



Sentencing Guidelines Council

Corporate Manslaughter &
Health and Safety Offences
Causing Death

Consultation Guideline

Foreword

The Sentencing Guidelines Council was created in 2004 in order to frame guidelines to assist courts as they deal with criminal cases across the whole of England and Wales.

The Council receives advice from the Sentencing Advisory Panel which consults widely before tendering that advice. The Council then produces a draft guideline on which it seeks the views as provided by the Criminal Justice Act 2003.

This is the first offence guideline relating to sentencing organisations rather than individuals, and concerns sentencing for offences where the most serious form of harm was caused, the death of one or more persons.

The guideline takes a different form from that used for most other offences. It sets out the key principles relevant to assessing the seriousness of the range of offences covered which may involve a wide variation in culpability. Principles concerning the assessment of financial penalties are also provided and consideration is given to the additional powers available to a court imposing sentence for these offences.

The advice from the Panel (and the consultation paper that preceded it) contains further background details and is published alongside this draft guideline. Since there are differences in approach from those contained in the Panel's consultation paper and advice, the Council is inviting views more widely than usual. A detailed letter to consultees and interested parties sets out the rationale for the approach on which the guideline is based.

All documents can be found at www.sentencing-guidelines.gov.uk or can be obtained from the Council's Secretariat at 4th Floor, 8-10 Great George Street, London SW1P 3AE.

Responses to the consultation should be received no later than 5th January 2010.

When the consultation period is concluded, the Council will consider any responses received and then issue a definitive guideline to which every court is required to have regard in accordance with section 172 of the 2003 Act.

Chairman of the Council
October 2009

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CORPORATE MANSLAUGHTER AND HEALTH AND SAFETY OFFENCES CAUSING DEATH

A. Elements of the offences

1. Corporate manslaughter is created by the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA). The offence:
 - (a) can be committed only by organisations and not by individuals. The organisations which can commit the offence are exhaustively defined by section 1(2) and Schedule 1;
 - (b) has as its root element *a breach of a duty of care* under the law of negligence (s 2(1));
 - (c) requires that the breach be a *gross breach*, that is to say one where the conduct falls *far below* what can reasonably be expected of the organisation (s 1(4));
 - (d) further requires that a substantial element in the breach is the way in which the organisation's activities are managed or organised by its *senior management* (s 1(3));
 - (e) is committed only where death is shown to have been caused by the gross breach of duty (s 1(1)(a)); and

An obligation is imposed upon the prosecution to prove each of these elements to the criminal standard.

2. Health and safety offences, typically those contrary to sections 2 and 3 of the Health and Safety at Work Act 1974 (HSWA):
 - (a) can be committed by both organisations and individuals;
 - (b) do not depend on the law of negligence; the root element is a breach of a duty to *ensure* the health and safety of others, or absence of risk to them, whether employees or members of the public affected by the activity of the defendant;
 - (c) once an absence of safety, or at least a risk to the health or safety of others, is proved by the prosecution, involve a statutory reverse burden of proof placed upon the defendant to show that it was *not* reasonably practicable to do more than was done to comply with the duty;
 - (d) do not involve the proof of any particular injury or consequence; whilst prosecutions will very often ensue where there has been injury or death, the offence does not require proof that that injury or death was caused by the breach; this may well be in dispute even if a breach is proved or admitted;

- (e) thus embrace a very wide spread of culpability from the minimal to the very grave.
3. Where death occurs, there may therefore be a significant overlap between the offences, and it is to be expected that some cases will be prosecuted in the alternative despite the increased complexity that that will entail for a jury.
 4. However, there are considerable differences between the two offences:
 - (a) because corporate manslaughter involves both a *gross* breach of duty of care and senior management failings as a substantial element in that breach, those cases will generally involve systemic failures; by contrast the HSWA offences are committed whenever the defendant cannot show that it was not reasonably practicable to avoid a risk of injury or lack of safety; that may mean that the failing is at an operational rather than systemic level and can mean in some cases that there has been only a very limited falling below the standard of reasonable practicability;
 - (b) in corporate manslaughter the burden of proof remains on the prosecution throughout; in particular this will ordinarily involve the prosecution identifying the acts or omissions which it relies upon as constituting the breach, and then proving them; by contrast, in a HSWA prosecution the prosecutor need only prove that there has been a failure to ensure safety or absence of risk, which it may often be able to do simply by pointing to the injury; once it has done so the burden of proof shifts to the defendant; the prosecution need not identify the precautions which it says ought to have been taken, nor need it prove how the accident happened;¹ usually however it will do so.
 - (c) in corporate manslaughter the prosecution must prove that the breach was *a* (but not necessarily *the only*) substantial cause of death; by contrast the HSWA offences can be proved without demonstrating that any injury was caused by the failure to ensure safety; **these guidelines are for cases where it is proved that the offence caused death, not simply that death occurred.**

B. Factors likely to affect seriousness

5. This guideline applies only to corporate manslaughter and to those HSWA offences where death is shown to have been caused by the offence. By definition, the harm involved is very serious.

