic offences. Additionally, the Minister said the study would address the 'penalty gap' for reckless driving. The Minister further wanted the study to examine the need to increase powers to investigate failure to stop after an accident involving serious injury or death. This study implements the undertakings given by the Minister. The research questions concern the sentencing practice for serious traffic offences, the views of practitioners of law on this subject, and legal or practical problems in dealing with serious traffic offences (see Chapter 1, par. 2, for the wording of the research questions).

Chapter 1

The first chapter explains how the study into the sentencing practice focused on the criminalisation instances set out in Sections 5 through 9, 107 and 163 of the Road Traffic Act 1994 and a few crimes defined in the Criminal Code. The sentencing practice for these instances of criminalisation was examined based on judgements published in www.rechtspraak.nl. This part of the study covered approximately 314 criminal cases. Twenty interviews were additionally conducted as part of the study: 5 with district judges and appeals judges, 5 with members of the Public Prosecutor's Office, 5 with lawyers and 5 with experts. Each interview included questions about the sentencing practice and questions about the legal framework for that purpose.

Chapter 2

The second chapter describes instances of criminalisation that may lead to conviction for serious road traffic offences and the sanctions that may be imposed for them by law. The chapter further discusses supplementary frameworks for sentencing as laid down in policy rules of the Public Prosecutor's Office and in the national sentencing benchmarks that have been developed by the judiciary (LOVS).

The instances of criminalisation contained in the Criminal Code concern

murder, manslaughter, grievous bodily injury and menace as well as punishable attempts to commit any of those crimes. Supreme Court case law shows that (conditional) intent to cause the death of other road users is not something that may quickly be presumed. Requirements regarding intent also limit the scope of the two other instances of criminalisation. A wide range of behaviours with maximum penalties of highly varying severity are provided for in the instances of criminalisation in the Road Traffic Act 1994 that this study examined. The severest maximum penalties apply to the culpable causing of a road traffic accident that led to the death of another person or defined instances of bodily injury incurred by another person (Section 6 in conjunction with Section 175 of the Road Traffic Act 1994). Even higher maximum penalties apply where culpability consists of recklessness. However, the Supreme Court has laid down stringent requirements for proof of recklessness – more stringent requirements than the legislator had in mind. Failure to stop after an accident, driving under the influence and refusal to cooperate in an alcohol test are also crimes; the maximum term of imprisonment for these crimes is three months (Sections 7, 8 and 163 in conjunction with Section 176 of the Road Traffic Act 1994). The same applies to driving while banned or after cancellation or expiry of a driving licence (Section 9, first and second clauses, in conjunction with Section 176 of the Road Traffic Act 1994). The misdemeanours covered by this study concern (in brief) dangerous and obstructive driving (Section 5 of the Road Traffic Act 1994) and driving without a driving licence (Section 107 of the Road Traffic Act 1994). Two months is the maximum term of detention for these punishable offences (Section 177 of the Road Traffic Act 1994).

Guidelines have standardised the criminal prosecution policy for a number of serious road traffic offences. These guidelines are established by the Board of prosecutors general. The public prosecution service is bound by these guidelines under the principles of a proper criminal procedure. In the guideline for attempted manslaughter, the deliberate driving of a car into a person has been made equivalent, as regards the imprisonment recommended by prosecutors, to a few other behaviours such as drowning or strangling a person. Specifically for this type of behaviour, there is additionally a requirement for a driving ban. Similarly, the guidelines for grievous bodily injury, attempted grievous bodily injury and threat set out basic principles for a recommended sentence for driving a car into a person. The guideline for road traffic accidents and leaving the scene of an accident is predicated on three tables. The first table concerns road traffic accidents that constitute violation of Section 5 of the Road Traffic Act 1994; the second concerns causing a serious accident (Section 6 of the Road Traffic Act 1994); the third concerns leaving the scene of an accident (Section 7 of the Road Traffic Act 1994). Using the relevant table, the recommended sentence for causing a serious road traffic accident is based on three variables, (1) the consequences for the victim, (2) alcohol consumption, and (3) the degree of culpability. There is also a guideline for driving under the influence of alcohol and/or drugs and driving while banned. This again

includes a number of tables. For driving under the influence, the table applicable to experienced drivers is the most important one in relation to this study. The recommended sentence is set, according to this table, by reference to two factors, namely the alcohol content in breath or blood and reoffending.

