

FOCIS

The Forum of Complex Injury Solicitors

**The Forum of Complex Injury Solicitors
(FOCIS)**

Response to

**Department for Transport's Consultation on
changing the law regarding using a mobile
phone while driving**

January 2021

About Us

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims, including group actions. The objectives of FOCIS are to:-

1. Promote high standards of representation of Claimant personal injury and medical negligence clients;
2. Share knowledge and information among members of the Forum;
3. Further better understanding in the wider community of issues which arise for those who suffer serious injury;
4. Use members' expertise to promote improvements to the legal process and to inform debate;
5. Develop fellowship among members.

See further www.focis.org.uk

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 22 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Seven of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hugh James
Atherton Godfrey	JMW
Ashtons	Irwin Mitchell
Balfour + Manson	Kingsley Napley
Bolt Burdon Kemp	Leigh Day
Dean Wilson	Osbornes
Digby Brown	Potter Rees Dolan
Fieldfisher	Prince Evans
Fletchers	Stewarts
Freeths	Thompsons NI
Hodge Jones & Allen	

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims. In line with the remit of our organisation, we restrict our responses relating to our members' experience, practices and procedures relating to complex injury claims only. We will defer to others to respond on the impact relating to other classes of case.

Introduction

FOCIS welcomes the opportunity to respond to the Department for Transport's consultation on changing the law regarding using a mobile phone while driving. We welcome the acknowledgment that change is required to close the technical gap in the law to ensure that when a driver chooses to physically hold a mobile phone or a similar interactive communications device whilst driving and uses it for any purpose, that driver will be committing an offence. This change will not only improve safety for all road users, including cyclists and pedestrians, but we also agree that enforcement of the offence in these terms should be easier for both the police and prosecutors.

Whilst we agree with the need to update and revise the law, this is an opportunity for the government to consider a broader change to the terminology around hand-held electronic devices generally, in light of the major technological advances since implementation in 2003. Whilst potentially outside the scope of the questions in this consultation, it is important to acknowledge through any such update, the realities of current and near future device usage.

We consider that the phrase "mobile phone" is too limited and repeated references are made to this throughout, in the context of the current legislation. Despite the extension of the term in adding "and other hand-held interactive communication devices", there remains a danger that limiting the key terminology in this manner may create confusion amongst drivers as to when the offence is triggered and in turn, give rise to adverse effects where the requirements of the new law is not understood. To provide greater clarity and to simplify the phrase used for the devices covered by the revised offence, our suggestion is that the offence should apply to a broader category such as the use of any "hand-held electronic device".

The government should also give due consideration to those drivers who are not using a hand-held electronic device, but are actively using a smart watch. There remains a material distinction between mobile phones and smart watches but this distinction is getting closer each year as the functionality of smart watches advances. We suggest such devices should also be considered in the context of this consultation and/or incorporated to any update to legislation and the Highways Code.

FOCIS also considers the use of an electronic device positioned in a cradle to be equally as distracting and dangerous, even if the device is not obscuring the driver's view of the road, yet there is a lack of clarity as to whether this would be prohibited under the revised offence and may give rise to a further loophole in the legislation.

Response to Consultation

We respond with reference to the three main changes proposed in the consultation as outlined below:

1. Closing a gap in the law so that drivers are guilty of an offence if they use their hand-held mobile phone or similar device for any purpose while driving;
2. Introducing an exemption for drivers who use their hand-held mobile phone to pay for goods or services that they receive immediately;
3. Strengthen the wording in the Highway Code to reflect the proposed changes in the law on hand-held mobile phone use.

In summary, FOCIS support each of these themes. It is appreciated that the proposed changes represent an overdue update to the law that could not have been anticipated when the original mobile phone offence was introduced in 2003. Advancements in modern technology have

meant that the original offence now only covers a small proportion of the uses of today's smartphones and it is imperative that the law reflects the way in which people use their hand-held electronic devices in 2021 and beyond.