¹ *R v Chagot* [2008] UKHL 73 at paragraph 30, *R v Electric Gate Services Ltd* [2009] EWCA Crim 1942

6. Beyond that, the possible range of factors affecting the seriousness of the offence will be very wide indeed. Seriousness should ordinarily be assessed first by asking:
- (a) How foreseeable was serious injury?**
The more foreseeable it was, the graver usually will be the offence.
 - (b) How far short of the applicable standard did the defendant fall?**
 - (c) How common is this kind of breach in this organisation?**
An isolated breach is likely to be significantly less serious than one which is endemic.
 - (d) How far up the organisation does the breach go?**
Usually, the higher up the responsibility for the breach, the more serious the offence.²
7. In addition, other factors are likely, if present, to aggravate the offence (the list is not exhaustive):
- (a) more than one death, or very grave personal injury in addition to death;**
 - (b) failure to heed warnings or advice, whether from officials such as the Inspectorate, or by employees, or by other persons;**
 - (c) cost-cutting at the expense of safety;**
 - (d) deliberate failure to obtain or comply with relevant licences, at least where the process of licensing involves some degree of control, assessment or observation by independent authorities with a safety responsibility;**
 - (e) injury to vulnerable persons.**
8. Conversely, the following factors, which are similarly non-exhaustive, are likely, if present, to afford mitigation:
- (a) a prompt acceptance of responsibility;**
 - (b) a high level of co-operation with the investigation, beyond that which will always be expected;**
 - (c) genuine efforts to remedy the defect;**
 - (d) a good safety record;**
 - (e) a responsible attitude to safety, such as the commissioning of expert advice or the consultation of employees or others affected by the organisation's activities.**

4.

² For corporate manslaughter the involvement of senior management is a necessary element in the offence.

9. Since corporate manslaughter requires proof of gross breach of duty and the substantial involvement of senior management, it is unlikely that the unauthorised act of an employee will significantly reduce the culpability of the defendant in that offence.
10. Commission of an HSWA offence may in some cases be established solely by the unauthorised act of an employee. In such a case the responsibility of the organisation must be assessed, for example for inadequate supervision or training. There may be some cases where there is very little culpability in the organisation itself.
11. It will generally be appropriate to require the prosecution to set out in writing the facts of the case relied upon and any aggravating or mitigating features which it identifies; the defence may conveniently be required similarly to set out in writing any points on which it differs. If sentence is to proceed upon agreed facts, they should be set out in writing.³

C. Financial information; size and nature of organisation

12. The law must expect the same standard of behaviour from a large and a small organisation. Smallness does not by itself mitigate, and largeness does not by itself aggravate, these offences. Size may affect the approach to safety, whether because a small organisation is careless or because a large one is bureaucratic, but these considerations affect the seriousness of the offence via the assessment set out in paragraphs 6-9 above, rather than demonstrating a direct correlation between size and culpability.
13. A large organisation may be more at risk of committing an offence than a small one simply because it conducts very many more operations. Some large corporate groups operate as a single company whereas others are structured as separate companies for separate operations. A large organisation may be operating upon a budget as tight (or tighter) than a small one because of the demands placed upon it – large local authorities, hospital trusts or police forces may be examples, but so might commercial companies with large turnover but small profit margins. However, in some instances, a large organisation may have less excuse for not dealing properly with matters affecting safety, since it may have greater access to expertise, advice and training resources, whether in-house or otherwise.
14. Size is, however, relevant. The means of any defendant are relevant to a fine, which is the principal available penalty for organisations. The court should require information about the financial circumstances of the defendant before it. The best practice will usually be to call for the relevant information for a three year period including the year of the offence, so as to avoid any risk of atypical figures in a single year.

³ See *Friskies Petcare (UK) Ltd* [2000] EWCA Crim 95; [2000] 2 Cr App Rep (S) 401

