

ADVICE TO THE SENTENCING GUIDELINES COUNCIL

Sentencing for Corporate Manslaughter
and Health and Safety Offences Involving Death



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FOREWORD BY THE CHAIRMAN

This advice from the Sentencing Advisory Panel to the Sentencing Guidelines Council proposes guidelines for sentencing organisations for the offence of corporate manslaughter or for a health and safety offence involving death.

The offence of corporate manslaughter was created by the Corporate Manslaughter and Corporate Homicide Act 2007 (CMA), the main provisions of which came into force on 6 April 2008. The CMA applies only to organisations and restricts the application of the common law offence of manslaughter by gross negligence to individuals. The statutory offence is designed to secure, in a wider range of situations than under the common law, a conviction for a criminal offence that properly reflects the seriousness of the worst instances of management failure causing death.

When sentencing an organisation for corporate manslaughter, a court will be able to impose an unlimited fine, a remedial order and/or a publicity order; the publicity order is new to England and Wales and the Government has delayed implementation of the relevant provisions until a Council guideline governing their use is in force. The Panel proposes that a court normally should impose a publicity order following an offence of corporate manslaughter, and recommends minimum requirements regarding the extent of publicity.

The offence of corporate manslaughter is designed to complement, rather than replace, existing health and safety offences, for which organisations may still be prosecuted as an alternative to, or in addition to, the new offence. In order to promote consistency and properly reflect the seriousness of the offending involved, this advice proposes guidelines on sentencing for both corporate manslaughter and breaches of health and safety law resulting in death where they are committed by organisations. Both guidelines draw on existing guidance on sentencing offences involving death under health and safety law, but the differences between the two types of offence are highlighted.

Both types of offence involve the same form of harm, but whilst corporate manslaughter involves senior management failure and a *gross* breach of a duty of care, health and safety offences encompass a wider range of culpability. The proposed starting points and ranges for fines imposed following offences of corporate manslaughter are set at a higher level but overlap with those for health and safety offences involving death. Levels of seriousness for both types of offence have been identified by the extent to which the conduct of the offending organisation created a risk of causing death (and, in the case of health and safety offences, serious injury), and the degree to which this was reasonably foreseeable.

The proposed fines have been devised to have an equal economic impact on organisations of different sizes, from companies of small means to those with very large resources. The Panel has concluded that turnover is the fairest and most stable measure of an organisation's financial resources, so the starting points and ranges are expressed as percentages of the organisation's average gross annual turnover during a three-year period. When fining publicly funded bodies or third sector organisations, the Panel has proposed that the appropriate financial measure is gross revenue income or equivalent.

SENTENCING FOR CORPORATE MANSLAUGHTER AND HEALTH AND SAFETY OFFENCES INVOLVING DEATH

THE PANEL'S ADVICE TO THE SENTENCING GUIDELINES COUNCIL

INTRODUCTION

1. The Corporate Manslaughter and Corporate Homicide Act 2007 (CMA)¹ came into force on 6 April 2008,² creating a new statutory offence of corporate manslaughter. When sentencing an organisation for this offence, a court will be able to impose an unlimited fine, a publicity order and/or a remedial order; publicity orders are a new sanction in England and Wales. As this is both a new offence and one for which a new sanction will be available, the Sentencing Guidelines Council has asked the Sentencing Advisory Panel to produce advice on guidelines for use by sentencers.
2. An organisation is guilty of the new offence if the way in which it managed its activities both caused a person's death and was a gross breach of a duty of care that the organisation owed the deceased. Previously such circumstances may have led to corporate liability for the common law offence of manslaughter by gross negligence. The CMA applies only to organisations and not to individuals and is designed to ensure that the application of the common law offence is restricted to individuals. This advice is limited to corporate offending and does not, therefore, cover the offence of manslaughter by gross negligence.
3. However, an organisation may still be prosecuted for breach(es) of health and safety law, as an alternative to, or in addition to, the

new offence.³ In order to promote consistency and properly reflect the seriousness of the offending involved, this advice provides guidance on sentencing for both corporate manslaughter and breaches of health and safety law resulting in death where they are committed by organisations.⁴

4. Between 1996 and 2006, 2721 workers and 4312 members of the public were killed in work-related or public incidents in the United Kingdom.⁵ The rate of fatal injury to workers has fallen considerably over the last twenty years, and is now the lowest in the European Union.⁶ The UK has a comprehensive legislative framework regulating risks to health and safety arising from work activity, with which the conscientious employer will comply. The Health and Safety Executive (HSE) can issue an improvement notice if inspectors consider that legislation is being contravened, or a

¹ The offence is corporate manslaughter in England and Wales and in Northern Ireland and corporate homicide in Scotland.

² Except s.10 (publicity orders), implementation of which has been delayed pending publication of the Council's sentencing guideline.

³ Where a work-related death occurs and evidence indicates that a serious criminal offence other than a health and safety offence may have been committed, the police, Crown Prosecution Service and the Health and Safety Executive, local authority or other enforcing authority must liaise with each other when making decisions regarding the investigation, charging and prosecution of offences. This may result in prosecution by both the CPS and the HSE: *Work-related deaths: A protocol for liaison*; HSE (2003); www.hse.gov.uk.

⁴ The Sentencing Guidelines Council has recently issued guidance on sentencing for all health and safety offences in magistrates' courts: *Magistrates' Court Sentencing Guidelines*, published May 2008; www.sentencing-guidelines.gov.uk. In 2004-05, the HSE brought 862 prosecutions in magistrates' courts and 212 prosecutions in the Crown Court: Written Parliamentary Answer, 22 February 2007; *Hansard* Column 862W.

⁵ The latter figure includes acts of suicide and trespass on railway systems, which make up around two-thirds of these fatalities each year: Health and Safety Commission and National Statistics, *Statistics of fatal injuries 2006/07*; www.hse.gov.uk.

⁶ In 2003, the most recent year for which data are published across the EU, the average rate of workplace fatal injury was 2.5 deaths per 100,000 workers. The equivalent rate for the UK was 1.1; *ibid*.

prohibition notice if a work activity is creating the risk of injury.

5. The HSE claims that the majority of workplace deaths are preventable;⁷ it sees prosecution as an important deterrent against managing activities in a way that puts lives at risk, as well as leading to an appropriate punishment where the failures of an organisation have, in fact, resulted in death. The statutory provisions considered in this advice extend beyond the workplace and to relationships beyond that of employer/employee, and may include the wider public.
6. Very few organisations were prosecuted for an offence of manslaughter by gross negligence,⁸ and conviction was considered to be almost impossible where a large organisation was involved. The main difficulty with the common law offence arose from the 'identification principle', according to which an organisation could be convicted only if a person identified as a 'directing mind' of the organisation was proved to have had the knowledge and fault required for conviction. This was possible where the defendant was a small company with a basic management structure, but in large organisations the lines of accountability are often unclear, with responsibilities delegated to lower level managers and/or shared between a number of individuals.
7. Problems with the law were highlighted by the lack of successful prosecutions following a

⁷ See e.g. *The role of managerial leadership in determining workplace safety outcomes* (2003), HSE; www.hse.gov.uk.

⁸ The Government stated in 2005 that there had been 34 prosecutions since 1992, and only six convictions: *Corporate Manslaughter: The Government's Draft Bill for Reform* (2005) Cm 6497, para. 9. The Centre for Corporate Accountability website lists seven such convictions: www.corporateaccountability.org.

number of public disasters in the 1980s,⁹ and led the Law Commission to propose a new statutory offence of corporate killing in 1996.¹⁰ A long process of consultation and policy development culminated in the CMA, which broadens the identification principle by introducing a test of 'senior management failure'; this aggregates the faults of a group of managers to facilitate prosecution. According to the Government, the new offence is designed to secure, in a wider range of situations, a conviction for a specific, serious criminal offence that properly reflects the gravity and consequences of the conduct involved in "the worst instances of management failure causing death".¹¹

8. In light of responses to the consultation, this advice deals separately with corporate manslaughter and offences under health and safety legislation. The first section sets out the Panel's proposals for sentencing for corporate manslaughter, with reference to the existing guidance on health and safety offences where it is relevant and useful. The second section of the advice sets out the proposals for sentencing for health and safety offences resulting in death, focussing on the relevant differences between these and offences of corporate manslaughter.

⁹ Most notably the substantial loss of life when the *Herald of Free Enterprise* ferry foundered on 6 March 1987; the trial collapsed after Turner J directed the jury to acquit the company of manslaughter, principally because there was insufficient evidence to convict any of the most senior individual defendants of that offence: (1990) 93 Cr App R 72.

¹⁰ Law Commission Report No 237, *Legislating the Criminal Code: Involuntary Manslaughter: Item 11 of the Sixth Programme of Law Reform: Criminal Law* (HC 171 1995-96).

¹¹ *Corporate Manslaughter: The Government's Draft Bill for Reform*, paras. 5-6; see fn. 8. The Regulatory Impact Assessment for the Bill estimates 10 to 13 additional prosecutions per year in the UK; www.homeoffice.gov.uk/documents/ria-corporate-manslaughter.pdf.

SECTION ONE: CORPORATE MANSLAUGHTER

A. THE OFFENCE

9. Section 1 of the CMA states that:

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised –

(a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

The legislation applies to all corporations and some unincorporated bodies such as trades unions, partnerships, employers' organisations and police forces. It also applies to most Crown bodies, although the CMA precludes a 'relevant duty of care' arising in respect of many of their activities.¹²

10. A gross breach is defined as conduct which falls far below what can reasonably be expected in the circumstances.¹³ An organisation will be guilty of the offence only if the way in which its activities are managed or organised by its senior managers is a substantial element of the breach.¹⁴ This test of 'senior management failure' is intended to ensure a wider application of the offence than was achieved under the common law, but

it is not yet clear to what extent it broadens the requirement for a 'directing mind' into an aggregation of the conduct of a group of managers.

11. In deciding whether or not there was a gross breach the jury must consider whether the organisation failed to comply with relevant health and safety legislation and, if so, how serious that failure was and how much of a risk of death it posed.¹⁵ The jury may also consider any relevant health and safety guidance and the extent to which there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged or produced tolerance of the relevant failure.¹⁶ These factors will also be relevant to the assessment of the seriousness of an offence for the purposes of sentencing.

¹² Activities excluded from the ambit of the offence include: public policy decisions; 'exclusively public functions'; certain military activities; policing and law enforcement; emergency service response; child protection and probation functions: ss.2-7. s.2(1) provides for a duty of care arising in respect of a person in custody, but the commencement of this section is subject to an affirmative resolution of both Houses of Parliament: s.27(2).

¹³ CMA 2007, s.1(4)(b).

¹⁴ *ibid.*, s.1(3).

¹⁵ *ibid.*, s.8(2).

¹⁶ *ibid.*, s.8(3).

B. SERIOUSNESS

12. The seriousness of an offence is determined by an assessment of the culpability of the offender and any actual, intended or foreseeable harm involved in the offence.¹⁷ The range of seriousness will be reflected primarily in the level of culpability, as the harm involved (the death of one or more person(s)) will always be at the highest level.

