The North Review of Drink-Driving: Some Sobering Proposals

By Sally Cunningham *

Introduction

In the late 1980s the distinguished academic Peter North headed the Road Traffic Law Review Committee whose recommendations led to the Road Traffic Act 1991, replacing reckless driving with dangerous driving and creating the new offence of causing death by careless driving whilst under the influence of drink or drugs. 1 Two decades on and the Labour Government chose North to conduct a much smaller review of one particular aspect of road traffic law: drink and drug-driving. The resulting Report was completed shortly before the election and was made public on 16 June 2010. 2

The principal finding of the Report is that the legal Blood Alcohol Concentration (BAC) limit of 80 mg of alcohol per 100 ml of blood ought to be reduced to 50 mg of alcohol per 100 ml of blood. To enhance the police’s ability to enforce the new law, the Report also recommends that the law be changed to allow a form of “random testing”. In relation to drug-driving, North considered whether a “per se” drug-driving offence similar to the BAC law ought to be introduced but, due to the current status of scientific knowledge, only went so far as to

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recommend that such an offence be introduced “as and when” research has established impairment levels for particular drugs.

This article will look in more detail at the recommendations made by the North Review, the arguments relating to the changes to the law under review, and assess the desirability of the recommendations. The Report is split into two sections: the first on drink-driving and the second on drug-driving. These are two distinct issues and, whilst the discussion and recommendations in relation to drug-driving are important and of interest, there is insufficient space to give them the attention they deserve here. As it is, only some of the 28 recommendations made in relation to drink-driving have been selected for in-depth discussion. These have been broadly split into two issues: the BAC limit\(^3\) and the issue of police powers to conduct random breath-tests.

\(^3\) Alongside the simple question of assessing the level at which the legal BAC should be set, lie a number of tangential issues relating to how the law is enforced and operates in practice which are not discussed here. These include the question of how an equivalent breath alcohol concentration limit should be set; whether to employ prosecution thresholds to allow for inaccuracies in the technology; and the availability of the “statutory option” which allows someone who has a breathalyser reading of no more than 50 \(\mu g/100\) ml to choose to have a sample of their blood or urine sent for analysis (Road Traffic Act 1988, s.8(2)). Whilst these are not discussed here it should be noted that the ensuing recommendations will no doubt have a significant impact on the legal arena, given that the reliance on scientific evidence in prosecutions has thus far created a complex area of law leading to a number of “loopholes” of which lawyers on both sides do well to keep abreast. For examples of two recent developments in this area see P.M Callow, “The Drink-Drive Legislation and the Breath-Alcohol Cases” [2009] Crim LR 719 and H. Riddle, “Goldsmith: Will it Cause Problems?” [2010] Crim LR 565.
Drink-driving and the Legal BAC Limit

The current “per se” law on drink-driving can be found in section 5 of the Road Traffic Act 1988. If a driver (D) drives or attempts to drive a motor vehicle on a public road or other public place and at the time the proportion of alcohol in D’s breath, blood or urine exceeds the prescribed limit, D is guilty of an offence, the maximum sentence for which is six months’ imprisonment coupled with a mandatory minimum disqualification term of twelve months. The prescribed limit of alcohol is currently 35 micrograms of alcohol in 100 millilitres (35 µg/100 ml) of breath, 80 milligrams of alcohol in 100 millilitres (80 mg/100 ml) of blood, or 107 milligrams of alcohol in 100 millilitres (107 mg/100 ml) of urine.

The Report starts by noting that the drink-drive legislation can be viewed as a success. In 1966, the year before the introduction of the legal BAC limit and the preliminary breath test, there were 7,985 road deaths on Britain’s roads, the highest number of road deaths in peace time. In 2008 that figure had reduced to 2,538 road deaths. Of these, 430 deaths are estimated to have involved drivers in excess of the legal BAC limit. The most recent figures, released since the North Report was published, report that fatalities resulting from drink-

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4 In addition, a drunk-driver can be prosecuted under the “impairment” offence found in section 4 of the Road Traffic Act 1988. This offence, which is necessary to prosecute drug-driving, is not discussed here. There is potential for drivers who fall short of the legal BAC to be prosecuted under s.4, at whatever level the BAC is set.

5 Road Traffic Offenders Act 1988, s.34.

6 Road Traffic Act 1988, s.11.

7 North Report, para.1.9.

8 Ibid.
driving fell by 5 per cent in the year 2008-2009, to 380.\(^9\) When taking account of the fact that motor vehicle traffic trebled between 1967 and 2008 it can be argued that the drink-drive regime, alongside the road safety regime are “areas of conspicuous public policy success. Strategies combining effective enforcement of heavy penalties for drink-driving backed by high profile advertising have contributed to these successes. Significantly, there has also been a cultural shift where, for the majority of the public, drink-driving is no longer considered acceptable”.\(^{10}\)

It is true that drink-driving is often provided as an example of how the law can mould morality; when BAC laws were first introduced the pervasive attitude amongst drivers was that that there was little wrong with having a few drinks before driving. The scientific evidence that drink-driving is potentially dangerous, and as a consequence could be seen to be “morally wrong”, goes back at least as far as 1964 and the Grand Rapids study. The Grand Rapids study was carried out in Michigan in the United States by Borkenstein et al. and showed that the risk of being involved in a collision starts to increase significantly when a driver has a BAC of 40 mg/100 ml, and that a driver with a BAC of 100 mg/100 ml is five times as likely to be involved in a collision than someone with a BAC of zero.\(^{11}\) However, 


\(^{10}\) North Report, para.1.9.