15. **A fixed correlation between the fine and either turnover or profit is not appropriate.** The circumstances of defendant organisations and the financial consequences of the fine will vary too much; similar offences committed by companies structured in differing ways ought not to attract fines which are vastly different; a fixed correlation might provide a perverse incentive to manipulation of corporate structure.
16. The court should, however, look carefully at both turnover and profit, and also at assets, in order to gauge the resources of the defendant. When taking account of financial circumstances, statute⁴ provides for that to either increase or decrease the amount of the fine and it is just that a wealthy defendant should pay a larger fine than a poor one; whilst a fine is intended to inflict painful punishment, it should be one which the defendant is capable of paying, if appropriate over a period which may be up to a number of years.
17. Annex A sets out the kind of financial information with which, in the ordinary way, a court should expect to be provided in relation to a defendant. The primary obligation to provide it lies on the defendant. As a matter of practice it would be helpful if the prosecution takes the preliminary step of calling upon the defendant to provide it to the court and prosecution and, if the defendant does not do so, of assembling what can be obtained from public records and furnishing that to the court. If a defendant fails to provide relevant information, the court is justified in making adverse assumptions as to its means, and may be obliged to do so.
18. It will not ordinarily be necessary for the prosecution to embark upon analysis of the figures, as distinct from ensuring that the raw material is available to the court, and it may not in any event normally have the expertise to do so. In a few complex cases of relevant dispute the prosecution can if genuinely necessary undertake such analysis either in-house or by the instruction of an accountant and if it can justify the expense as part of its necessary costs those costs will ordinarily be recoverable from the defendant.⁵
19. In assessing the financial consequences of a fine, the court should consider (inter alia) the following factors:
- (i) the effect on the employment of the innocent may be relevant;**
 - (ii) any effect upon shareholders will, however, not normally be relevant; those who invest in and finance a company take the risk that its management will result in financial loss;**
 - (iii) the effect on directors will not, likewise, normally be relevant;**

6.

⁴ Criminal Justice Act 2003, ss.164(1) and 164(4)

⁵ *ibid.*, s.164(5)(b)(iii)

(iv) nor would it ordinarily be relevant that the prices charged by the defendant might in consequence be raised, at least unless the defendant is a monopoly supplier of public services;

(v) the effect upon the provision of services to the public will be relevant; although a public organisation such as a local authority, hospital trust or police force must be treated the same as a commercial company where the standards of behaviour to be expected are concerned, and must suffer a punitive fine for breach of them, a different approach to determining the level of fine may well be justified;

“The Judge has to consider how any financial penalty will be paid. If a very substantial financial penalty will inhibit the proper performance by a statutory body of the public function that it has been set up to perform, that is not something to be disregarded.”⁶

The same considerations will be likely to apply to non-statutory bodies or charities if providing public services.

(vi) the liability to pay civil compensation will ordinarily not be relevant; normally this will be provided by insurance or the resources of the defendant will be large enough to meet it from its own resources; [for compensation generally see paragraphs 28-29 below]

(vii) the cost of meeting any remedial order will not ordinarily be relevant, except to the overall financial position of the defendant; such an order requires no more than should already have been done;

(viii) whether the fine will have the effect of putting the defendant out of business will be relevant; in some bad cases this may be an acceptable consequence.

21. In the case of a large organisation the fine should be payable either immediately or within seven days. In the case of a smaller or financially stretched organisation, it is permissible to require payment to be spread over a much longer period. There is no limitation to payment within twelve months, but the first payment should be required within a short time of sentencing. An extended period for the payment of further instalments may be particularly appropriate for an organisation of limited means which has committed a serious offence, and where it is undesirable that the fine should cause it to be put out of business.

22. In some cases it may be apparent that a broadly quantifiable saving has been made by the defendant by committing the offence. In such cases it will normally be the proper approach to ensure that the fine removes the profit and imposes an appropriate additional penalty. 7.

⁶ *R v Milford Haven Port Authority* [2000] 2 Cr App R(S) 423 per Lord Bingham CJ at 433-4

D. Level of fines

23. There will inevitably be a broad range of fines because of the range of seriousness involved and the differences in the circumstances of the defendants. Fines must be punitive and sufficient to have an impact on the defendant. They must be capable of being paid.
24. Fines cannot and do not attempt to value a human life in money. Civil compensation will be payable separately. The fine is designed to punish the defendant and is therefore tailored not only to what it has done but also to its individual circumstances.
25. The offence of corporate manslaughter, because it requires gross breach at a senior level, will ordinarily involve a level of seriousness significantly greater than a HSWA offence. The appropriate fine will seldom be less than **£500,000** and may be measured in **millions of pounds**.⁷
26. The range of seriousness involved in HSW offences is greater than for corporate manslaughter. However, where the offence is shown to have caused death, the appropriate fine will seldom be **less than £100,000** and may be measured in **hundreds of thousands of pounds or more**.
27. A plea of guilty should be recognised by the appropriate reduction.

E. Compensation

28. The assessment of compensation in cases of death will usually be complex, will involve payment of sums well beyond the powers of a criminal court, and will ordinarily be covered by insurance.
29. In the great majority of cases the court should conclude that compensation should be dealt with in a civil court, and should say that no order is made for that reason.⁸ There may be occasional cases, for example if the defendant is uninsured and payment may not otherwise be made, when consideration should be given to a compensation order in respect of bereavement and/or funeral expenses.⁹

F. Costs

30. The defendant ought ordinarily (subject to means) to be ordered to pay the properly incurred costs of the prosecution.