Culpability

13. The culpability of the offender should be the initial factor in determining the seriousness of any offence.¹⁸ Convictions for corporate manslaughter will always involve conduct that falls 'far below what can reasonably be expected of the organisation in the circumstances'.¹⁹ The offence generally will not involve any intention to cause harm, but in most cases harm (if not death) will have been foreseeable. The extent to which any breach of health and safety legislation ran the risk of causing death, and the degree to which this was reasonably foreseeable, will be highly relevant to the assessment of offender culpability.

Harm

14. An offence of corporate manslaughter involves actual harm of the highest level: the death of one or more persons. Where the offence has caused harm to more than one person, this

will aggravate the seriousness of the offence, as discussed below.

Aggravating and mitigating factors

15. A number of particular factors may aggravate or mitigate the seriousness of an offence of corporate manslaughter.²⁰ Several of the aggravating factors set out below, in particular in paragraphs 16 to 20, may show that the risk of causing death was reasonably foreseeable and, therefore, indicate higher culpability.

Factors indicating higher culpability

Failure to act upon advice, warnings, court orders, or statutory notices from regulatory authorities

16. A failure to act upon a warning from the regulatory authorities regarding the inadequacies of safety standards before the death occurred will indicate greater culpability.²¹ In 1997, for example, inspectors from the HSE had spoken to English Brothers Ltd construction company about a gang foreman working without the correct safety equipment. Nothing was done to improve the situation, and two years later the same employee fell through a fragile roof to his death. The company pleaded guilty to manslaughter under the common law,²² and was fined £25,000.²³

¹⁷ Criminal Justice Act 2003, s.143.

¹⁸ SGC Guideline, *Overarching Principles: Seriousness* (2004); www.sentencing-guidelines.gov.uk.

¹⁹ The offence of causing death by dangerous driving involves a similar standard of liability, being 'driving that falls far below what would be expected of a competent and careful driver': Road Traffic Act 1988, s.2A. See the joint Parliamentary Select Committee report on the Draft Corporate Manslaughter Bill (HC 540 2005-06), para. 174.

²⁰ See Annex B for the Council's list of general aggravating and mitigating factors. Where there is a guilty plea to an offence under the HSWA it is now common practice for the prosecution to serve a 'Friskies schedule', setting out the aggravating and mitigating features of the case for agreement with the defendant. It is not yet known whether or not this practice will be adopted in relation to offences under the CMA.

²¹ *Howe and Son (Engineers) Ltd* [1999] 2 Cr App R (S) 37.

²² See para. 6 above.

²³ www.corporateaccountability.org.

17. Other types of warning may include previous incidents of a similar nature to which an organisation should have responded;²⁴ failure to act despite the imposition of a remedy order by the court, or of an improvement or prohibition notice by the regulatory authorities, is particularly serious. Failure to respond to more than one warning will make an offence of corporate manslaughter more serious. Where the main element of the gross breach is such a failure or failures, care must be exercised to avoid 'double-counting' this as an aggravating factor.

Failure to heed relevant concerns of employees or others

18. Specific warnings may originate from sources other than the authorities and, if unheeded, also may indicate greater culpability where it is apparent that action should have been taken. The first company to be convicted of manslaughter under the common law was OLL Ltd, which operated an activity centre in Lyme Regis. In 1992 two instructors resigned in protest at poor safety standards, one warning the managing director in writing that lives might be endangered if standards were not improved. A year later four school pupils drowned during a canoeing trip. The company was fined £60,000 and the director was sentenced to three years imprisonment, reduced to two years on appeal.²⁵ Again, a failure to respond on more than one occasion will make an offence of corporate manslaughter more serious. Where the main element of the gross breach is such a failure or failures, care must be exercised to avoid

'double-counting' this as an aggravating factor.

Action or lack of action due to financial or other inappropriate motive(s)

19. An offence will be more serious where it was the result of a deliberate act or omission on the part of senior management who, having weighed up the options, chose to take a risk or proceeded in the knowledge of the risks being taken. If the appropriate standard of care has been breached deliberately with a view to profit, this will be a seriously aggravating feature.²⁶ For example, in 2004 Keymark Services haulage company pleaded guilty to common law manslaughter after one of its lorry drivers fell asleep on the motorway and collided with seven vehicles, killing himself and two other drivers. The subsequent investigation revealed that employees regularly tampered with tachographs and falsified records in order to work grossly excessive hours. This conduct appeared to be financially motivated.²⁷ The company was fined a total of £50,000 for both manslaughter and health and safety offences; the managing director was sentenced to 7 years imprisonment.²⁸ This is one of the longest sentences imposed for the common law offence,²⁹ reflecting the gravity of risking death in order to profit financially.

²⁶ *Howe* [1999] 2 Cr App R (S) 37, *Balfour Beatty Rail Infrastructure Services Ltd* [2007] 1 Cr App R (S) 370.

²⁷ news.bbc.co.uk/1/hi/england/4066331.stm.

²⁸ www.northants.police.uk/extranet2/default.asp?action=article&ID=6633.

²⁹ Following the Tebay rail deaths in 2004 the owner and operator of the machinery company responsible was sentenced to 9 years, reduced to 7 on appeal: *Connolly* [2007] EWCA Crim 790. The jury found that the defendant had deliberately disabled the braking system and then concealed the disablement. The motive for this conduct was said by Holland J to be "solely profit", and this was the first aggravating factor mentioned by the judge when sentencing the defendant at first instance.

²⁴ As the HSE notes in relation to sentencing for health and safety offences: www.hse.gov.uk/enforce/enforcementguide/court/sentencing/factors.htm#P3_586. See further para. 84 below.

²⁵ *Kite* [1996] 2 Cr App R (S) 295.

20. Organisations such as charities and public bodies do not make profits, but might still deliberately compromise safety standards due to financial motives.

Offending organisation carrying out operations without an appropriate licence

21. Licensing systems exist to help ensure safety in the workplace for employees and other members of the public. Organisations working with hazardous substances such as asbestos or explosives, or in a hazardous industry such as construction or diving, are generally required to hold a relevant licence. Operating without a required licence will usually constitute a separate offence, but will also increase culpability in relation to an offence of corporate manslaughter.

Marked or endemic corporate culture encouraging or producing tolerance of breach of duty of care

22. Under the CMA, factors that the jury may consider when deciding whether a gross breach has been committed include whether there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged or produced tolerance of the relevant failure.³⁰ A factor for consideration may be the absence of a clear process through which an employee can bring safety concerns to the attention of the organisation. Where such a corporate culture is particularly marked or pervades the entire organisation, this may aggravate an offence of corporate manslaughter. This type of culture aggravated the offences of manslaughter committed under the common law by Keymark Services (see above), where every driver employed by the company was

found to have been involved in falsifying records. The sentencing judge is reported to have described the scale of the offence(s) as "shocking", saying it was "hard to imagine a more serious case of its type".³¹

Exposing vulnerable employees to unsafe practices

23. Where an organisation has employed workers who are vulnerable, for example due to language difficulties, financial hardship, and/or uncertain or illegal immigrant status, and has exposed them to unsafe working practices, this will aggravate an offence of corporate manslaughter.

Failure to cooperate with authorities after the offence

24. Where a person has died, the organisation involved will be expected to cooperate with the relevant authorities in investigating and improving health and safety policy and practices; failure to do so will aggravate the offence.

Factors indicating a greater degree of harm

More than one person killed as a result of the offence

25. In *Balfour Beatty* the Court stated that an offence under the Health and Safety at Work etc Act 1974 (HSWA) involving more than one death must be regarded as more serious, by analogy with cases of causing death by dangerous driving.³² This factor also aggravates an offence of corporate manslaughter, as it is clear that the level of

³⁰ CMA 2007, s.8(3).

³¹ See fn. 27 above.

³² This factor and the others referred to as aggravating an offence of causing death by dangerous driving would aggravate any 'death by driving' offence: SGC Guideline: *Causing death by driving* (2008); www.sentencing-guidelines.gov.uk.

harm is higher where more than one death has resulted. However, whilst some offences obviously produce a risk of harm to a large number of people, in others the number of deaths likely to result is not so obvious and may sometimes be a matter of chance. Offences will be most serious where a number of deaths occur *and* that outcome would reasonably have been foreseeable.

Serious injury caused to one or more other(s), in addition to the death(s)

26. As well as the death caused by the offence, there may be serious injury caused to other people. Indeed, it is often a matter of chance whether or not the injuries caused by work-related or public incidents are so severe as to result in death. It is clear that such injuries increase the harm caused by the offence and so increase the seriousness of an offence of corporate manslaughter.

Factor indicating lower culpability

Unusual or abnormal behaviour of victim or third party contributed to the offence

27. Although the immediate cause of many safety-related incidents at work is employee behaviour, the HSE is of the view that such behaviour usually stems from organisational failures which are the responsibility of management, such as inadequate training or supervision of employees.³³ Under the CMA, senior management failure must have been a substantial cause of the breach of the duty of care, and this requirement is designed to exclude liability of an organisation for "immediate, operational negligence causing death or indeed for the unpredictable, maverick

acts of its employees".³⁴ However, even in those cases there still may be evidence of senior management failure, leading to convictions for corporate manslaughter. Where the immediate failure of the victim or a third party (either of which may be an employee, a person in some other form of contractual relationship with the offending organisation, or a member of the public) contributed to the offence, this will only mitigate seriousness where those actions were abnormal or unusual.

Offender mitigation

Prompt and extensive remedial action

28. As mentioned above, the organisation will be expected to cooperate with the relevant authorities as well as taking any necessary remedial action and, generally, this should not be regarded as mitigation. However, if the offending organisation has taken prompt action and gone to considerable lengths, exceeding what was necessary to remedy the safety failures specific to the offence, this should be taken into account.

Good previous safety record

29. A good safety record is one of the mitigating factors listed in *Howe* and endorsed in *Balfour Beatty* as relevant to offences under the HSWA. However, an organisation convicted under the CMA will have been found to have committed a gross breach of its duty of care, in the light of which a good safety record is of minimal relevance.

³³ *Successful health and safety management*, HSE (1997).

³⁴ *Corporate Manslaughter: The Government's Draft Bill for Reform*, para. 26; see fn. 8.