\(^{11}\) Borkenstein et al., *The role of the drinking driver in traffic accidents*, Bloomington, IN, Department of Police Administration, Indiana University (1964) cited in Global Road Safety Partnership (GRSP), *Drinking and...*
outside the scientific community the “wrongness” of drink-driving was generally not recognised until the enforcement of drink-drive laws setting a maximum legal BAC limit of 80 mg/100 ml had communicated this “wrongness” to drivers.

Although the Grand Rapids study took place in the US, most States in that country have been slow to act on its findings compared to the countries of Europe, particularly those of Scandinavia. In 1966 in Norway the legal BAC had already been set at 50 mg/100 ml, and Andenaes reported that the courts were extremely consistent in giving prison sentences for violations.\(^{12}\) This, he suggested, was the source of differing attitudes to drink-driving amongst Norwegians and Americans: “It is … my feeling – although I am here on uncertain grounds – that the legislation has been instrumental in forming or sustaining the widespread conviction that it is wrong, or irresponsible, to place oneself behind the wheel when intoxicated”.\(^{13}\) At that time the message had not permeated American society because, Andenaes asserted, the law there took a far less strict approach to drink-driving.

The message has now got through to most of the citizens of Western countries, through what Braithwaite labels “effective shaming”. “Effective shaming” is perhaps another term for “educational deterrence”, and has been directed at offences such as drink-driving, which did not traditionally fall within the category of behaviours deemed to be criminal or immoral.\(^{14}\)

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\(^{13}\) Ibid.

\(^{14}\) J. Braithwaite, Crime, Shame and Reintegration (1989).
Bottoms provides drink-driving as an example of criminal laws which, unlike traditional crimes which involve acts that are considered to be impermissible by society, do not, when first passed, reflect positive morality but are created in order to change behaviour through their deterrent effect and can change perceptions of what is immoral.\textsuperscript{15}

**Setting the legal BAC limit**

Unlike other offences designed to promote road safety, such as speeding, drink-driving has become an accepted use of the executive’s power to limit autonomy behind the wheel.\textsuperscript{16} Perhaps it is because of this early acceptance of the law (in comparison, for example, to some of the states in the US), that has led to a situation in which the UK is in fact lagging behind the rest of Europe in terms of its BAC law. Once the law was introduced in the late 1960s, it took some time for the effect of educative deterrence to take hold but, once entrenched within the British psyche, the question of whether the BAC was set at an appropriate level was not considered with any seriousness until recently. As a result, the UK is one of only three countries in Europe that has a legal BAC of 80 mg/100 ml. The UK, Ireland, and Malta are the only EU member states to have such a high BAC (Luxembourg having been the last to


\textsuperscript{16} In the European-wide public opinion survey SARTRE 3, 80% of respondents were of the opinion that they should not be allowed to decide for themselves how much they could drink before driving (i.e. they were happy for the law to dictate this). On the other hand, one in three EU drivers had been penalised for speeding in the previous three years, implying that in practice they decide for themselves how fast to drive instead of letting the law dictate this. European drivers appear to think that exceeding the speed limit is prevalent, with at least 70% of respondents in each country believing that “other drivers” exceed the speed limit “often”, “very often” or “always”: J-P Cauzard, (ed.) *European drivers and Road Risk*, SARTRE 3 Reports (2004) available at [http://sartre.inrets.fr/documents-pdf/repS3V1E.pdf](http://sartre.inrets.fr/documents-pdf/repS3V1E.pdf), p.40 and pp.69-70.
lower its BAC to 50 mg/100 ml in 2007), with most EU Member States having now adopted a legal BAC of 50 mg/100 ml. Some have gone even further with a level as low as 20 mg/100 ml (Estonia, Poland and Sweden) whilst others apply a zero policy with a legal BAC of 0 g/100 ml (Czech Republic, Hungary and Slovakia).\textsuperscript{17} The European Commission recommends that all member states of the EU should set a legal BAC of 50 mg/100 ml or lower.\textsuperscript{18}

Whilst it might be seen to be rather extreme to adopt a legal BAC of zero, as has been done in some of the eastern European countries, research shows that even the smallest amount of alcohol can affect a driver's performance. A BAC of 10–50 mg/100 ml leads to: increase in heart and respiration rates; decrease in various brain centre functions; inconsistent effects on behavioural task performances; decrease in judgement and inhibitions; mild sense of elation, relaxation and pleasure. A BAC of 60–100 mg/100 ml leads to: physiological sedation of nearly all systems; decreased attention and alertness, slowed reactions, impaired coordination, and reduced muscle strength; reduced ability to make rational decisions or exercise good judgement; increase in anxiety and depression; decrease in patience.\textsuperscript{19}

Given the recommendation from the European Commission, and the fact that the UK is now falling behind its peers, the time seems ripe for change. Some consideration has been given


\textsuperscript{18} 2001/116/EC. A lower BAC of 20 mg/100 ml is recommended for professional and novice drivers. The option to recommend a separate BAC for these groups of drivers was considered and rejected by North (Recommendations 5 and 8).