The judiciary has set non-binding sentencing benchmarks for some of the most common offences. Benchmarks have been formulated for sentencing the offence of threat that are relevant to serious traffic offences. Where the crime of threat occurs by driving a car into a person, the benchmark has been a term of imprisonment of four months since 11 March 2016. Where the offence was committed against a police officer (or similar), the punishment may be increased by 33 to 100%, according to the explanatory notes. Benchmarks have also been laid down for Section 6 of the Road Traffic Act 1994. The table there strongly resembles the table for this crime contained in the guideline, although there are some differences. The benchmarks (tables) for Section 8 of the Road Traffic Act 1994 strongly resemble the corresponding tables in the guidelines, although once again there are differences. Sometimes the prosecution guidelines indicate a higher sentence than the benchmarks, sometimes it is the other way around.

Chapter 3

The third chapter looks at the results of the study into the sentencing practice for serious road traffic offences. There are 17 different categories of serious road traffic offences. They are shown in the table below.

Table 1. Categories of serious road traffic offences

Number	Category heading	Number of cases
1.	Murder and manslaughter	11
2.	Bodily injury and serious bodily injury	7
3.	Recklessness	17
4.	Section 6 of Road Traffic Act, under the influence	26
5.	Section 6 of Road Traffic Act, not under the influence	29
6.	Section 5 of the Road Traffic Act, with serious consequences	15
7.	Attempted manslaughter, driving into a vehicle	11
8.	Attempted manslaughter, driving into a person	24
9.	Attempted grievous bodily injury	29
10.	Section 5 of Road Traffic Act, without serious consequences	20
11.	Threat	10
12.	Driving under the influence	36
13.	Section 163 of Road Traffic Act	13
14.	Failure to stop after an accident	18
15.	Driving while banned	14
16.	Driving after cancellation or expiry of a driving licence	16
17.	Driving without a driving licence	18

These categories were placed together in three subgroups. The first concerns serious road traffic offences with serious consequences. This covers categories 1 to 6. The second subgroup concerns serious road traffic offences without serious consequences but do constitute endangerment or threat of a particular person. Categories 7 to 11 fall under this subgroup. The remaining categories concern serious road traffic offences where there does not necessarily need to have been serious consequences, endangerment or threat. This covers categories 12 to 17.

The chapter discusses the sentencing practice for each subgroup. First, a picture is provided of the sentencing practice for each category in a subgroup. The discussion in this chapter follows a fixed structure (except for the section concerning recklessness). The chapter states (in a table) for each category (1) the criminal cases factored into the study, (2) the penalties imposed by the trial judge and those recommended by the public prosecutor, and (3) the penalty-setting factors considered by the highest trial judge who heard the case. This is followed by a sub-conclusion for each subgroup. All of the sub-conclusions include tables that show, for each category, the most frequently imposed principal penalty and driving ban, as well as the bandwidth of the principal penalties.

It may be concluded from the table regarding the subgroup of serious road traffic offences with serious consequences that where there is a combination of very serious consequences (fatality or grievous bodily injury) and a high degree of culpability (intent or recklessness) the basic principle is the imposition of a prison sentence that is not suspended (or suspended only in part). The courts hand down a different type of punishment only in very exceptional cases. Where culpability does not consist of recklessness, it can be seen that a matter of significance (in line with the benchmarks) is whether or not the suspect was driving under the influence. Where there is a combination of culpability, consumption of drugs or alcohol plus very serious consequences (fatality or grievous bodily injury), the basic principle is again the imposition of a non-suspended prison sentence (or suspended only in part). If alcohol or drugs are found not to have been consumed, the courts usually decided in the examined cases to impose a community service order (linked to a suspended prison sentence), even when a fatal injury had occurred. In virtually all cases, the courts imposed a driving ban as an additional penalty, almost always non-suspended (or suspended only in part).