Summary

30. The primary factors in assessing the seriousness of an offence of corporate manslaughter are the extent to which it was a deliberate breach of the organisation's duty of care, and the extent of the risk of death created by that breach. The following aggravating or mitigating factors are relevant:

Factors indicating higher culpability

- failure to act upon advice, warnings, court orders, or statutory notices from regulatory authorities
- failure to heed relevant concerns of employees or others
- action or lack of action due to financial or other inappropriate motive
- offending organisation carrying out operations without an appropriate licence
- marked or endemic corporate culture encouraging or producing tolerance of breach of duty of care
- exposing vulnerable employees to unsafe practices
- failure to cooperate with authorities after the offence

Factors indicating a greater degree of harm

- more than one person killed as a result of the offence
- serious injury caused to one or more other(s), in addition to the death(s)

Factor indicating lower culpability

- unusual or abnormal behaviour of victim or third party contributed to the offence

Offender mitigation

- prompt and extensive remedial action
- good previous safety record (minimal relevance)

C. AIMS OF SENTENCING

31. There are three sanctions available to the court when sentencing for the new offence of corporate manslaughter: an unlimited fine, a remedial order and a publicity order. The availability of a range of sanctions enables a court to further all of the purposes of sentencing set out in the Criminal Justice Act (CJA) 2003: punishment of offenders and reduction of crime through the punitive and deterrent effects of fines and publicity orders, reform and rehabilitation of offenders through remedial orders, the protection of the public through both deterrence and remedial action, and reparation by offenders to those affected by the offence through a compensation order³⁵ and possibly a remedial order.³⁶
32. The offence of corporate manslaughter is intended to reflect the gravity of the most serious instances of management failure resulting in death.³⁷ The Panel considers the most important aim of sentencing to be to punish the offending organisation in a way that reflects serious public concern at the unnecessary loss of life. The possibility of a conviction for the new offence is also expected to provide an extra deterrent against unsafe working practices;³⁸ in contrast to individual offenders,³⁹ it is widely agreed that deterrent sentencing can be effective for corporate offenders.⁴⁰ Reform, rehabilitation and reparation are all subsidiary aims.
33. The court will be alert to the possibility of conflict between these aims. For example, a fine set at a high level to punish the offending organisation may make it difficult for the organisation to invest in improved health and safety practices that prevent further offending and protect the public. A publicity order that leads to loss of business may exacerbate this situation by indirectly reducing the resources of the organisation still further. These issues are discussed in more detail later in this advice.

Recommendation 1

The main aim of sentencing an organisation for an offence of corporate manslaughter is to impose a level of punishment that reflects serious public concern at the unnecessary loss of life.

³⁵ See paras. 74–76 below.

³⁶ See paras. 41–44 below.

³⁷ *Corporate Manslaughter: The Government's Draft Bill for Reform*, para. 32; see fn. 8.

³⁸ *ibid.*, para. 6.

³⁹ See e.g. Halliday report *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, Home Office (2001), which reviewed the evidence for the deterrent effects of sentencing individuals.

⁴⁰ Hazel Croall, *Penalties for Corporate Homicide*, published as Annex B to *Corporate Homicide: Expert Group Report*, Scottish Executive (2005), p. 24; www.scotland.gov.uk/Resource/Doc/76169/0019246.pdf.

D. THE SANCTIONS AVAILABLE AND THE PANEL'S PROPOSALS

Publicity orders

34. The CMA provides for a publicity order through which a court will be able to require an organisation convicted of corporate manslaughter to advertise the fact of its conviction, specified particulars of the offence, the amount of any fine imposed, and the terms of any remedial order that has been made.⁴¹ The order must specify the period within which the advert is to be placed and the court may require the organisation to supply evidence of compliance with the order to any enforcement authority it has consulted.⁴² Failure to comply with an order will be an offence punishable on indictment by an unlimited fine.⁴³ The normal expectation is that a publicity order would be imposed alongside a fine but there is nothing to prevent a court making a stand-alone order.
35. This is a new power in the UK,⁴⁴ although it is already available for various offences in Canada, the United States and Australia. A publicity order is considered to be an effective deterrent, potentially exceeding the effect of a fine, as it can impact upon the public reputation of an organisation through

⁴¹ CMA 2007, s.10(1).

⁴² *ibid.*, s.10(3).

⁴³ *ibid.*, s.10(4).

⁴⁴ Similar provisions were available in the 19th century that allowed courts to order the publication of certain details of convicted offenders and their offence. For example, in cases where the offender adulterated bread, statute provided for the offender's name, abode and offence to be published in a local newspaper, the cost of publication being deducted from the fine also imposed: London Bread Act 1822, s.10; Bread Act 1836, s.8; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003); www.agd.nsw.gov.au.

damage to consumer confidence, market share and equity value. The HSE's 'name and shame' database launched in 2000 serves a similar purpose in relation to health and safety offences, providing a public record of all successful prosecutions and the names of convicted companies.

36. Prior to imposing an order the court must ascertain the views of the appropriate enforcement authority, and in deciding on the terms of the order it must consider any representations made by the prosecution or defence.⁴⁵ In practice, it is anticipated that the content of the order usually will be suggested to the court by the enforcement authority or prosecution following consultation with the victim's family, although it is for the court to decide upon the appropriate wording. This advice does not therefore offer guidance as to the content of the order.

Whether an order should be made

37. The order is primarily intended as an additional deterrent designed to put offending organisations at a disadvantage in comparison with competitors who comply with the law, so an order would be appropriate in most cases where the offending organisation is operating in a competitive market. However, a publicity order may also be a particularly appropriate disposal where the offending organisation is publicly funded, as such an order could be more effective than the fine in ensuring that those responsible for governance are properly aware of the need for a safe environment. Even though a case may have already attracted media attention, a publicity order will ensure that the relevant details are

⁴⁵ CMA 2007, s.10(2).

published in a comprehensive and accurate form and in a way that is designed to reach the attention of all interested parties.

38. Therefore the Panel considers that a publicity order normally should be imposed following conviction for an offence of corporate manslaughter. It would be inappropriate only in exceptional circumstances, for example where it would genuinely threaten national security.

The extent of publicity

39. A court may order that the details of an offence are published in any 'specified manner', giving the court scope to ensure that the publicity reaches its intended audience. In light of the range of organisations to which the CMA applies, the Panel considers that suggesting minimum standards for the extent of publicity is more appropriate than providing detailed guidance. It is suggested that a publicity order will usually include requirements for the offending organisation to place, within a specified period:

- a quarter-page advertisement in a local or regional newspaper, in the case of an organisation operating in one area; or
- an eighth-page advertisement in three specified national daily newspapers, in the case of an organisation operating nationally; and
- an eighth-page notice in a relevant trade publication; and
- a prominent notice in the organisation's annual report (also in electronic format where applicable); and
- where applicable, a notice on the homepage of the organisation's website for a minimum period of three months.

This is not an exhaustive list and it is open to the court to decide on other additional ways in which information should be published, for example by an email to shareholders where appropriate.

Recommendation 2

When sentencing an organisation for an offence of corporate manslaughter, a court normally should impose a publicity order requiring the details to be published in the recommended manner.

Effect on overall sentence

40. The requirements of a publicity order will entail both direct and indirect costs for the offending organisation; the direct costs of placing the advertisements should be easily calculable, but the indirect costs in the form of loss of custom and/or investment are potentially much larger and more difficult to estimate. However, as the Panel's proposed starting points and ranges for the financial penalty are based on the premise that a publicity order normally will be imposed, the court should not need to give any further consideration to the effect of such an order on the overall sentence.

Recommendation 3

The making of a publicity order does not justify a reduction in the level of fine imposed on an organisation for an offence of corporate manslaughter.

Remedial orders

41. The CMA provides for rehabilitation of the offending organisation through a remedial order, setting out steps to be taken to ensure

that the failures that led to the death are addressed. The order may be made only following application by the prosecutor.⁴⁶ Failure to comply with such an order is an offence punishable on indictment by an unlimited fine. The availability of this sanction has been widely welcomed, even though the similar order available for offences under the HSWA⁴⁷ is itself rarely used as, by the time an organisation is sentenced for an offence, the regulatory authorities are likely to have taken any appropriate action.

42. The remedial order will provide an additional safeguarding power for cases where the offending organisation has failed to respond to other interventions, or where the offence discloses a deficiency in the organisation's health and safety policies, systems or practices. The Panel has considered whether the order could be used to require the offending organisation to take further steps such as disciplinary action against individual employees, but it has concluded that this would not be appropriate in light of the corporate nature of the offence. Individuals can be prosecuted separately under the common law or the HSWA.
43. As mentioned above in relation to a publicity order, a remedial order may also be particularly appropriate where the organisation is publicly funded, as such an order could be more effective than the fine in ensuring that those responsible for governance are properly aware of the need for a safe environment. The Panel does not consider it to be necessary to give further guidance on the situations in which

⁴⁶ CMA 2007, s.9(2). The application must specify terms for the proposed order, but the court is not restricted to those terms in making the order.

⁴⁷ s.42.

it would be appropriate for a court to impose an order. As a remedial order will be imposed only after consultation and will be highly case-specific, the Panel also does not consider it necessary to advise on the content of such an order.

44. As a remedial order is rehabilitative rather than punitive, and requires the offending organisation to take steps to comply with the health and safety standards already required by law, the Panel considers that the costs involved in complying with a remedial order should not lead to a corresponding decrease in any fine imposed for the offence. Any reduction in the fine would reward unfairly the few organisations that have resisted compliance with those standards, and would lead to inequitable treatment of the majority of offending organisations that take remedial action before the point of sentence.

Recommendation 4

The making of a remedial order does not justify a reduction in the level of fine imposed on an organisation for an offence of corporate manslaughter.

Fines

45. The maximum fine is unlimited for offences under the CMA. The basic approach to fixing a fine for any type of offence is the same whether the offender is an organisation or an individual. The amount of the fine must reflect the seriousness of the offence⁴⁸ and the court must take into account the financial circumstances of the offender.⁴⁹ The information about financial circumstances may have the effect of either increasing

⁴⁸ CJA 2003, s.164(2).

⁴⁹ *ibid.*, s.164(3).

or decreasing the amount of the fine.⁵⁰ Considerations that may arise where the offending organisation is a publicly funded body or third sector organisation are addressed below.⁵¹

Current practice

46. Fines imposed on organisations for offences of manslaughter by gross negligence and for offences under the HSWA involving death have been criticised as being too low in relation to the harm and culpability concerned.⁵² The information available on current practice is very limited: the CMA has only recently come into force, and the recording of sentences under the common law did not distinguish manslaughter by gross negligence from other types of manslaughter. The HSE provides some data on fines imposed following work-related fatalities, but this does not distinguish between individual offenders and organisations.
47. The fines imposed in cases of corporate manslaughter under the common law of which we are aware ranged from £4,000 to £90,000 (the latter also including fines for health and safety offences). It should be noted that the offending organisations were all small companies, as the identification principle referred to above⁵³ effectively prevented convictions of larger organisations. The latter have instead been prosecuted under the HSWA. Leaving aside the exceptional cases mentioned below, fines for corporate offences

under the HSWA involving death appear to range from £15,000 to £750,000.⁵⁴ When both corporate and individual convictions are taken into account, the average fine imposed following work-related fatalities in the UK in 2004/05 was £29,867.⁵⁵

48. Over the last decade, high-profile health and safety cases involving multiple deaths have resulted in increasingly high fines. Great Western Trains was fined £1.5 million following the 1997 Southall train crash in which seven people died and 150 were injured. The train collision at Ladbroke Grove in which 31 people died and over 400 were injured in 1999 resulted in fines of £2 million for Thames Trains and £4 million for Network Rail.⁵⁶ Following the Hatfield train derailment in 2000, in which four people died and 102 were injured, Network Rail was fined £3.5 million and maintenance firm Balfour Beatty was fined £7.5 million.⁵⁷

Aims of the fine

Reflecting serious public concern at the unnecessary loss of life

49. While it is not possible to incorporate a financial measure of the value of human life in the fine imposed for an offence,⁵⁸ the Court stated in *Howe* that the fine should “reflect public disquiet at the unnecessary loss of life” where a death has occurred. In *Balfour Beatty*

⁵⁰ *ibid.*, s.164(4).