\textsuperscript{19} GRSP, above n.11, Table 1.1.
previously by the UK parliament to lowering the legal BAC.\textsuperscript{20} At a time when it was thought that a European Directive on the matter was imminent, the government stated that it was minded to reduce the BAC limit to 50 mg/100 ml,\textsuperscript{21} but when the European Commission passed a recommendation on the matter instead of a Directive the reform was shelved. In answering questions posed by the House of Lords Select Committee on Europe, the government indicated that the main reason for not following the advice of the European Commission was that it was feared that a debate on the question of reducing the permitted BAC would imply that there was an acceptable level below which it is safe to drink and drive, and the government strongly endorsed the view that motorists should not drink and drive at all.\textsuperscript{22} In addition, there was concern that reduction of the permitted legal limit would lead to violations of this lower limit being seen as a “lesser offence”, resulting in pressure to reduce the penalties for drink-driving.\textsuperscript{23}

Another excuse provided by the government for not lowering the limit in the past was that there was insufficient support for such a move. This is contrary to the responses collected to the government’s 1998 consultation paper on the matter: of the 401 responses 206 were in favour of the reduction compared to 163 who argued for retaining the existing 80 mg/100 ml limit. A more recent survey found that 62 per cent of respondents were in favour of a lower

\textsuperscript{20} See, for example, debates on the Road Safety Bill Hansard, HC October 9, 2006, column 74.


\textsuperscript{23} \textit{Ibid}, para.37.
BAC limit.\textsuperscript{24} Research at a European level has similarly suggested that the British public would not be adverse to more stringent drink-drive laws. The SARTRE 3 study, a survey of drivers conducted in 23 European countries with funding from the European Commission, found that as many as 51 per cent of respondents in the UK thought that drivers should be permitted to drink no alcohol at all.\textsuperscript{25} More recently, the British Social Attitudes Survey reported that 83 per cent of respondents agreed with the statement that “If someone has drunk any alcohol they should not drive”, with 58 per cent agreeing strongly.\textsuperscript{26}

This change in public attitudes is recognised by North, who ultimately recommends a reduction of the BAC. Given, however, that such recommendations have so far been ignored by the British government, is there any reason to think that the current government might, on this occasion, act on the recommendation? In order for this question to be answered in the positive, and without appearing too cynical, there must be some political mileage in adopting the recommendation for it to be taken forward. Although the Report acknowledges the success of the current legislation as a factor in the reduction in the number of road deaths in the past forty years, North plays an important political card in highlighting the further reductions that could be gained and comparing the number of deaths due to drink-driving with those caused by other unlawful methods. He reports that there were 380 drink-drive deaths in England and Wales in 2007 compared with 270 knife murders and 227 deaths due to fire.\textsuperscript{27} Given the media frenzies surrounding gang culture and the carrying of knives this

\begin{itemize}
  \item \textsuperscript{24} Home Office, \textit{Drink-driving: prevalence and attitudes in England and Wales 2002} Home Office Research Findings 258, (2004).
  \item \textsuperscript{25} SARTRE 3, above n.16, Figure 2.5.
  \item \textsuperscript{26} British Social Attitudes Survey 2009 (unpublished), cited by the North Report, para.3.85.
  \item \textsuperscript{27} North Report, para.1.10.
\end{itemize}
might prove prudent. Highlighting the fact that one is more likely to be killed by a drunk-driver than a knife-wielding gang member will most likely capture politicians’ attention.

North draws on data from published academic papers on the effectiveness of reducing BAC limits in support of his recommendation. The first is by Albalate, which evaluates the effectiveness of lowering the BAC to 50 mg/100 ml as a means of reducing road traffic fatalities in Europe. Albalate’s main finding is that lowering the BAC has been an effective tool for saving lives in relation to certain road user groups, namely males, especially in urban areas, and drivers aged 18-49. However, lowering the BAC was not found to be statistically significant for the whole population when controls were added for other concurrent policies and infrastructure quality, and it is noted that a short time lag exists between the change in legislation and the positive results: the biggest impacts are not achieved until three years after the adoption of the lower BAC.

North also draws on statistics collected in Australia, where the BAC was lowered to 50 mg/100 ml in the 1980s, resulting in reported reductions in fatal collisions of 18% in Queensland and 8% in New South Wales. Of most significance, though, is the literature review commissioned by the Department for Transport (DfT) from NICE, treading similar ground to that of Albalate. Part of the problem in assessing the likely benefits of a reduction

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29 Ibid, p.22.