In the subgroup of serious road traffic offences where there was endangerment or threat of a particular person, it may be concluded from the table that the classification of the sentencing in the different categories corresponds with the statutory maximum sentence. The more severe the statutory maximum penalty, the more severe will be the type of punishment most frequently imposed and the more severe will be the highest principal penalty imposed. In the case of attempted manslaughter, the courts were found to impose a non-suspended prison sentence as a rule. In the case of threat, the courts usually hand down a prison sentence or community service order. The sentencing practice exhibits a highly varied picture in

cases of violation of Section 5 of the Road Traffic Act 1994 where there were no serious consequences. In a significant proportion of the examined cases, the courts imposed detention; in some of those cases, the courts even handed down the maximum sentence. In many of these cases, however, the suspect was also sentenced for other crimes (sometimes serious). The examined cases do not representatively reflect the criminal cases for which convictions occurred under Section 5 of the Road Traffic Act 1994.

The subgroup of serious road traffic offences where there does not necessarily need to have been serious consequences or associated endangerment or threat includes some crimes for which there is the same maximum penalty. This include driving under the influence, refusal to cooperate in an alcohol test, failure to stop after an accident and driving while banned. The severest penalties imposed for each of these crimes are not easy to rank. For example, the highest principal penalty was imposed for failure to stop after an accident (three months imprisonment); at the same time, the courts impose only a fine for this crime in most instances. In the event of refusal to cooperate in a breath test, the courts most frequently hand down a community service order. For driving under the influence, the courts were found in the examined cases to have imposed a fine in most instances, although in serious cases they also hand down prison sentences for such crimes. For driving while banned, or driving after cancellation or expiry of a driving licence, the courts imposed a non-suspended prison sentence in some cases, but in most cases they handed down a community service order.

From the collective findings in the different subgroups, it may be concluded that differences between the imposed penalties and those recommended by the public prosecutor sometimes relate to the recommended and imposed penalty being based on different types of crimes. This was found to occur, for example, (1) for sentences for violation of Section 6 of the Road Traffic Act based on culpability that does not consist of recklessness (basis for the recommended sentence: culpability consisting of recklessness), (2) sentences for violation of Section 5 of the Road Traffic Act, whereby there were serious consequences (basis for recommended sentence: violation of Section 6 of the Road Traffic Act), (3) sentences for attempted grievous bodily injury (basis for recommended sentence: attempted manslaughter) and (4) sentences for threat with homicide or grievous bodily injury (basis for recommended sentence: attempted manslaughter or attempted grievous bodily injury).

Chapter 4

The fourth chapter reports on the findings obtained from the interviews with legal practitioners. There are different types of findings. Firstly, the interviews produced a picture of support for certain views among the respondents (or subgroups thereof). Secondly, reasons for views were formulated in the interviews. Thirdly, suggestions

for amending the law were made in the interviews.

As regards sentencing, some respondents stated that they considered the sentencing practice in the Netherlands for serious road traffic offences to be reasonably adequate. Other respondents said they were unable to answer the question (what do you think in general of the sentencing for serious road traffic offences in the Netherlands?). A few respondents were completely dissatisfied with the level of sentencing. In response to the second question, concerning the level of sentencing for specific crimes, more respondents voiced criticism. According to some respondents, the sentences for dangerous driving without serious consequences were too mild. Similarly, according to a few respondents, the sentences for failure to stop after an accident were too mild (particularly where a person was injured). In the case of driving under the influence, a few respondents expressed criticism of the benchmarks, among other things about the sentencing in case of reoffending. Some respondents said that sentences for driving while banned were also too mild. Some maintained that sentences were too mild in cases where a person caused an accident under the influence of alcohol, in which another person incurred grievous bodily injury or was killed. Criticism of too severe sentences was far less in evidence in the interviews, and came only from two respondents in the legal profession.