⁵¹ See paras. 70–73.

⁵² In *Howe* [1999] 2 Cr App R (S) 37, for example, the Court acknowledged that fines were too low for health and safety offences in general.

⁵³ See para. 6.

⁵⁴ Gerard Forlin and Michael Appleby, *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (2003), pp. 47–55.

⁵⁵ *Health and Safety Offences and Penalties 2004/05*, HSE; www.hse.gov.uk.

⁵⁶ Formerly Railtrack.

⁵⁷ This was originally £10 million but was reduced upon appeal: *Balfour Beatty Rail Infrastructure Services Ltd* [2007] 1 Cr App R (S) 370.

⁵⁸ *Friskies Petcare Ltd* [2000] 2 Cr App R (S) 401.

the Court said that the fine must reflect both the degree of fault and the consequences of the breach so as to raise appropriate concern on the part of any shareholders. As an offence under the CMA will involve a gross breach of an organisation's duty of care resulting in the highest degree of harm, the Panel considers the reflection of serious public concern at the unnecessary loss of life to be the main aim of the fine.

Encouraging future compliance with safety standards

50. In *Balfour Beatty* the Court also endorsed the statement in *Howe* that the fine for an offence under the HSWA involving death needs to be large enough to 'bring home' the need to achieve a safe environment for employees and the public, to those responsible for the governance of the organisation. As well as encouraging the offending organisation to comply with its legal duties in the future, the fine may encourage other organisations to ensure they are providing a safe environment. This is also an important aim for a fine imposed as a result of corporate manslaughter.

Eliminating financial benefit

51. A more specific approach has been suggested as providing an individual and general deterrent from offending. The Macrory review of regulatory penalties recommended that these should aim to eliminate any financial gain or benefit resulting from regulatory non-compliance.⁵⁹ If the expected penalty cost does not outweigh the expected gain from the offence, an organisation might choose to take the risk of being detected and prosecuted.

⁵⁹ Richard Macrory, *Regulatory Justice: Making Sanctions Effective* (2006), pp. 29-30; www.cabinetoffice.gov.uk/regulation/reviewing_regulation/penalties/index.asp.

52. The Panel has previously stated that, in principle, it should not be cheaper to offend than to prevent the commission of an offence,⁶⁰ and this is extremely unlikely to be the outcome in the case of corporate manslaughter if the proposed fine levels are implemented. It can be very difficult to make an accurate assessment of the amount of savings or profits resulting from the failures giving rise to an offence, but, where such information is available, it is the responsibility of the prosecution to present this to the court. The court should then make an assessment of the financial benefit and ensure that an equivalent additional sum is added to the fine as calculated below. However, it is possible that the cost of any remedial action, whether carried out before conviction or as the result of a remedial order, may indirectly eliminate any financial benefits and this may need to be taken into account when calculating the fine.

Summary

53. In summary, the aims of the fine described above require that the amount should be sufficient:

- a) primarily to reflect serious public concern at the unnecessary loss of life;
- b) also to ensure that those responsible for the governance of this and other organisations are properly aware of the need for a safe environment; and
- c) in addition, to eliminate any financial benefit from the offence where possible.

⁶⁰ Sentencing Advisory Panel, *Advice on Environmental Offences* (2000), para.16; www.sentencing-guidelines.gov.uk.

Recommendation 5

As well as reflecting serious public concern at the unnecessary loss of life, a fine for corporate manslaughter should aim to encourage future safety and, in addition, to eliminate any financial benefit resulting from the offence where possible.

Calculating the fine

54. In order to fulfil the aims set out above, a consistent method of calculating the fine, which both reflects the seriousness of the offence and takes account of the financial circumstances of the offending organisation, is needed. Consistency of *approach* rather than *outcome* (i.e. quantum) is the aim, as the organisation's ability to pay must be taken into account.
55. As a general principle the Panel has previously stated that fines should be devised to have an equal economic impact on organisations of different sizes.⁶¹ Such an approach requires an agreed method of calculation to determine an organisation's ability to pay. The principal measures by which this ability can be assessed are turnover, profitability and liquidity.
56. Turnover is the aggregate of all sums of money received by an organisation during the course of its business over an annual period. Of the three measures mentioned above it compares the most closely with the income of an individual, which is typically the primary measure used to assess an individual offender's ability to pay a fine. It is also the measure used by both the Office of Fair
- Trading (OFT)⁶² and the European Commission⁶³ when imposing financial penalties on companies that have infringed competition law. In 2005 the joint Parliamentary Select Committee report on the Draft Corporate Manslaughter Bill noted that many of their consultees had suggested 10 per cent of annual turnover as an appropriate fine for the new offence.⁶⁴
57. Several responses to the Panel's consultation suggested that profitability is a better measure of ability to pay, but the Panel continues to believe that turnover is a fairer and more stable measure of the financial resources of an organisation. Profits can fluctuate and can also be redirected to fund activities and rewards that are not a fundamental requirement of the business operation, whilst turnover is much more difficult for a company to manipulate. However, although the Panel continues to take the view that annual turnover should be the primary measure of an organisation's ability to pay a fine, where the defence is able to demonstrate that the organisation operates in an industry with genuinely and endemically low profitability (rather than profits that fluctuate or that have fallen after the offence), this may be taken into account in order to avoid injustice. A caveat to this is that the court should always consider whether the organisation has any

⁶¹ Sentencing Advisory Panel, *Advice on Environmental Offences* (2000), para.22; www.sentencing-guidelines.gov.uk

⁶² The OFT calculates the starting point with regard to the seriousness of the infringement and the company's turnover in the product market and geographic market affected by the infringement in the last business year. In any event the fine must not exceed ten per cent of the company's worldwide turnover: *OFT's guidance as to the appropriate amount of a penalty* (2004); www.of.gov.uk.

⁶³ Ten per cent of global turnover is the maximum fine that the European Commission can impose for breaches of European Community competition law: Regulation 1/2003; www.europa.eu.

⁶⁴ Para. 264; see fn. 19.

assets that could be realised in order to be able to pay the proposed level of fine.

58. Where the offending organisation provides evidence of low liquidity, the court may decide to increase the timescale within which the fine must be paid, but should not reduce the level of the fine. The fact that an organisation is highly profitable should not lead a court to impose a higher penalty although any profits generated by the offence should, if possible, be eliminated (as noted in paragraph 19 above, where profit has been the motive for the offence this constitutes serious aggravation).
59. The Panel has considered whether there is a minimum amount, in monetary terms rather than a percentage of turnover, below which a fine would never be appropriate. In view of the wide range of organisations and financial circumstances, the Panel has concluded that setting a minimum fine is not possible, but a court should always be mindful of the need to punish the offending organisation and to reflect serious public concern at the unnecessary loss of life.

The Panel's proposals

60. The proposed guideline for sentencing for an offence of corporate manslaughter is based on the seriousness of the breach of the duty of care, and the extent of the risk of death created by that failure. The starting points relate to offences committed by a first time offender pleading not guilty.⁶⁵ Both the starting points and ranges⁶⁶ are expressed as percentages of the organisation's

⁶⁵ For guidance on the appropriate discount to be made where the offending organisation has entered a guilty plea, see the revised Council Guideline: *Reduction in Sentence for a Guilty Plea* (2007); www.sentencing-guidelines.gov.uk.

⁶⁶ See Annex A for explanations of 'starting point', 'range' and 'first time offender'.

average annual turnover; the average will usually be taken from the three years prior to sentencing (see paragraph 65 below). The relevant turnover is that of the company convicted of the offence or, where the offending organisation is a holding company, the consolidated turnover of the group of companies of which it is the holding company. The proposed fine levels have been calculated on the basis that a publicity order normally will be imposed on the offending organisation.

61. Once the appropriate starting point has been selected, the court will take into account any aggravating and/or mitigating factors,⁶⁷ arriving at a fine which will normally fall within the relevant range. The ranges are designed to accommodate variations in seriousness within the relevant level, rather than differences in financial resources between offending organisations. Significant aggravating factors (including previous convictions) or mitigating factors may take the fine outside the range.
62. Where the offending organisation is very large, the Panel's approach would result in larger fines than have been imposed previously by the courts. It has been suggested that even the largest fine imposed to date for a health and safety offence in the UK could have been easily absorbed, due to the size of the offending organisation.⁶⁸

⁶⁷ Factors of particular relevance to corporate manslaughter are summarised at para. 30 above.

⁶⁸ In that Scottish case, Transco was fined £15 million for breaches of regulations which led to the deaths of four members of the same family in a gas explosion, representing 5 per cent of the company's after-tax profits and less than one per cent of annual turnover. The offending organisation did respond appropriately to the incident, but the deterrent value of the fine in itself has been questioned: *Regulatory Justice: Making Sanctions Effective*, para. 1.23; see fn. 59.

63. A fine expressed as a percentage of average annual turnover is designed to have an equal economic impact on all sizes of organisation, in order to reflect the seriousness of the offence even where the organisation has large financial resources. Although this approach would result in fines that might appear to be disparate, it is not the absolute monetary value but the economic impact of the fine on organisations with different financial resources that is crucial.

Recommendation 6

In order to achieve an equal economic impact on offending organisations of different sizes, the proposed starting points and ranges for offences of corporate manslaughter are expressed as percentages of the offending organisation's average annual turnover during the three years prior to sentencing. The relevant turnover is that of the company convicted of the offence or, where the offending organisation is a holding company, the consolidated turnover of the group of companies of which it is the holding company.

Recommendation 7

Where an organisation convicted of corporate manslaughter is operating in an industry with endemically low profitability, this may be taken into account in order to avoid injustice. However the court may decide against lowering the fine if the organisation has assets that could be realised in order to pay.

Provision of financial information

64. It is common practice for an organisation to supply its accounts to the court in order to demonstrate its ability to pay a fine. If it fails to do so, the court may draw adverse inferences, and may make such determination of the offending organisation's financial

circumstances as it thinks fit.⁶⁹ The Panel proposes that an organisation should be expected to provide comprehensive accounts for a three-year period, to enable the court to make an accurate assessment of its financial status. Where the offending organisation is a holding company, it will need to provide the consolidated accounts of the group of companies. Where the organisation does not provide the required accounts, a court should ask if the prosecutor is able to supply the information.⁷⁰

65. The period for which accounts are requested will usually be the last three financial years, but the court should be alert to the possibility that the organisation may try to rearrange its finances in order to receive a lower fine, particularly where several years have passed between the offence and the imposition of sentence. Where three years or more have passed in the interim, the court may also wish to examine accounts for the year of the offence.

Recommendation 8

An organisation convicted of corporate manslaughter should be expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. Where three years or more have passed between the offence and the imposition of sentence, the court may also wish to examine accounts for the year of the offence.

⁶⁹ CJA 2003, s.164(5)(iii).

⁷⁰ Where a court considers it necessary to ask a prosecutor to provide information about the offending organisation's financial circumstances, the costs of doing so should be awarded against the offending organisation.