30 Ibid.

31 North Report, para.3.35.

32 A. Killoran, U. Canning, N. Doyle, and L. Sheppard, Review of effectiveness of laws limiting blood alcohol concentrations to reduce alcohol-related road injuries and deaths, Centre for Public Health Excellence NICE
in the legal BAC is that reductions in road traffic fatalities are likely to be influenced by a whole catalogue of variables such as enforcement of other traffic laws (speed limits and seat-belt wearing), the effectiveness of safety campaigns and the effects of engineering including safer cars and improvements in road layout. However, the NICE report concludes that “overall, there is sufficiently strong evidence to indicate that lowering the legal BAC limit for drivers does help reduce road traffic injuries and deaths in certain contexts”\(^{33}\) and that “there is sufficiently strong evidence to indicate that lowering the BAC limit changes the drink-driving behaviour of drivers at all BAC levels. The BAC law appears to act as a general deterrent and the beneficial effects are not just restricted to the drivers at the BAC levels involved.”\(^{34}\)

The most controversial evidence base for reducing the BAC seems to be the estimated casualty reduction that can be expected from a change in the law. These estimates range from a reduction of 303 deaths per annum, based on the Australian experience, to 77-168 deaths, based on Albalate’s study.\(^{35}\) However, in his written evidence to the North Review, Professor Allsop suggests that a more realistic figure would be a saving of 43 lives a year.\(^{36}\) This is nearer to previous predictions made when the change has been contemplated in the past.\(^{37}\) Arguably any

\(^{33}\) Ibid, p.162.

\(^{34}\) Ibid, p.165.

\(^{35}\) North Report, para.3.42.

\(^{36}\) Ibid, para.3.44.

\(^{37}\) Department for the Environment, Transport and the Regions, *Combating Drink-driving: Next Steps: A Consultation Paper*, (1998). It was suggested that 50 deaths a year might be avoided if the BAC were reduced to 50 mg/100 ml.
saving in lives, no matter how small, would justify a change in the law (and it should be remembered that a reduction in fatal collisions will also save money spent on fatal collision investigations\(^{38}\)). However accurate these predictions are, the question is whether a change in the law will make a difference to driving behaviour to deter drivers from drinking enough to affect their ability to drive safely. Yet another study commissioned by the DfT concluded that:

the key to abating the problem of drink-driving is to change the behaviour of those who drive impaired so that fewer of them do so and less often and less impaired. The emerging evidence identifies a body of people whose behaviour is entrenched and – because they are not measuring their consumption – perhaps not easily influenced by legal limits. However, the authors were reassured that there is evidence from other countries that tightening the policy can yield a long-term change, provided it is properly backed by enforcement and education.\(^{39}\)

Having concluded that a reduction in the BAC was desirable, North then had the decision to make as to what the new level should be set at: 50 mg/100 ml, a level most prevalent amongst European neighbours, or the more extreme limit of 20 mg/100 ml. The former was preferred and the latter rejected on the basis that a sudden reduction from 80 mg/100 ml to 20 mg/100 ml could have a detrimental effect on the currently high level of public support for the drink-drive legislation,\(^{40}\) and on the idea that in those countries operating the lower BAC a breach of the 20 mg/100 ml


\(^{40}\) North Report, para.4.9.
limit is often addressed by administrative penalties and Great Britain would need to introduce a graduated penalty system if it were to take such an extreme measure.\(^{41}\) Having considered the possible negative effect that a reduction to 50 mg/100 ml could have on the entertainment and hospitality sector,\(^{42}\) and based on the strong support for such a reduction from the majority of consultees to the Review, North has recommended that s.11 RTA 1988 be amended to reduce the legal BAC from 80mg/100ml to 50mg/100ml.\(^{43}\)

**Breath-alcohol concentration, prosecution thresholds and the statutory option**

Alongside the simple question of assessing the level at which the legal BAC should be set, lie a number of tangential but important issues relating to how the law is enforced and operates in practice. The first of these relates to setting a legal breath/alcohol concentration (BrAC) limit equivalent to the new BAC. Although a legal BAC was set in 1967, a legal BrAC was not set until 1981, once reliable breathalyser tests had been developed. At this time there was a need to determine what the BrAC should be, compared to the BAC. This required setting a blood-breath ratio (BBR) to make such a comparison. The UK legislation used a BBR of 2,300:1. It is now known that the BBR in fact varies between individuals, and also that an individual’s BBR can vary over time, ranging from 2,000:1 to 3,000:1.\(^{44}\) Elsewhere in Europe, the BBR used to set the legal BrAC has ranged from 2,000:1 (France and Spain) to

\(^{41}\) *Ibid*, para.4.10.

\(^{42}\) *Ibid*, para.4.21-4.26.

\(^{43}\) Recommendation (3).

2,400:1 (Finland).\textsuperscript{45} One issue to be considered is whether, if a new BAC limit is introduced, the correlating new BrAC limit ought to use the current BBR of 2,300:1 or a lower ratio.