The additional exemption for drivers who use their hand-held mobile phone to pay for goods or services that they receive immediately is a logical update to the current legislation and is sensible and necessary.

Taking the relevant numbered themes above, in turn, we comment as follows:

1. Closing the gap in the law

Do you agree with the proposal to extend the hand-held mobile phone offence to cover "standalone" functions?

Yes. We agree with the proposal to extend the hand-held mobile phone offence to cover "standalone" functions, as such uses are at least equally as distracting and dangerous. The current legislation enables individuals to avoid the tougher penalties of the mobile phone offence when using their phone while driving for a "standalone" function and this not only generates a significant problem regarding enforcement but also weakens the tough stance taken by the government on penalties for using a hand-held mobile phone while driving.

Are there any other mobile phone functions that you think should be listed in the revised offence? If yes, in your view what other mobile functions should be listed?

FOCIS considers the inclusion of any list of activities to be unnecessary given that the proposed changes will result in the offence being triggered when a driver manually uses a hand-held electronic device for any purpose while driving. Providing a list of activities that will be captured under the revised offence creates scope for confusion amongst drivers, scope for arguments over loopholes and may weaken the tough stance taken by the government.

However, if including a list of activities is deemed necessary (perhaps simply on the basis a list is already present which requires updates), it should be emphasised that the list is non-exhaustive. In creating a non-exhaustive list, enforcement agencies will have less difficulty enforcing the law where they are unable to ascertain the exact use or reason for somebody reacting or looking at their mobile device. If the list is extended, we believe the following mobile phone functions would be reasonable additions to those already proposed, to avoid confusion for drivers. For example, at present the proposed list includes to make, receive or to reject a telephone call. However, the list only includes to send or to compose a text message. This distinction may give rise to doubt as to whether reading a text message falls under this revised offence.

- Read a text message
- Read an email
- Make, receive or reject a video call
- View photos or videos, whether stored on the phone or within an application such as Netflix
- Adjust the settings i.e. changing the volume or screen brightness

- Operating the satnav function
- Browsing or operating any other application

Do you foresee any unintended consequences, for example any potential impacts on particular groups, as a result of extending the offence? If yes, what unintended consequences do you foresee?

No.

Do you agree with the proposal to bring within the offence any device which is capable of interactive communication, even if that capability is not enabled in the vehicle?

Yes. We agree with the proposal given that the handling of any device that is capable of sending and receiving data i.e. a hand-held tablet or gaming equipment, even if the device is not in a mode or state of connectivity to enable the sending or receiving of data, is equally as distracting and dangerous. However, as explained within the introduction, FOCIS proposes that the terminology is amended to any "hand-held electronic device". The government should give consideration to the fact that simply adding to the terminology of "mobile phone" may not send a sufficiently clear message to the public to cause the intended change in driver habits.

As noted above, the government should also give due consideration to the use of smart watches and electronic devices positioned in a cradle while driving. In reality, there is very little difference between using a hand-held electronic device and actively using a smart watch or a device in a cradle, as each scenario will momentarily distract the driver and create a potentially dangerous situation. FOCIS believes that the use of smart watches and electronic devices positioned in a cradle for any purpose, unless the use is completely hands-free or falls under one of the limited exemptions, is equally as distracting and dangerous and should be covered under the revised offence. If the government decide not to extend the offence as suggested, at a minimum the Highway Code should highlight the dangers of using smart watches or electronic devices positioned in a cradle.

Do you foresee any unintended consequences, for example any potential impacts on particular groups, as a result of amending the offence in this way? If yes, what unintended consequences do you foresee?

No, we do not foresee any unintended consequences.

2. Additional exemption

Do you agree with the proposal to exempt drivers from the hand-held mobile phone offence if they are making a contactless payment for immediate goods or services while stationary?

Yes. We agree with the proposal to create this additional exemption to the mobile phone offence given the minimal risk attached to the activity in question.