Potential reasons for deviating from the proposed fine levels

The 'deterrence trap'

66. As mentioned above, a fine set at a high level may hinder other aims of sentencing – the prevention of offending and the protection of the public – by reducing the resources available to the organisation to invest in improved health and safety practices. This 'deterrence trap' is of particular relevance where the organisation operates in an industry with very small profit margins, and is therefore less able to absorb the impact of paying a large fine. As stated in paragraph 57 above, in such a case the court may decide to lower the fine, unless the offending organisation's assets indicate a ready ability to pay. This issue is also of importance where the offending organisation is a publicly funded body or third sector organisation (see paragraphs 71 and 73 below).

The 'spill-over' effect

67. Another concern associated with large fines is the potential 'spill-over' effect on third parties such as employees, customers, and shareholders: wage levels and jobs may be threatened; customers may be faced with increased prices for goods or services (in some cases with little option of taking their custom elsewhere), or reduced services where the offending organisation is a public body; shareholders' investments may be affected.

68. The Panel is of the view that, as shareholders have taken a risk by investing, may actually profit from offences, and can influence management decisions,⁷¹ they should not be

⁷¹ Hazel Croall, *Penalties for Corporate Homicide*; see fn. 40.

protected from the effect of those decisions by a reduction in the fine. Similarly, a potential impact on customers will not usually justify a reduced fine, unless the offending organisation is a publicly funded body or third sector organisation (see paragraphs 71 and 73 below).

69. However, it may be appropriate for the court to take into account any adverse effects on jobs, particularly where individuals have also been convicted of offences and where the organisation has not, in fact, benefited from the conduct.⁷² In most circumstances the court will wish to avoid imposing a fine that is so large as to imperil the commercial survival of the organisation; where the size of the fine threatens jobs or the existence of the organisation, the court may wish to consider spreading the payment of the fine. The Court of Appeal has established that, where appropriate, payment of the fine can be spread over a number of years.⁷³ Only where the fine would still imperil the commercial survival of the organisation, despite allowing time to pay, should the court consider reducing the fine; this may be particularly relevant in relation to publicly funded organisations. However, there may be cases of exceptional culpability where it would be appropriate to disregard the effect of the fine on the commercial survival of the offending organisation.

⁷² New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, para. 6.11; see fn. 44.

⁷³ *Rollco Screw & Rivet Co Ltd* [1999] 2 Cr App R (S) 436. In that case the Court reduced the payment period from six years and five months to five years and seven months.

Recommendation 9

Where the appropriate fine for an offence of corporate manslaughter will threaten jobs or the commercial survival of the organisation, the court may wish to consider spreading payment. Only if the commercial survival of the organisation would be inappropriately threatened despite the spreading of payment, should the court consider reducing the fine.

Publicly funded organisations

70. The CMA applies to most Crown bodies as well as other publicly funded bodies although, as it precludes a 'relevant duty of care' arising in respect of activities such as policing and law enforcement, emergency service response, certain military activities, and public policy decisions,⁷⁴ the scope for conviction is limited. The aims of the fine as discussed above⁷⁵ are just as important whether fining a public body or a private company, and the majority of respondents agreed that it is important that a body that has caused a death through a gross breach of its duty of care does not escape sanction.⁷⁶

71. However, where the offending organisation is funded from the public purse, the Panel recognises that the fine will be paid with public money; there is, therefore, a legitimate concern that any fine imposed on, for example, a local authority, hospital trust or police force may constitute an inefficient recycling of money or worse, if public services suffer as

⁷⁴ See further fn. 12 above.

⁷⁵ See paras. 49-53.

⁷⁶ This was also the view of a majority of those who responded to the Government's consultation on the Draft Corporate Manslaughter Bill and those who gave evidence to the joint Select Committee; see, respectively, the *Summary of Responses* at www.homeoffice.gov.uk/documents/cons-2005-corporate-manslaughter/draft-bill-responses-2005-cons, and fn. 19 above.

a result. In light of this, the fine may be of less significance in achieving the main aim of sentencing identified above; publicity and remedial orders are likely to have a greater impact (see paragraphs 37 and 43 above).

72. When calculating a fine, the concept of 'turnover' cannot be easily applied to a publicly funded body and the Panel has concluded that the percentages set out in the table below should instead relate to the offending organisation's gross revenue income,⁷⁷ which will be the relevant measure of its ability to pay a fine. However, once the provisional fine has been identified by reference to the table on page 23, the court should consider its potential impact on the provision of public services and whether this might justify a reduction in the size of the fine.

Third sector organisations

73. The concept of turnover is not readily applied to third sector organisations that reinvest any financial surpluses to further their objectives, such as charitable and voluntary bodies. These organisations rely on private donations and, in many cases, public funds, and often provide essential services to the public. The Panel considers that an approach similar to that outlined in the paragraph above also should be applied to third sector organisations.

⁷⁷ 'Gross revenue income' refers to all sources of income; it is intended to describe the equivalent to 'turnover' in relation to a commercial organisation. In the case of a local authority, for example, it will include funding from central government grants, council tax, and charges for leisure services. Different terms such as 'gross income' may commonly be used in relation to other bodies such as NHS trusts, but the relevant sum should always be the money that is available to the organisation to spend on the provision of services.

Recommendation 10

Where a publicly funded or third sector organisation is convicted of corporate manslaughter, the proposed starting points and ranges relate to the organisation's gross revenue income or equivalent. In such cases the court should consider the potential impact of the proposed fine on the provision of services by the organisation and whether this might justify a reduction in the size of the fine.

Factors to take into consideration

1. The following guideline applies to a first-time offending organisation convicted after a trial.
2. When assessing the seriousness of any offence, the court must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness⁷⁸ as well as those set out in the adjacent table as being particularly relevant to an offence of corporate manslaughter.
3. Every offence of corporate manslaughter involves a gross breach of a relevant duty of care. Where a main element in determining that a breach was a 'gross' breach is also found in the list of aggravating factors, the court must take care to avoid 'double counting' such an element.
4. The three levels of seriousness are distinguished by how likely it was that death would result. Some risk of death will have been reasonably foreseeable in all cases; the greater the risk of death that was created, the higher the culpability of that organisation.
5. The overlap between the ranges allows for the breadth of discretion necessary to accommodate circumstances where there are significant aggravating or, to a lesser degree, mitigating factors.
6. References to 'annual turnover' in the adjacent table refer to the average annual turnover of the organisation, or gross revenue income or equivalent in the case of a publicly funded or third sector body, during the three years prior to sentencing. Where three years or more have passed since the offence, the court may also wish to examine accounts for the year of the offence.
7. Where the prosecution presents information that failures giving rise to an offence have resulted in savings or profits, the court will make an assessment of any financial benefit and ensure that an equivalent additional sum is added to the fine. However, the court may need to take into account the cost of any remedial action, whether carried out before conviction or as the result of a remedial order, which may eliminate any financial benefit.

⁷⁸ See Annex B.

CORPORATE MANSLAUGHTER

Corporate manslaughter

Section 1(1) Corporate Manslaughter and Corporate Homicide Act 2007

Maximum Penalty: Unlimited fine, publicity order and/or a remedial order

Type/nature of activity	Fine range
Gross breach of duty of care creating very high risk of death	Starting point – 5% annual turnover Range – 2.5 – 10% annual turnover
Gross breach of duty of care creating high risk of death	Starting point – 3.5% annual turnover Range – 2 – 7% annual turnover
Gross breach of duty of care creating some risk of death	Starting point – 2% annual turnover Range – 1 – 4% annual turnover
Factors indicating higher culpability	Factor indicating lower culpability
<ol style="list-style-type: none"> 1. Failure to act upon advice, warnings, court orders, or statutory notices from regulatory authorities. 2. Failure to heed relevant concerns of employees or others. 3. Action or lack of action due to financial or other inappropriate motive(s). 4. Offending organisation carrying out operations without an appropriate licence. 5. Marked or endemic corporate culture encouraging or producing tolerance of breach of duty of care. 6. Exposing vulnerable employees to unsafe practices. 7. Failure to cooperate with authorities after the offence. 	<ol style="list-style-type: none"> 1. Unusual or abnormal behaviour of victim or third party contributed to the offence.
	Offender mitigation
	<ol style="list-style-type: none"> 1. Prompt and extensive remedial action. 2. Good previous safety record (minimal relevance).
Factors indicating greater degree of harm	
<ol style="list-style-type: none"> 1. More than one person killed as a result of the offence. 2. Serious injury caused to one or more other(s), in addition to the death(s). 	

Compensation orders

74. The court has the power to make an order requiring the organisation to pay compensation for any personal injury, loss or damage resulting from the offence,⁷⁹ and must give reasons for its decision if it does not make such an order.⁸⁰ A compensation order can be made in favour of the relatives and dependants of the deceased, in respect of bereavement and funeral expenses.⁸¹ An order in respect of funeral expenses can be made for the benefit of anyone who has incurred them,⁸² but compensation for bereavement can be made only in favour of persons who could claim damages for bereavement under the Fatal Accidents Act 1976,⁸³ namely the spouse or civil partner of the deceased or, in the case of a minor who was never married or a civil partner, his or her parents.⁸⁴ The maximum sum able to be awarded for bereavement under the Powers of Criminal Courts (Sentencing) Act 2000 is currently £11,800,⁸⁵ to be shared where the claimants are the parents of the deceased.
75. More than one person may have been killed as a result of the offence; others may have been injured. The amount of compensation should be such as the court considers appropriate, having regard to the offending organisation's means. Where both a fine and

a compensation order are appropriate but the offending organisation lacks the means to pay both, the compensation order will take priority. Compensation paid is deducted from any damages received in civil proceedings, so the existence of a pending civil claim should not in itself prevent the imposition of a compensation order.

76. Even though offences of corporate manslaughter are likely to be complex cases, as a matter of principle a court should make a compensation order wherever appropriate, in the knowledge that this will be taken into account if any damages are awarded subsequently in civil proceedings.

⁷⁹ Powers of Criminal Courts (Sentencing) Act (PCCSA) 2000, s.130(1).

⁸⁰ *ibid.*, s.130(4).

⁸¹ *ibid.*, s.130(1)(b).

⁸² *ibid.*, s.130(9).

⁸³ s.1A.

⁸⁴ In the case of an illegitimate minor, only the mother may make a claim under the Act: s.1A(2)(b)(ii).

⁸⁵ Damages for Bereavement (Variation of Sum) (England and Wales) Order (SI 2007/3489).

SECTION TWO: HEALTH AND SAFETY OFFENCES INVOLVING DEATH

A. THE OFFENCES

77. The new offence of corporate manslaughter is designed to complement rather than replace existing offences under the HSWA, the overarching legislation governing health and safety in the workplace in the United Kingdom.⁸⁶ Breaches of the HSWA or health and safety regulations are offences under section 33, punishable by an unlimited fine in the Crown Court. In a magistrates' court, breach of any of the general duties of an employer under sections 2 to 6 is punishable by a fine of up to £20,000; for most other offences, including breaches of health and safety regulations, the maximum fine is £5,000.⁸⁷ This advice applies only to offences committed by organisations and not individuals.⁸⁸
78. Most prosecutions under the HSWA are based on breaches of the general duties set out in sections 2 and 3. Section 2 states that it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees. Section 3 states that it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or

safety. There is a significant overlap between these statutory duties and the 'duty of care' referred to by the CMA.⁸⁹

⁸⁶ *Corporate Manslaughter: The Government's Draft Bill for Reform*, para. 5; see fn. 8.