A related issue which the Report considers at length is the policy applying to the prosecution threshold for drink-driving. Although the current BrAC is 35 µg/100 ml, the prevailing policy is that a prosecution will not be brought unless there is an evidential breath-test reading at least 40 µg/100 ml.\textsuperscript{46} This in fact means that in practice a BBR of 2,000:1 is being used at the threshold of criminality.\textsuperscript{47} The historical reason for this relates to potential inaccuracies in the breath-testing equipment and is to “cater for occasions where the machine may be reading high”.\textsuperscript{48} This policy is also applied to BAC readings, where laboratory results routinely have 6 mg/100 ml deducted from the results, meaning that someone found to have a BAC of 83 mg/100 ml will not be prosecuted because the report from the laboratory will state that they have a BAC of “not less than 77 mg/100 ml”. Thus, although the current legal limit is 80 mg/100 ml a prosecution cannot take place unless D is found to have a BAC of at least 86 mg/100 ml.

Such prosecution policies are not uncommon when dealing with driving offences. In relation to speeding, for example, ACPO has set in place various threshold levels as guidance to police forces as to when and how speeding should be enforced. The bottom level threshold provides a limit below which speed offences should not be prosecuted of “10%+2”,\textsuperscript{49}

\textsuperscript{45} Ibid.

\textsuperscript{46} North Report, para.2.65, citing Home Office Circular 1983/43.

\textsuperscript{47} Jones, above n.44, p.21.

\textsuperscript{48} North Report, para.2.65.

meaning that D will not be prosecuted unless D’s speed is at least ten per cent above the speed limit plus an additional two miles per hour above that. So if the speed limit is 30 mph, speeding will only be prosecuted if it is 35 mph or higher. The reason for this is yet again to do with technology: to allow for equipment inaccuracy, speedometer inaccuracy and human error interpreting a speedometer.

The North Review was informed that modern breath-testing equipment has a precision of 0.1 µg, avoiding the need for such a generous prosecution policy.\(^{50}\) North hopes to simplify prosecution policy by recommending that the prosecution threshold be set to provide a 3% buffer in using BAC results (instead of the 6 mg/100 ml currently operating).\(^{51}\) This is in turn linked to another technical issue relating to the need to provide for margins of error in the equipment. The current law allows for someone who has a breathalyser reading of no more than 50 µg/100 ml to take what is known as the “statutory option” and choose to have a sample of their blood or urine sent for analysis.\(^{52}\) This was one way to tackle the problem of the “variable ratio” in measuring alcohol in the blood and breath, discussed above. However, scientists now argue that there is in fact no scientific benefit to be had from using a blood test rather than a breath test, and that it is not scientifically sound unless an allowance is also made for the elimination of alcohol between the times of sampling the blood and breath.\(^{53}\)

\(^{50}\) North Report, para.4.47.

\(^{51}\) Recommendation (13).

\(^{52}\) Road Traffic Act 1988, s.8(2).

\(^{53}\) Jones, above n.44, p.30.
Jones argues that the statutory option has created a loophole in the law, permitting offenders to opt for a blood test in the full knowledge that the requirement that blood be taken by a forensic physician will create a delay, hoping that by the time the blood is taken the level of alcohol in the blood will have been metabolised to below the legal limit.\textsuperscript{54} North has taken Jones’ scientific opinion on board in recommending the abolition of the “statutory option.”\textsuperscript{55} Instead, the problems of variable BBR will be addressed by reducing the BBR used in setting the BrAC to 2,000:1, giving a BrAC of 25 µg/100 ml if the BAC is reduced to 50 g/100 ml.\textsuperscript{56}

**Sentencing matters**

In relation to the punishment of drink-drivers, one option considered by North was the possibility of using administrative sanctions such as licence suspension, as commonly occurs in the US and Canada. These licence suspensions differ from the criminal sanction of disqualification in that they involve the immediate confiscation of a driving licence by the police, without the involvement of the criminal courts, following a failed breath, blood or urine test, lasting anything from a few hours up to a period of months.\textsuperscript{57} “Civil” sanctions are now available in relation to a number of regulatory statutory regimes following the Macrory Report\textsuperscript{58} and the passing of the Regulatory Enforcement and Sanctions Act 2008, which allows Ministers to introduce statutory instruments providing civil sanctions to a wide range of strict liability offences contained in a long list of statutes. Drink-driving is, of course, a strict liability offence and the Road Traffic Act is listed under Schedule 6 of the 2008 Act as

\textsuperscript{54} Ibid.

\textsuperscript{55} Recommendation (11).

\textsuperscript{56} Recommendation (12).