Respondents were asked whether the picture of the sentencing practice that emerged from the third chapter was representative, in particular as regards Section 6 of the Road Traffic Act 1994. Some respondents answered this question in the affirmative, while others expressed themselves more cautiously, and a few refrained from giving an opinion. A number of respondents made comments and observations, among other things about confinement of the study to criminal cases published on www.rechtspraak.nl. The final question concerning the sentencing for serious road traffic offences related to the influence of procedural matters. A number of respondents confirmed differences in the method of laying charges (by each prosecutor's office) (Section 5 or Section 6 of the Road Traffic Act 1994). A respondent from the public prosecutor's office stated that measures had already been taken in connection with this issue.

As regards the legal framework, a number of respondents said that in instances of seriously dangerous driving, Section 5 of the Road Traffic Act 1994 offered insufficient remedies. Most respondents either advocated or saw benefits in criminalising seriously dangerous behaviour by having a maximum penalty that is significantly higher than provided for under Section 5 of the Road Traffic Act 1994. All respondents said they found the Supreme Court's interpretation of recklessness (Section 175(2) of the Road Traffic Act 1994) to be strict or very strict. A few had no problems with this strict interpretation, while others were unhappy (or very unhappy) with it. Several objections were mentioned. Victims and next of kin find this interpretation hard to understand; not only the sentence, but also the way the criminal conduct is labelled is deemed important; and the strict interpretation does

not converge with the legislator's intentions. Another issue is that according to some respondents, the aggravating circumstances mentioned in Section 175(3) of the Road Traffic Act 1994, as well as the relation between these circumstances and recklessness, raised criticism. Different answers were given to the question of whether there should be a different way of criminalising serious forms of endangerment that have serious consequences. Some respondents wanted to see amendments that would result in behaviour that does not currently fall under recklessness being made subject to a more severe maximum penalty. The respondents expressed different views when asked whether prosecution under Section 5 of the Road Traffic Act 1994 was desirable in cases where another road user had died due to dangerous behaviour on the roads. There was greater consensus regarding the desired forum if prosecution occurs in such cases; a fair number of respondents indicated that the case should be heard by a full bench.

A few respondents had no pronounced views about the content of the benchmarks and/or guidelines. Many respondents considered the content adequate in general. However, a few noted that reoffending should play a more important role in the benchmarks. During a few conversations, it emerged that the benchmarks made either no pronouncements or unclear pronouncements about some subjects. Some respondents found that the sentences set out in the benchmarks tended to be on the mild side in general. Specific comments were made about the benchmarks in respect of Section 6 and Section 8 of the Road Traffic Act 1994. A number of respondents felt that reoffending should carry more weight in respect of driving under the influence.

Specifically regarding failure to stop after an accident, the respondents were asked about the desirability of having greater investigative powers when there was a suspicion of this particular crime. A large number of respondents did not answer this question in the affirmative. Respondents from the Public Prosecutor's Office, plus a few others, did however say there was a need to possess certain investigative powers. Matters mentioned were the detaining of the people who were not actually caught in the act and the power to obtain camera images and to require telephone details.

In an open final question, a relatively large number of respondents mentioned matters related to the relationship between the sanctions systems under criminal law and under administrative law.

Chapter 5

The fifth and final chapter is structured on the basis of the research questions and contains conclusions and recommendations. The conclusions follow from the contents of chapters 2, 3 and 4 as presented in abridged form in this summary. In the context of the summary, therefore, the recommendations are particularly important. The recommendations concern the legal and practical problems that

have been noted in the course of this research.

The first recommendation concerns failure to stop after an accident. A large number of investigative powers do not currently apply to this crime. They include the power to carry out seizure of property other than when a person is caught in the act of committing the crime. If a decision is taken to increase the maximum penalty, allowance could be made for the standardising of powers set out in the draft of Book Two of the new Code of Criminal Procedure. The draft links numerous powers to the criterion of suspicion of a crime for which the term of imprisonment is one year or more. For example, an investigating officer who suspects such a crime has the authority to seize property capable of seizure.