⁸⁷ See fn. 4.

⁸⁸ The maximum fines are similar in the case of an individual, but for certain offences (for example operating without a licence) a custodial sentence is available, up to a maximum six months in a magistrates' court and two years in the Crown Court.

⁸⁹ For more detail on this point and commentary on the CMA as a whole see *A guide to the Corporate Manslaughter and Corporate Homicide Act 2007* (October 2007), Ministry of Justice; www.justice.gov.uk/docs/guidetomanslaughterhomicide07.pdf.

B. SERIOUSNESS

79. The basic approach to seriousness of an offence under the HSWA involving death is similar to the approach discussed above in relation to corporate manslaughter; to avoid repetition, this second section of the advice focuses on the differences between the two types of offence. Whilst corporate manslaughter is triable only upon indictment, health and safety offences are triable either way, indicating the wider range of seriousness that may be involved. This range is reflected in the level of culpability, as the harm involved (the death of one or more person(s)) is always at the highest level.

Culpability

80. Breaches of the duties under sections 2 and 3 HSWA involve failure to take all 'reasonably practicable' steps to ensure the safety of employees and/or the public. Therefore they will encompass a wider range of culpability than offences of corporate manslaughter, up to and possibly overlapping with the latter. For example, an offence under the HSWA may involve conduct falling far below the standard expected but the test of 'senior management failure'⁹⁰ may not be satisfied.
81. The critical factor will be the extent to which the conduct of the offending organisation created a risk of causing death or serious injury, and the degree to which this was reasonably foreseeable. A failure to keep pace with changing standards is likely to be one of the factors taken into account by the court, and it will be particularly significant whether the death was the result of an isolated breach of duty, of several breaches occurring at

around the same time, or of breaches that took place over a period of time.⁹¹

Harm

82. As is the case with corporate manslaughter, a breach of the HSWA of the type covered in this advice involves actual harm of the highest level: the death of one or more person. A greater degree of foreseeable or actual harm will aggravate the seriousness of the offence.

Aggravating and mitigating factors

83. Several of the aggravating and mitigating factors discussed above in relation to corporate manslaughter are also relevant to offences under the HSWA involving death; the aggravating factors referred to in paragraphs 84 to 86 below are again particularly relevant to whether the risk of causing death or serious injury was reasonably foreseeable. The paragraphs below focus on the differences between the two types of offence.⁹² The proposals for sentencing set out in the table on page 37 relate to a first time offending organisation pleading not guilty. However, where there is a guilty plea to an offence under the HSWA it is now common practice for the prosecution to serve a 'Friskies schedule',⁹³ setting out the aggravating and mitigating features of the case for agreement with the defendant.

⁹¹ *Howe* [1999] 2 Cr App R (S) 37; *Balfour Beatty Rail Infrastructure Services Ltd* [2007] 1 Cr App R (S) 370.

⁹² See Annex B for the Council's list of general aggravating and mitigating factors.

⁹³ The schedule has come to be known by this name since the decision in *Friskies Petcare Ltd* [2000] 2 Cr App R (S) 401, when the Court of Appeal recommended that the defence and prosecution should set out these features in advance.

⁹⁰ See para. 7 above.

Factors indicating higher culpability

Failure to act upon advice, warnings, court orders, or statutory notices from regulatory authorities

84. In *Howe*⁹⁴ the Court stated that a failure to act upon warnings from the regulatory authorities will indicate greater culpability. As mentioned above, such warnings may include previous incidents of a similar nature to which an organisation should have responded.⁹⁵ In 2001, for example, the London Borough of Hammersmith and Fulham was fined £350,000 for offences under the HSWA, following the death of two council tenants from carbon monoxide poisoning as a result of a faulty boiler that was overdue its annual safety check. The sentencing judge condemned the offending organisation for "prolonged dereliction of duty", noting that an earlier death in the same circumstances "provided the plainest salutary lesson imaginable", which regrettably had not been learned.⁹⁶ The fact that an offending organisation has failed to act upon advice or warnings may be a fundamental element of the *gross breach* that results in a charge of corporate manslaughter and the importance of avoiding 'double counting' a single failure as an aggravating factor is discussed in paragraphs 16 and 17. Where a health and safety offence is charged, the prosecution may not have to prove that the offending organisation failed to act upon advice or warnings, but any such failure will always make an offence more serious.

⁹⁴ [1999] 2 Cr App R (S) 37.

⁹⁵ As the HSE notes in relation to sentencing for health and safety offences: www.hse.gov.uk/enforce/enforcementguide/court/sentencing/factors.htm#P3_586.

⁹⁶ Gerard Forlin and Michael Appleby, *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (2003), p.53.

Failure to heed relevant concerns of employees or others

85. As is the case with the factor above, any such failure will aggravate an offence.

Action or lack of action due to financial or other inappropriate motive(s)

86. This will aggravate an offence under the HSWA involving death in the same way as it aggravates an offence of corporate manslaughter.⁹⁷

Offending organisation carrying out operations without an appropriate licence

87. This will aggravate an offence under the HSWA involving death in the same way as it aggravates an offence of corporate manslaughter.⁹⁸

Corporate culture encouraging or producing tolerance of breach of duty

88. In contrast with the CMA, there is no provision for the court to consider whether a corporate culture is likely to have encouraged or produced tolerance of the relevant failure when deciding whether an organisation has breached its duties under the HSWA. Since it is not part of the offence but is clearly relevant to culpability, the presence of such a corporate culture will aggravate the seriousness of a health and safety offence involving death.

Exposing vulnerable employees to unsafe practices

89. This will aggravate an offence under the HSWA involving death in the same way as it aggravates an offence of corporate manslaughter.⁹⁹

⁹⁷ See paras. 19-20 above.

⁹⁸ See para. 21 above.

⁹⁹ See para. 23 above.

Failure to cooperate with authorities after the offence

90. This will aggravate an offence under the HSWA involving death in the same way as it aggravates an offence of corporate manslaughter.¹⁰⁰

Factors indicating a greater degree of harm

More than one person killed as a result of the offence

91. This will aggravate an offence under the HSWA involving death in the same way as it aggravates an offence of corporate manslaughter.¹⁰¹

Serious injury caused to one or more other(s), in addition to the death(s)

92. This will aggravate an offence under the HSWA involving death in the same way as it aggravates an offence of corporate manslaughter.¹⁰²

Factors indicating lower culpability

Death resulted from an isolated lapse in safety standards

93. The seriousness of the offence will be mitigated where the death was the result of an isolated breach of the organisation's duty, rather than an ongoing breach or breaches that took place over a period of time.¹⁰³

Behaviour of victim or third party contributed to the offence

94. An act or failure by an employee will not provide a defence to a health and safety prosecution¹⁰⁴ if it has been proven that the organisation did not take all reasonably practical steps to avoid safety risks, through measures such as the training and supervision of employees. Nevertheless, if the failure of the victim or a third party – either of which may be an employee, a person in some other form of contractual relationship with the offending organisation, or a member of the public – has been a contributory factor it may be considered appropriate for this to mitigate the seriousness of an offence under the HSWA involving death. This factor may be of more relevance here than in relation to an offence of corporate manslaughter, as there is no requirement for 'senior management failure' under the HSWA.

Offender mitigation

Prompt and extensive remedial action

95. As mentioned above in relation to corporate manslaughter,¹⁰⁵ cooperation with the relevant authorities and any necessary remedial action are to be expected and, generally, should not be regarded as mitigation. However, if the offending organisation has taken prompt action and gone to considerable lengths, possibly exceeding what was necessary to remedy the safety failures specific to the offence, this should be taken into account.

¹⁰⁰ See para. 24 above.

¹⁰¹ See para. 25 above.

¹⁰² See para. 26 above.

¹⁰³ *Howe* [1999] 2 Cr App R (S) 37; *Balfour Beatty Rail Infrastructure Services Ltd* [2007] 1 Cr App R (S) 370.

¹⁰⁴ Management of Health and Safety at Work Regulations 1999 (SI 1999/3242), reg. 21.

¹⁰⁵ See para. 28 above.

Good previous safety record

96. One of the mitigating factors listed in *Howe* and endorsed in *Balfour Beatty* is a good safety record, and this may be of more relevance here than in relation to corporate manslaughter.

Summary

97. The primary factors in assessing the seriousness of an offence under the HSWA involving death are the extent to which the conduct of the offending organisation fell below the appropriate standard, and the extent of the risk of death created by that failure. The following aggravating or mitigating factors are relevant:

Factors indicating higher culpability

- failure to act upon advice, warnings, cautions, court orders, or statutory notices from regulatory authorities
- failure to heed relevant concerns of employees or others
- action or lack of action due to financial or other inappropriate motive(s)
- offending organisation carrying out operations without an appropriate licence
- corporate culture encouraging or producing tolerance of breach of duty
- exposing vulnerable employees to unsafe practices
- failure to cooperate with authorities after the offence

Factors indicating a greater degree of harm

- more than one person killed as a result of the offence
- serious injury to one or more other(s), in addition to the death(s)

Factors indicating lower culpability

- death resulting from an isolated lapse in safety standards
- behaviour of victim or third party contributed to the offence

Offender mitigation

- prompt and extensive remedial action
- good previous safety record

C. AIMS OF SENTENCING

98. When considering sentence for an offence under the HSWA resulting in death, the Crown Court may impose an unlimited fine and/or a remedy order;¹⁰⁶ the court has no power to make a publicity order, although the HSE website contains a public database of organisations convicted under the Act since 2000, which has become known as the 'name and shame' list.¹⁰⁷ Nonetheless the court is able to further all of the purposes of sentencing set out in the Criminal Justice Act (CJA) 2003: punishment of offenders and reduction of crime through the punitive and deterrent effects of fines, reform and rehabilitation of offenders through remedy orders, the protection of the public through both deterrence and remedial action, and reparation by offenders to those affected by the offence through a compensation order¹⁰⁸ and possibly a remedy order.¹⁰⁹
99. General and individual deterrence are the most important aims of prosecutions for regulatory offences under the HSWA, which is designed to protect employees and the wider public through improving future performance and promoting safety in the workplace. Punishing the offending organisation in a way that reflects serious concern at the unnecessary loss of life is also important but may not be as relevant here as it is under the CMA, as corporate manslaughter will involve a higher level of culpability at senior management level.¹¹⁰

¹⁰⁶ Under s.42, where it appears to the court that it is in the offending organisation's power to remedy any matters in respect of the offence, the court can (in addition to or instead of any other sentence) order the offending organisation to take steps to remedy those matters.

¹⁰⁷ Gerard Forlin and Michael Appleby, *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (2003), p. 56.

¹⁰⁸ See para. 116 below.

¹⁰⁹ See paras. 100-101 below.

¹¹⁰ See para. 10 above.

Recommendation 11

The main aim of sentencing an organisation for an offence under the HSWA involving death is to encourage safe working practices and the future safety of the public.