\textsuperscript{57} North Report, para.2.119.

one to which civil sanctions can be applied. It would not be too much of a stretch of the imagination that the government might decide that the police ought to be enabled to confiscate driving licences as a type of “stop notice” under s.46 of the Act. In its report to North NICE concluded there is sufficiently strong evidence to indicate that administrative licence suspension can help reduce road traffic injuries and deaths; though it noted that proper regard would need to be had to human rights concerns.\(^{59}\) In addition, the AA supplied evidence of a poll of its members that would suggest the public would be in favour of the police having the power immediately to suspend a licence, with 68 per cent of respondents being in favour.\(^{60}\)

Whilst it might have been possible for North to recommend that the police be granted a power to suspend a licence in the interim period between an offence being committed and reaching court,\(^{61}\) to do so would arguably go against the presumption of innocence and prove a controversial move. In the event, since North was recommending a reduction in the legal BAC limit to 50 mg/100 ml, but not to 20 mg/100 ml, it was thought that to allow civil sanctions to be used as an alternative (rather than an addition) to the criminal justice system would undermine the seriousness of the offence and so in the absence of a graduated penalty system that a much lower limit would necessitate, the option was rejected.\(^{62}\)

Ultimately, in relation to the penalty for the recommended new BAC, North drew on support for the current position in recommending that the mandatory term of disqualification of

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\(^{59}\) North Report, para.3.55.

\(^{60}\) Ibid., para.3.102.

\(^{61}\) It is possible for a licence to be suspended as one of the conditions of bail, pending trial, but North received evidence from District Judges that such conditions were rarely applied: North Report, para.3.100.

\(^{62}\) North Report, para.4.10.
twelve months remain in place, despite the lower BAC.\textsuperscript{63} Whilst witnesses to the Review held diverse views on what the penalty should be for a lower BAC,\textsuperscript{64} consultees overwhelmingly supported a minimum period of disqualification of some length,\textsuperscript{65} and many stressed that the current 12 month period was a major deterring factor.\textsuperscript{66} In the AA’s pole of members, 49% of respondents were reported to be in favour of the 12 month period applying to the proposed lower BAC.\textsuperscript{67} Such a recommendation is perhaps, however, a gamble, and may risk alienating politicians. Whilst a lower BAC is no doubt long overdue given the legal position in other European countries, it will be more difficult to justify applying the same severe penalty in contrast to the more lenient penalties employed by our European counterparts. That said, the reward may be worth it in that, as long as the proposal does not scare-off the government from the whole reform project, the deterrent effect of the mandatory disqualification period will encourage would-be offenders to take the lower BAC seriously.

**Random Testing**

In order to maximize the effects of a lower legal BAC limit, some changes could, and should, be made with regards to enforcement. It is worth considering the present position in the UK and elsewhere before North’s proposals are examined. Currently there is a huge variance in the likelihood of being detected for drink-driving depending on regional location. In 2008, for example, there were 231 breath-tests carried out per 100,000 population in the West

\textsuperscript{63} Recommendation (15).

\textsuperscript{64} North Report, para.3.97.

\textsuperscript{65} *Ibid.* para.4.63.

\textsuperscript{66} *Ibid.* para.4.65.

\textsuperscript{67} *Ibid.* para.3.96.
Midlands, compared to 4,420 tests carried out per 100,000 population in North Wales. It seems far less likely that a drunk-driver will be apprehended in the UK than in some of its neighbouring countries, given that the SARTRE 3 survey found that only 3% of UK drivers had been stopped and tested for alcohol in last three years, compared to the European average of 16%. For the purposes of deterrence rather than enforcement, perhaps what is more important than the number of tests carried out is the public’s perception of the likelihood that they will be caught, although this must bear some relation to the actual threat posed to effect enduring deterrence. When asked how likely it was for a drink-driver to be caught if driving over the legal limit once a week for a year, half of the respondents in a public survey thought it was unlikely or very unlikely that they would be caught. Greater consistency in the numbers of screening tests carried out is likely to increase the deterrent effect.


69 North Report, para.3.22.

70 C. Corbett, Car Crime (2003), p.94

71 Home Office, above n.24.

72 One way in which North hopes to increase consistency in the enforcement of the law is for the offence to be added to the list of “Offences Brought to Justice” on which the police in England and Wales are required to report (Recommendation 25). North is of the opinion that it is “wholly irrational” that the offences under ss.4 and 5 RTA 1988 are not included on the list when the causing death offences under ss.1, 2B and 3A are so included (North Report, para.4.103). What this fails to recognise, however, is that when one of the causing death offences is committed the police are under a duty to investigate the death that has occurred. The offence of drink-driving, on the other hand, being a purely endangerment offence which does not require harm to have been caused, might be committed many times over without ever coming to the attention of the police. This explains why it is not one of the “violence against the person” offences which is required to be reported as an “offence brought to justice”, as are the causing death offences, although it could possibly be added in a separate
Under current law a police officer has no power “randomly” to test drivers and can only carry out a preliminary breath-test if D has committed a moving traffic offence, has been involved in an accident, or has provided the officer with reasonable suspicion that he or she is under the influence of drink and has been driving.\(^73\) However, it is possible for the police to circumvent this prohibition on random testing to some extent. It has been confirmed by the Divisional Court that it is permissible for the police to stop cars randomly and, if they suspect that a particular driver is under the influence of drink or drugs (for example, because of D’s demeanour or the smell of alcohol), they are then afforded the necessary suspicion to carry out a preliminary test under s.6.\(^74\)

Although random testing is not yet permitted in the UK, police forces often conduct campaigns at specific times of year when a far higher number of breath-tests are likely to take place. Campaigns at Christmas are commonplace, and in 2008 22 per cent of screening tests were carried out during December.\(^75\) Such campaigns still require police officers to have reasonable suspicion to administer a breath-test once they have stopped a vehicle, but they appear to be successful, given that the proportion of breath-tests which were positive or refused during December was five per cent,\(^76\) compared to an annual failed/refused rate of 13 per cent.\(^77\) This suggests that the campaigns are having the desired deterrent effect which, in

\(^73\) Road Traffic Act, s.6.