The recommendation concerning reckless driving without serious consequences is very important. In our opinion, grounds exist for introducing criminalisation that carries a maximum term of imprisonment for more than two months for an instance of very dangerous driving, even without serious consequences. Inspiration for framing this criminalisation could be drawn from Paragraph 315c of Germany's Criminal Code. Criminalisation according to this model would be rooted in selected traffic violations capable of causing such great danger that a (far) more severe penalty would be justified under certain circumstances. The seriousness of the traffic violation and the disregarding of any other road users seem to be crucially important factors as regards the additional conditions for criminality. The maximum penalty of two years set for similar criminalisation in Spain could be a model for the Netherlands. Criminalisation framed in this way could be incorporated in a new Section 5a of the Road Traffic Act 1994.

With a special prosecution situation under Section 5 of the Road Traffic Act 1994, while the endangerment relates to consequences incurred by other persons (death or grievous bodily injury), our conclusion is that prosecution by the sub-district courts appears undesirable. An amendment of the competence rules that would allow prosecution before a full bench for charges brought under Section 5 of the Road Traffic Act 1994 also has advantages in terms of choices that may arise when laying charges. It would not be necessary to bring charges primarily under Section 6 of the Road Traffic Act 1994 in order to allow the case to be heard by a full bench. And in cases where charges were evidently wrongly brought solely under Section 5 of the Road Traffic Act 1994, the crime could still be charged under Section 6 of the Road Traffic Act 1994 (if the charges are based on the same offence within the meaning of Article 68 of the Criminal Code).

The next recommendation concerns the statutory maximum penalty for driving under the influence. Given the great dangers arising from driving motor vehicles when under the influence of alcohol, there is much to be said for significantly increasing the statutory maximum penalty. The knock-on effect this would have on the statutory maximum penalty for reoffending is another reason for this approach. The maximum penalty is one-third higher; for multiple reoffending involving driving under the influence the maximum prison sentence is currently also

four months (under Section 43a of the Criminal Code). Additionally, it is highly conceivable to let reoffending carry greater weight in the guidelines and benchmarks than is currently the case.

An analysis of the relationship between the sanctions systems under criminal law and under administrative law is the reason for the recommendation to incorporate in criminal law (in due course) the reoffending regulation under Section 123b of the Road Traffic Act 1994. The amendment that resulted in introduction of the reoffending regulation may possibly have been based on a lack of confidence in a sufficiently stringent application by the courts of the proposed standardising of the driving ban. Implementation of the proposals made in this study might increase this confidence. Additionally, the presumption of innocence argues in favour of making attendance of alcohol awareness programmes, which at the present time are administrative sanctions, sanctions under criminal law. This would assure that such programmes cannot be imposed for a punishable offence for which a suspect has been cleared.

Two recommendations concern driving while banned or after cancellation or expiry of a driving licence. Firstly, it is recommended, on systematic grounds, to increase the statutory maximum penalty. The second recommendation relates to proof that the person concerned has knowledge or has reasonable grounds to know that he is banned to drive or that his driving licence is cancelled. The cancellation decision by the Driver Licensing Centre is sent to the person concerned; it is not legally assigned. It seems appropriate to provide for a form of announcement which promotes that cancellation produces the best results under criminal law.

The final recommendation concerns recklessness. The proposed criminalisation of reckless driving under Section 5a of the Road Traffic Act 1994 could be linked to the existing definition of recklessness. This could be accomplished by adding the following sentence to Section 175(2) of the Road Traffic Act 1994: 'Recklessness shall in any event be deemed to exist if the behaviour may also constitute a violation of Section 5a'. Additionally, being in a condition within the meaning of Section 8 (1), (2), (3) or (4), or failure to obey an instruction given under or pursuant to Section 163 (2), (6), (8) or (9), could be retained in the third clause of Section 175 of the Road Traffic Act 1994 as a ground for increasing the sentence. This definition would bring about a situation where the scope of the concept of recklessness will be widened, and would assure a logical relationship between recklessness and the ground for an increased sentence under the third clause.