D. THE SANCTIONS AVAILABLE AND THE PANEL'S PROPOSALS

Remedy orders

100. As mentioned above, the remedy order available under the HSWA¹¹¹ is rarely used,¹¹² as by the time an organisation is sentenced for an offence, the regulatory authorities are likely to have taken any appropriate action. However, it provides an additional safeguarding power for a limited number of cases where the offending organisation has failed to respond to other interventions. For the reasons explained in relation to corporate manslaughter, the Panel does not consider it to be necessary to give guidance on the situations in which it would be appropriate for a court to impose this order, or on the content of such an order.
101. The Panel's approach to the effect on overall sentence is the same as that outlined above in relation to corporate manslaughter.

Recommendation 12

The making of a remedy order does not justify a reduction in the level of fine imposed for an offence under the HSWA involving death.

Fines

102. Given that a death has resulted, it is recommended that the offences considered in this advice should be sentenced in the Crown Court, where the maximum fine is unlimited. Many of the issues that arise in relation to the calculation of a fine are the same as those outlined above in relation to corporate manslaughter.

¹¹¹ s.42.

¹¹² Since 2002 six remedy orders have been issued by the courts in cases prosecuted by the HSE: www.hse.gov.uk/prosecutions.

Recommendation 13

Where an offence under the HSWA has resulted in the death of one or more person(s), the offence should be sentenced in the Crown Court.

Current practice

103. As noted above, fines imposed on organisations for offences under the HSWA involving death have been criticised as being too low in relation to the harm and culpability concerned,¹¹³ although there is little information available on current practice as the limited data available on fines imposed following work-related fatalities does not distinguish between individual offenders and organisations.
104. The average fine imposed following work-related fatalities in the UK in 2004/05 was £29,867.¹¹⁴ Fines for corporate offences under the HSWA involving death appear to range from £15,000 to £750,000¹¹⁵ in cases with a lower profile but, as noted above, over the last decade highly publicised rail disasters involving multiple deaths have resulted in fines of up to £7.5 million.
105. When discussing health and safety offences in *Colthrop Board Mills Ltd*¹¹⁶ the Court stated: "it appears from the authorities that financial penalties of up to around half a million pounds are appropriate for cases which result in the death even of a single employee". The

¹¹³ In *Howe* [1999] 2 Cr App R (S) 37, for example, the Court acknowledged that fines were too low for health and safety offences in general.

¹¹⁴ *Health and Safety Offences and Penalties 2004/05*, HSE; www.hse.gov.uk.

¹¹⁵ Gerard Forlin and Michael Appleby, *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (2003), pp. 47-55.

¹¹⁶ [2002] EWCA Crim 520 (a health and safety case that did not involve death).

Court was considering a review of reported HSWA cases made in the judgment of *Friskies Petcare (UK) Ltd*¹¹⁷ which had concluded that "fines in excess of £500,000...tend to be reserved for those cases where a major public disaster occurs".

Aims of the fine

Encouraging future compliance with safety standards

106. As noted above, in *Balfour Beatty* the Court endorsed the statement in *Howe* that the ultimate objective of a fine for a health and safety offence in the workplace is to achieve a safe environment for employees and the public, through encouraging compliance with the offending organisation's legal duties as well as encouraging other organisations to ensure they are providing a safe environment. The Court stated in *Howe* that the fine for an offence under the HSWA involving death needs to be large enough to "bring that message home" to those responsible for the governance of the organisation, not only managers but also any shareholders who may be able to influence company policy and practice. The Panel considers this to be the main aim of the fine for an offence under the HSWA involving death.

Reflecting serious public concern at the unnecessary loss of life

107. The Court also stated in *Howe* that the fine should "reflect public disquiet at the unnecessary loss of life", and the Panel considers that the fine should punish the offending organisation in a way that achieves this aim.

Eliminating financial benefit

108. As discussed above, the deterrent effect of a fine will be diminished if it does not outweigh the savings or profits made from the offence. Under the Panel's approach, fines for offences under the HSWA involving death will be generally lower than those imposed for offences of corporate manslaughter, but it is still unlikely that any gains from the offence will outweigh the fine. In any case, the Panel proposes that the same approach should be taken as is suggested above.¹¹⁸

Summary

109. In summary, the aims of the fine described above require that the amount should be sufficient:
- a) primarily to ensure that those responsible for the governance of this and other organisations are properly aware of the need for a safe environment;
 - b) to reflect serious public concern at the unnecessary loss of life; and
 - c) in addition, to eliminate any financial benefit from the offence where possible.

Recommendation 14

As well as encouraging future safety, a fine for an offence under the HSWA involving death should aim to reflect serious public concern at the unnecessary loss of life and, in addition, to eliminate any financial benefit resulting from the offence where possible.

Calculating the fine

110. The Panel proposes that the method of calculating the fine for a health and safety offence involving death should be the same as that used for calculating a fine for an offence

¹¹⁷ [2000] 2 Cr App R (S) 401.

¹¹⁸ See para. 52 above.

of corporate manslaughter. By expressing the fine as a percentage of relevant turnover, this approach addresses the lack of consistency in fines that was found by the Macrory review to be a major concern of bodies such as the HSE.¹¹⁹ In most cases under the HSWA, culpability will be lower than that involved in offences of corporate manslaughter, and therefore the proposed starting points and ranges for the lower and middle levels of seriousness under the HSWA are lower than those proposed under the CMA. However, the highest level of culpability involved in offences under the HSWA overlaps with the lowest level of culpability under the CMA;¹²⁰ the starting point and range for the highest level of seriousness under the former are similar to that for the lower level of seriousness under the latter, to reflect the fact that such offences involve a very high risk of death.

The Panel's proposals

111. As the statutory offence of corporate manslaughter has been created for the most serious instances of management failure resulting in death, the fines proposed for offences under the HSWA are mainly set at a lower level but the top range allows for a possible overlap in offence seriousness. The starting points and ranges¹²¹ proposed below apply to first time offending organisations pleading not guilty.
112. Once the appropriate starting point has been selected, the court will take into account any aggravating and/or mitigating factors,¹²² arriving at a fine which will normally fall

¹¹⁹ See fn. 59 above.

¹²⁰ See para. 80 above.

¹²¹ See Annex A for explanations of 'starting point', 'range' and 'first time offender'.

¹²² Factors of particular relevance to offences under the HSWA resulting in death are summarised at para. 97 above.

within the relevant range. As with the proposals for corporate manslaughter, the ranges are designed to accommodate variations in seriousness within the relevant level, rather than differences in financial resources between offending organisations. Significant aggravating factors or previous convictions may take the fine beyond the range; any mitigation related to the offending organisation (rather than the offence) may take the fine below the range.

Recommendation 15

In order to achieve an equal economic impact on offending organisations of different sizes, the proposed starting points and ranges for offences under the HSWA involving death are expressed as percentages of the offending organisation's average annual turnover during the three years prior to sentencing. The relevant turnover is that of the company convicted of the offence or, where the offending organisation is a holding company, the consolidated turnover of the group of companies of which it is the holding company.

Recommendation 16

Where an organisation convicted of an offence under the HSWA involving death is operating in an industry with endemically low profitability, this may be taken into account in order to avoid injustice. However the court may decide against lowering the fine if the organisation has assets that could be realised in order to pay.

Provision of financial information

113. The Panel proposes that the approach set out above in relation to corporate manslaughter should also apply where an offending organisation has committed an offence under the HSWA involving death.¹²³

¹²³ See paras. 64-65 above.

Recommendation 17

An organisation convicted of an offence under the HSWA involving death should be required to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. Where three years or more have passed between the offence and the imposition of sentence, the court may also wish to examine accounts for the year of the offence.

Potential reasons for deviating from the proposed fine levels

114. The 'deterrence trap' and potential 'spill-over' effects on third parties discussed above in relation to corporate manslaughter may not be of as much concern under the HSWA, as the proposed fines are mainly set at a lower level. However, where these issues are of concern, the court should follow the approach set out above.¹²⁴

Recommendation 18

Where the appropriate fine for an offence under the HSWA involving death will threaten jobs or the commercial survival of the organisation, the court may wish to consider spreading payment. Only if the commercial survival of the organisation would be inappropriately threatened despite the spreading of payment, should the court consider reducing the fine.

115. With regard to publicly funded and third sector organisations, the issues identified in relation to corporate manslaughter are also relevant to offences under the HSWA involving death, and the same approach should be taken.¹²⁵

Recommendation 19

Where a publicly funded or third sector organisation is convicted of an offence under the HSWA involving death, the proposed starting points and ranges relate to the offending organisation's gross revenue income or equivalent. In such cases the court should consider the potential impact of the proposed fine on the provision of services by the organisation and whether this might justify a reduction in the size of the fine.

¹²⁴ See para. 69 above.

¹²⁵ See paras. 70-73 above.

Factors to take into consideration

1. The following guideline applies to a first-time offending organisation convicted after a trial.
2. When assessing the seriousness of any offence, the court must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness¹²⁶ as well as those set out in the adjacent table as being particularly relevant to an offence under the HSWA involving death.
3. The three levels of seriousness are distinguished by how likely it was that death would result.
4. The overlap between the ranges allows for the breadth of discretion necessary to accommodate circumstances where there are significant aggravating or, to a lesser degree, mitigating factors.
5. References to 'annual turnover' in the adjacent table refer to the average annual turnover of the organisation, or gross revenue income or equivalent in the case of a publicly funded or third sector body, during the three years prior to sentencing. Where three years or more have passed since the offence, the court may also wish to examine accounts for the year of the offence.
6. Where the prosecution presents information that failures giving rise to an offence have resulted in savings or profits, the court will make an assessment of any financial benefit and ensure that an equivalent additional sum is added to the fine. However, the court may need to take into account the cost of any remedial action, whether carried out before conviction or as the result of a remedial order, which may eliminate any financial benefit.

¹²⁶ See Annex B.

HEALTH AND SAFETY OFFENCES INVOLVING DEATH

Health and safety offences

Section 33 Health and Safety at Work etc Act 1974

Maximum Penalty (organisations): Unlimited fine

Type/nature of activity	Fine range
Breach of duty creating very high risk of death	Starting point – 2.5% annual turnover Range – 1 – 4% annual turnover
Breach of duty creating high risk of death	Starting point – 1.25% annual turnover Range – 0.5 – 2% annual turnover
Breach of duty creating some risk of death or serious injury	Starting point – 0.5% annual turnover Range – 0.25 – 1% annual turnover
Factors indicating higher culpability	Factors indicating lower culpability
<ol style="list-style-type: none"> 1. Failure to act upon warnings from regulatory authorities. 2. Failure to heed relevant concerns of employees or others. 3. Offending organisation carrying out operations without an appropriate licence. 4. Action or lack of action due to financial or other inappropriate motive. 5. Corporate culture encouraging breach of duty. 6. Exposure of vulnerable employees. 7. Failure to cooperate with authorities after the offence. 	<ol style="list-style-type: none"> 1. Death resulted from an isolated lapse of safety standards. 2. Behaviour of victim or third party contributed to the offence.
	Offender mitigation
	<ol style="list-style-type: none"> 1. Prompt and extensive remedial action. 2. Good previous safety record.
Factors indicating greater degree of harm	
<ol style="list-style-type: none"> 8. More than one person killed as a result of the offence. 9. Serious injury caused to one or more other(s), in addition to the deaths. 	