\(^74\) Chief Constable of Gwent v Dash [1986] RTR 41.

\(^75\) HOBS 06/10, above n.69, p.67.

\(^76\) Ibid.

\(^77\) Ibid, p.66.
turn, might suggest that if drivers could expect to be stopped at any time of year thanks to powers of random testing, further benefits could be achieved in terms of reducing the occurrence of drink-driving.

Random breath testing has been the principal method of drink-drive law enforcement in Australia since 1982. Unlike in the UK, police in Australia have the power to breathalyse any driver regardless of whether they suspect an offence has been committed. Random breath-testing programmes use roving cars and buses to stop drivers, rather than stationary check-points, which increases visibility of enforcement measures. The Australian policy of random breath testing is modelled on deterrence principles and aims to increase drivers’ perceived risk of apprehension through highly visible and well-publicized patrols that breath-test a large proportion of the motoring population selected at random. The results appear to be positive: following the introduction of random breath testing in New South Wales serious injury accidents fell by 19 per cent, fatalities fell by 48 per cent and single-vehicle night-time collisions (often caused by drink-driving) fell by 26 per cent. These effects appear to persist over the long term, unlike many initiatives that show an immediate effect followed by a gradual wearing-off.

Random breath-testing occurs in several other jurisdictions, such as Sweden, where it can take the form of “sobriety checks” or road blocks. Unlike in Australia, these involve stopping every vehicle at a particular location in order to conduct breath tests of the drivers. A review

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80 Ibid.
of the studies on the effectiveness of the initiative found that overall fatalities measured before and after implementation of random breath-testing showed reductions ranging from 16.2 per cent to 29 per cent.\textsuperscript{81} Those studies that related to Australia tended to show a higher decline in alcohol-related fatalities than those studies that related to the United States, where sobriety checkpoints are more common.\textsuperscript{82} This suggests that the long-term use of random breath testing in Australia is more effective than the short “blitz” effect of sobriety checkpoints in the US.\textsuperscript{83}

Given the positive results in other jurisdictions, it might be advantageous to introduce random breath testing in the UK. Support for random testing in one form or another exists amongst the British public: 86 per cent of drivers were in favour of random breath testing in one survey, including 70 per cent of drivers who admitted to driving over the limit.\textsuperscript{84} In view of the public support for random testing, what is surprising about the consultation process carried out by North is the response of the police to the question of whether they would support an increase in their powers to conduct breath tests. In fact, the police see their current powers as “almost sufficient” to allow for random testing.\textsuperscript{85} The suggestion that the police are satisfied with their current position was one of the reasons given for the rejection of an amendment to the Road Safety Bill 2006 which was tabled in the House of Lords to allow for

\textsuperscript{81} Ibid, p.59.

\textsuperscript{82} Ibid, p.63.

\textsuperscript{83} It should be noted, however, that US sobriety checkpoints require the police to have reasonable suspicion that D has been drinking before they can require a breath test, which is perhaps more similar to the law in the UK than somewhere like Sweden, where true random testing operates.

\textsuperscript{84} Home Office, above n.24.

\textsuperscript{85} North Report, para.3.119.
random breath-testing. Lord Davies of Oldham, speaking on behalf of the government, stated that the proposal was a step too far and that the police were content with their existing powers and the government would not wish to widen them.

The police’s response to the offer of further powers would seem to be an anomaly, given how they might be seen to welcome extensions to their powers in other contexts. Although the police successfully circumvent the current law, it would surely only strengthen their position if they could do away with the requirement of reasonable suspicion before requiring a breath-test. This is recognised by North, who notes that arguments in favour of the extension of the current powers are that it would enable roadside checkpoints and the ability honestly to tell the public that any driver could be breath tested at any time, both of which would provide a powerful deterrent and help overcome the lack of fear of detection of those who drink drive at present. In the AA’s poll of its members 79% of respondents were in favour of this.

Whilst North supports the extension of police powers, he suggests that “random” testing is not in itself desirable:

The Review recognises that a strictly random approach may in practice be excessively resource and time intensive for the police and detrimental to the effectiveness of such operations. It may also invite concern or criticism regarding the proportionality of the use of such a wide and arbitrary power and real, or perceived, issues of abuse or unfairness. What is clear, however, is that enforcement of drink drive law in Great Britain must be much more visible, frequent, routine, sustained and well-publicised.