However, FOCIS considers that this exemption should also encapsulate the use of a hand-held electronic device to present pre-paid tickets, or confirmation emails as proof of prior payment, on entry or exit at events and attractions or when collecting goods. In light of the shift to paperless tickets to reduce the environmental impact of printing traditional tickets on paper, and more recently to limit the spread of Covid-19, the need to present a QR code to be scanned is becoming increasingly more prevalent in society

whether this be to enter an event such as a drive-in cinema, to exit barriers at an attraction where parking payments can be made online or to collect goods as a result of store closure due to Covid-19. As with the proposed exemption, FOCIS agree that the key requirement should be that the vehicle is stationary at the time of using the hand-held electronic device.

Do you foresee any unintended consequences, for example any potential impacts on particular groups, as a result of this exemption? If yes, what unintended consequences do you foresee?

No.

3. The Highway Code

Do you agree with the proposed changes to the Highway Code to explain that the hand-held mobile phone offence will apply to standalone functions? If not, why not and what are your suggestions for improvement?

In light of the above suggestions, we propose that the wording of Rule 149 of the Highway Code is amended as follows.

Hand-held electronic devices and in-vehicle technology

Rule 149

You MUST exercise proper control of your vehicle at all times. You MUST NOT manually handle any electronic device for any purpose when driving or when supervising a learner driver. This ban covers all physical usage of a hand-held electronic device and it applies even when the interactive communication capability is turned off or unavailable. It does not apply to usage that is fully voice controlled or fully controlled by your vehicle's controls.

There is an exception to call 999 or 112 in a genuine emergency when it is unsafe or impractical to stop. There is also an exception if you are using a hand-held electronic device, while the vehicle is stationary, to make a contactless payment for goods or services that you will be receiving immediately or when presenting a pre-paid ticket or confirmation email showing proof of payment. For example, when making a contactless payment at a drive-through restaurant, road tolls or a car wash in a garage or when presenting a pre-paid ticket or confirmation email at an event or attraction, or when collecting goods. However, you cannot use your hand-held device while driving even if stationary in traffic.

You may park your vehicle using a hand-held remote control app or device. The app or device MUST be legal, and you should not put other people in danger when you use it.

Never use a hand-held microphone when driving.

It is far safer not to use any hand-held electronic device while you are driving or riding. Unless your device is set to fully hands-free control you SHOULD ensure that any alarms or reminders are deactivated and the device is set to silent mode or 'do not disturb' before driving. Additionally, you SHOULD use the voicemail facility and listen to any messages later. Alternatively, you SHOULD find a safe place to stop first before handling any hand-held electronic device.

Laws RTA 1988 sects 2 & 3, & CUR regs 104 & 110

The proposed changes are clear and concise which will assist with driver understanding of the revised offence and what advice they should follow while driving.

Do you agree with the proposed change to the Highway Code which explains the new exemption from the offence of using a hand-held mobile phone while driving to make a contactless payment using a mobile phone? If not, why not and what are your suggestions for improvement?

Yes. We agree in principle with the proposed changes to the Highway Code in respect of the new exemption from the mobile phone offence, save that the wording should be revised further to confirm examples of the types of contactless payments that drivers could make when stationary i.e. for drive-through restaurants, road tolls or cash-wash facilities in a garage. FOCIS also considers that the wording in the Highway Code should be extended to encapsulate the additional uses of a hand-held device that should fall under the proposed new exemption.

Other comments

FOCIS consider that the change envisaged will require a prolonged education and publicity campaign in order to change driver habits and it is imperative that significant resources are dedicated to this to ensure that the intended long-term change in driver behaviour is achieved. Whilst we appreciate that not all mobile devices have a 'do not disturb' function, and might be used for navigation even if they do, the safest recommendation for all is that driver behaviour is shifted towards a routine switching onto silent/do not disturb for mobile devices when driving; this should begin at the time of the driver undertaking driving lessons and/or as part of any theory or practical test.