Compensation orders

116. Please see paragraphs 74 to 76 above.

MEANING OF "RANGE", "STARTING POINT" AND "FIRST TIME OFFENDER" WITHIN SENTENCING GUIDELINES COUNCIL GUIDELINES

A Council guideline is generally for a *first time offender* convicted after a trial. It commonly provides a *starting point* based on an assessment of the seriousness of the offence and a *range* within which sentence will normally fall.

A clear, consistent understanding of each of these terms is essential and the Council and the Sentencing Advisory Panel have agreed the following definitions.

They are set out in a format that follows the structure of a sentencing decision which identifies first those aspects that affect the assessment of the seriousness of the offence, then those aspects that form part of personal mitigation and, finally, any reduction for a guilty plea.

In practice, the boundaries between these stages will not always be as clear cut but the underlying principles will remain the same.

In accordance with section 174 of the Criminal Justice Act 2003, a court is obliged to "*state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed*".

In particular, "*where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate and the sentence is of a different kind, or is outside that range*" the court must give its reasons for imposing a sentence of a different kind or outside the range.

Assessing the seriousness of the offence

1. a) A typical Council guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. It will apply to a **first time offender** who has been convicted after a trial. Within the guidelines, a **first time offender** is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.
- b) As an aid to consistency of approach, a guideline will describe a number of types of activity falling within the broad definition of the offence. These will be set out in a column generally headed "type/nature of activity".
- c) The expected approach is for a court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a **starting point** from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the *offence* (beyond those contained in the description itself) to reach a **provisional sentence**.

-
- d) The range is the bracket into which the **provisional sentence** will normally fall after having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the **provisional sentence** falls outside the **range**.
 2. Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the **provisional sentence** beyond the **range** given particularly where there are significant other aggravating factors present.

Personal Mitigation

3. Once the **provisional sentence** has been identified (by reference to the factors affecting the seriousness of the **offence**), the court will take into account any relevant factors of **personal** mitigation. Again, this may take the provisional sentence outside the range.

Reduction for guilty plea

4. Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. This reduction may take the sentence below the **range** provided.

Sentencing Guidelines Council
Sentencing Advisory Panel
May 2007

AGGRAVATING AND MITIGATING FACTORS IDENTIFIED IN THE SENTENCING GUIDELINES COUNCIL GUIDELINE '*OVERARCHING PRINCIPLES: SERIOUSNESS*'

Aggravating factors

Factors indicating higher culpability:

- Offence committed whilst on bail for other offences
- Failure to respond to previous sentences
- Offence was racially or religiously aggravated
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- 'Professional' offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it
- Deliberate targeting of vulnerable victim(s)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Abuse of power
- Abuse of a position of trust

Factors indicating a more than usually serious degree of harm:

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim
- Victim is particularly vulnerable
- Location of the offence (for example, in an isolated place)
- Offence is committed against those working in the public sector or providing a service to the public
- Presence of others e.g. relatives, especially children or partner of the victim
- Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
- In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

Mitigating factors

Factors indicating significantly lower culpability:

- A greater degree of provocation than normally expected
- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence

Personal mitigation

- Genuine remorse
- Admissions to police in interview
- Ready co-operation with authorities

SUMMARY OF THE PANEL'S RECOMMENDATIONS

Recommendation 1

The main aim of sentencing an organisation for an offence of corporate manslaughter is to impose a level of punishment that reflects serious public concern at the unnecessary loss of life.

Recommendation 2

When sentencing an organisation for an offence of corporate manslaughter, a court normally should impose a publicity order requiring the details to be published in the recommended manner.

Recommendation 3

The making of a publicity order does not justify a reduction in the level of fine imposed on an organisation for an offence of corporate manslaughter.

Recommendation 4

The making of a remedial order does not justify a reduction in the level of fine imposed on an organisation for an offence of corporate manslaughter.

Recommendation 5

As well as reflecting serious public concern at the unnecessary loss of life, a fine for corporate manslaughter should aim to encourage future safety and, in addition, to eliminate any financial benefit resulting from the offence where possible.

Recommendation 6

In order to achieve an equal economic impact on offending organisations of different sizes, the proposed starting points and ranges for offences of corporate manslaughter are expressed as percentages of the offending organisation's average annual turnover during the three years prior to sentencing. The relevant turnover is that of the company convicted of the offence or, where the

offending organisation is a holding company, the consolidated turnover of the group of companies of which it is the holding company.

Recommendation 7

Where an organisation convicted of corporate manslaughter is operating in an industry with endemically low profitability, this may be taken into account in order to avoid injustice. However the court may decide against lowering the fine if the organisation has assets that could be realised in order to pay.

Recommendation 8

An organisation convicted of corporate manslaughter should be expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. Where three years or more have passed between the offence and the imposition of sentence, the court may also wish to examine accounts for the year of the offence.

Recommendation 9

Where the appropriate fine for an offence of corporate manslaughter will threaten jobs or the commercial survival of the organisation, the court may wish to consider spreading payment. Only if the commercial survival of the organisation would be inappropriately threatened despite the spreading of payment, should the court consider reducing the fine.

Recommendation 10

Where a publicly funded or third sector organisation is convicted of corporate manslaughter, the proposed starting points and ranges relate to the organisation's gross revenue income or equivalent. In such cases the court should consider the potential impact of the proposed fine on the provision of services by the organisation and whether this might justify a reduction in the size of the fine.

Recommendation 11

The main aim of sentencing an organisation for an offence under the HSWA involving death is to encourage safe working practices and the future safety of the public.

Recommendation 12

The making of a remedy order does not justify a reduction in the level of fine imposed for an offence under the HSWA involving death.

Recommendation 13

Where an offence under the HSWA has resulted in the death of one or more person(s), the offence should be sentenced in the Crown Court.

Recommendation 14

As well as encouraging future safety, a fine for an offence under the HSWA should aim to reflect serious public concern at the unnecessary loss of life and, in addition, to eliminate any financial benefit resulting from the offence where possible.

Recommendation 15

In order to achieve an equal economic impact on organisations of different sizes, the proposed starting points and ranges for offences under the HSWA involving death are expressed as percentages of the offending organisation's average annual turnover during the three years prior to sentencing. The relevant turnover is that of the company convicted of the offence or, where the offending organisation is a holding company, the consolidated turnover of the group of companies of which it is the holding company.

Recommendation 16

Where an organisation convicted of an offence under the HSWA involving death is operating in an industry with endemically low profitability, this may be taken into account in order to avoid injustice. However the court may decide against lowering the fine if the organisation has assets that could be realised in order to pay.

Recommendation 17

An organisation convicted of an offence under the HSWA involving death should be required to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. Where three years or more have passed between the offence and the imposition of sentence, the court may also wish to examine accounts for the year of the offence.

Recommendation 18

Where the appropriate fine for an offence under the HSWA involving death will threaten jobs or the commercial survival of the organisation, the court may wish to consider spreading payment. Only if the commercial survival of the organisation would be inappropriately threatened despite the spreading of payment, should the court consider reducing the fine.

Recommendation 19

Where a publicly funded or third sector organisation is convicted of an offence under the HSWA involving death, the proposed starting points and ranges relate to the offending organisation's gross revenue income or equivalent. In such cases the court should consider the potential impact of the proposed fine on the provision of services by the organisation and whether this might justify a reduction in the size of the fine.

THE CONSULTATION

In accordance with the duty imposed by section 171(3) of the Criminal Justice Act 2003, the Panel issued a consultation paper on 15 November 2007. The Panel's provisional views on sentencing guidelines for corporate manslaughter and health and safety offences involving death were set out.

Copies of the consultation paper were sent to 134 individuals and organisations including the Panel's 33 regular consultees and Resident Judges at each Crown Court Centre in England and Wales. It was also published on the Panel's website and in the Justice of the Peace journal. 63 responses were received.

Responses were received from the following:

Association of Chief Police Officers
Council of District Judges (Magistrates' Courts)
Council of Her Majesty's Circuit Judges
Criminal Bar Association (General Council of the Bar)
Crown Prosecution Service
Justices' Clerks' Society
National Offender Management Service (NOMS)
Police Federation of England and Wales

Responses were also received from:

Allen & Overy LLP
Dr John Anderson, civil engineer & expert witness
Angel Trains
Mike Appleby, Housemans Solicitors
Association of Personal Injury Lawyers (APIL)
Association of Police Authorities
Association of Train Operating Companies (ATOC)
Brake
Centre for Corporate Accountability (CCA)
Prof CMV Clarkson, University of Leicester
Communication Workers Union
Communication Workers Union NW Safety Forum
Confederation of British Industry (CBI)
Construction Confederation
Denbighshire County Council
DLA Piper UK LLP
Engineering Construction Industry Association (ECIA)
Eversheds LLP
Food and Drink Federation (FDF)
Gerard Forlin, barrister

Greater Manchester Hazards Centre & Families Against Corporate Killers (FACK)
Health and Safety Commission (HSC)
Health and Safety Lawyers' Association (HSLA)
Institution of Occupational Safety and Health
HH Judge Jennifer Kershaw QC
Dr Jeremy Large, University of Oxford
Local Government Association
London Criminal Courts Solicitors' Association
Manchester Crown Court Circuit Bench
National Association of Schoolmasters Union of Women Teachers (NASUWT)
National Union of Mineworkers (NUM)
Network Rail
Norton Rose solicitors
Office of Rail Regulation (ORR)
Passenger Focus and London TravelWatch
Paul Parry, health and safety manager, Cambridge City Council
Mike Ponsonby, private individual
Prospect
Rail Safety & Standards Board
Railway Industry Association
Raymond A Rapp, engineering health and safety adviser
Ron Reid, solicitor
HH Judge Richardson
Claire Saunders, health and safety adviser, Essex County Council
South East Regional Work Related Death Protocol Committee
Thompsons Solicitors
Trades Union Congress (TUC)
Transport for London (TfL)
George Tranter, solicitor and former justices' clerk
Union of Construction, Allied Trades and Technicians (UCATT)
Unison
Unite
Vizards Wyeth solicitors
Water UK
Zurich Municipal

The Sentencing Advisory Panel is an independent advisory and consultative body originally constituted under sections 80 and 81 of the Crime and Disorder Act 1998 (which came into force on 1 July 1999) and now constituted under section 169 of the Criminal Justice Act 2003. Its function, prior to implementation of the relevant provisions in the Criminal Justice Act 2003, was to provide fully researched, objective advice to the Court of Appeal to assist the Court when it framed or revised sentencing guidelines.

The Criminal Justice Act 2003 established a Sentencing Guidelines Council with responsibility for issuing sentencing guidelines. With effect from 27 February 2004, the Sentencing Advisory Panel submits its advice to the Council rather than to the Court of Appeal.

The following were members of the Panel at the time this advice was delivered to the Sentencing Guidelines Council:

Professor Andrew Ashworth CBE (Chairman)

His Honour Judge Anthony Ansell

His Honour Judge Philip Clegg

John Crawford

Amritlal Devani

Mrs Anne Fuller OBE JP

Professor Frances Heidensohn

David Mallen CBE

Michael Morgan

Judge Howard Riddle

John Staples

Ms Joan Webster QPM

Christopher Woolley

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