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86 Hansard, HL November 22, 2005, column 1523.
87 Ibid, column 1525
88 Stop and search powers under the Terrorism Act, for example.
89 North Report, para.3.120.
90 Ibid.
In the opinion of the Review, targeted or evidence led screening operations are an effective means of achieving these aims.\textsuperscript{91}

North therefore recommends “unrestricted” powers for breathalysing drivers and amendment of s.6(2) to either replace the current conditions for requiring and administering preliminary breath-tests with a general, unrestricted power to require such tests or to insert an additional power to enable preliminary breath tests to be required and administered in the course of a designated drink drive enforcement operation.\textsuperscript{92}

Such a recommendation was almost inevitable given the proposed reduction in the legal BAC. If drivers may be in contravention of the law after drinking far less alcohol it would surely become more difficult for police to apprehend drivers at the lower end of the scale and, with the public aware of this, there would be little deterrence for drivers to continue as before, unhindered by the change in the law. It could be argued that those who are sufficiently inebriated for their driving to be affected will provide the police with the reasonable grounds required under current law, but this ignores the scientific literature confirming that a driver’s abilities are affected at a lower BAC and to wait until the effects reveal themselves could be dangerous. Unlike controversial stop and search powers dispensing with the requirement for reasonable suspicion, the power to administer a breath-test is one which can only be exercised in relation to a particular section of the population and, as recognised by the European Court of Human Rights: “Those who choose to keep and

\textsuperscript{91} Ibid, para.4.110.

\textsuperscript{92} Ibid, para.4.111.
drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime”.

**Concluding remarks**

A strong commitment to lowering the legal BAC to 50 mg/100 ml coupled with “random” testing could go a long way to reducing road deaths, and it is hoped that the government will take up North’s recommendations. Other countries which have made such a move have seen positive results from legislative changes. A reduction in the legal BAC from 80 mg/100 ml to 50 mg/100 ml took place in Switzerland on 1 January 2005, with random breath testing being introduced at the same time. This combination appears to have led to a 20–25 per cent reduction in road deaths from 2004 to 2005.

There is reason to be cautious, however. Evidence from police officers to the Review confirmed that many members of the public underestimate how much alcohol they can drink without exceeding the current BAC:

There was a common perception among witnesses that part of the success of the drink drive law in this country was that people are confused about how much they can legally drink and therefore frequently underestimate how much alcohol they can consume and still remain legally within the limit. This results in an unexpected benefit; this level of ignorance actually protects the majority of the public on the basis that it provokes a very cautious response from the public to drinking and driving.

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93 *O’Halloran and Francis v UK* (2008) 46 E.H.R.R. 21 at [57]. This case is cited by North at para.4.93.


95 North Report, para.3.111.
Whilst the public might operate a cautious approach to the law, the government’s educative message of “don’t drink and drive” is arguably undermined by a law that in fact allows the drinking of a number of units before drivers exceed the limit of 80 mg/100 ml. It surely makes sense to amend the law to both bring it in line with the public’s opinion and to bring it nearer to conforming with the fundamental message of widespread anti-drink-driving campaigns.

Drink-driving, as a law, has succeeded where other regulatory driving offences seeking to reduce risk-taking, such as speeding, or even careless driving, have failed. The fact that most drivers judge themselves to be better than average means that no matter how much effort is given to educating drivers on the wrongness involved in committing the general driving offence of careless driving, they are unlikely to identify their driving with the prohibited behaviour. The advantage that drink-driving has over general offences is that, as what Duff terms an “implicit endangerment offence”, it has set down a simple rule (you must not drive with a BAC of more than 80 mg/100 ml) that has become acceptable to the majority of drivers, who endeavour to abide by the law and, in doing so, reduce risk-taking on the roads. In order to capitalize on this achievement (which has not been made to the same extent in relation to other implicit endangerment offences such as speeding), the law should set the


97 Endangerment offences are implicit (as opposed to explicit) if their definition does not specify the risk that grounds their criminalization, so that they can be committed without creating the risk: R.A. Duff, “Criminalizing Endangerment” in Duff and Green, *Defining Crimes: Essays on the Special Part of the Criminal Law* (2005), p.59. Drink-driving is criminalized in order to reduce the risk of death and serious injury on the roads but the offence itself does not require that a risk of death or serious injury is created; only that D has driven when over the BAC limit.

98 Ibid, p.61.
BAC at a level which is both acceptable to the public it has succeeded in winning over, and which can be justified in scientific terms as being required to minimise risk. The reduction of the legal BAC would likely, however, fail to modify the behaviour of many drivers in the absence of changes to police powers to enable breath-tests to be administered without the need for reasonable suspicion. Given that random breath-testing is generally recognized as one of the most cost effective road safety measures, it is about time that it was implemented in a country that, whilst making huge strides in reducing its road deaths, is keen to lower fatalities yet further.\textsuperscript{99}

\textsuperscript{99} North Report, para.3.52.

\textsuperscript{100} House of Commons Transport Committee, \textit{Ending the Scandal of Complacency: Road Safety beyond 2010}, HC 460, 11\textsuperscript{th} Report of Session 2007-08.