8.

⁷ Observations in *Friskies Petcare* [2000] EWCA Crim 95; [2000] 2 Cr App Rep (S) 401 notwithstanding, it is no longer the case that fines of £500,000 are reserved for major public disasters.

⁸ Powers of Criminal Courts Act 2000, s.130(3).

⁹ made under Powers of Criminal Courts Act 2000, s.130(9) and (10)

G. Publicity Orders

31. Publicity Orders are available in the case of corporate manslaughter only.¹⁰ They may require publication in a specified manner of:

- (a) the fact of conviction
- (b) specified particulars of the offence
- (c) the amount of any fine;
- (d) the terms of any remedial order.

32. Such an order should ordinarily be imposed in a case of corporate manslaughter. The object is deterrence and punishment.

(i) The order should specify with particularity the matters to be published in accordance with section 10(1). Especial care should be taken with the terms of the particulars of the offence committed.

(ii) The order should specify the place where public announcement is to be made. It should ordinarily contain a provision designed to ensure that the conviction becomes known to shareholders in the case of companies and local people in the case of public bodies. Consideration should be given to requiring a statement on the defendant's website. A newspaper announcement may be unnecessary if the proceedings are certain to receive news coverage in any event, but if an order requires publication in a newspaper it should specify the paper, the form of announcement to be made and the number of insertions required.

(iii) The prosecution should provide the court in advance of the sentencing hearing, and should serve on the defendant, a draft of the form of order suggested and the judge should personally endorse the final form of the order.

(iv) Consideration should be given to stipulating in the order that any comment placed by the defendant alongside the required announcement should be separated from it and clearly identified as such.

33. A publicity order is part of the penalty. Any exceptional cost of compliance should be considered in fixing the fine. It is not, however, necessary to fix the fine first and then deduct the cost of compliance.

H. Remedial Orders

34. A remedial order is available both for corporate manslaughter¹¹ and HSWA offences.¹²

35. A defendant ought by the time of sentencing to have remedied any specific failings involved in the offence and if it has not will be deprived of significant mitigation. 9.

¹⁰ Corporate Manslaughter and Corporate Homicide Act 2007, s.10

¹¹ Corporate Manslaughter and Corporate Homicide Act 2007, s.9

¹² Health and Safety at Work Act 1974, s.42

36. If, however, it has not, a remedial order should be considered if it can be made sufficiently specific to be enforceable. The prosecution is required by section 9(2) CMCHA to give notice of the form of any such order sought; although there is no equivalent stipulation in the HSWA it is good practice to require the same notice. The Judge should personally endorse the final form of such an order.
37. The cost of compliance with such an order should not ordinarily be taken into account in fixing the fine; the order requires only what should already have been done.

I. Summary of approach to sentence

38. The normal approach to sentence should therefore be (in outline):
- (1) consider the questions at paragraph 6;
 - (2) identify any particular aggravating or mitigating circumstances (paragraphs 7 - 11);
 - (3) consider the nature, financial organisation and resources of the defendant (paragraphs 12-19);
 - (4) consider the consequences of a fine (paragraphs 20-22);
 - (5) consider compensation (but see paragraphs 28-29);
 - (6) assess the fine in the light of the foregoing and all the circumstances of the case;
 - (7) reduce as appropriate for any plea of guilty;
 - (8) consider costs;
 - (9) consider publicity order;
 - (10) consider remedial order.

Annex A: Financial information expected to be provided to the court

1. *For companies:* published audited accounts. Particular attention should be paid to (a) turnover, (b) profit before tax, (c) directors' remuneration, loan accounts and pension provision, (d) assets as disclosed by the balance sheet (note that they may be valued at cost of acquisition which may not be the same as current value.) Most companies are required to lodge accounts at Companies House. Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.
2. *For partnerships:* annual audited accounts. Particular attention should be paid to (a) turnover, (b) profit before tax, (c) partner's drawings, loan accounts and pension provision, (d) assets as above. If accounts are not produced on request, see paragraph 1.
3. *For local authorities, police and fire authorities and similar public bodies:* the Annual Revenue Budget ("ARB") is the equivalent of turnover and the best indication of the size of the defendant organisation. It is published on www.local.communities.gov.uk/finance/bellwin.HTM. It is unlikely to be necessary to analyse specific expenditure or reserves unless inappropriate or grandiose expenditure is suggested. Such authorities also have attributed to them a "Bellwin factor" which represents the level of exceptional and unforeseen expenditure that they are expected by central Government to meet themselves in any one year without any claim to recourse to central funds. But since that is arithmetically related to the ARB (currently 0.2%) it will ordinarily add little of significance beyond an indication of budgetary discipline.
4. *For health trusts:* the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via www.monitor-nhsft.gov.uk/sites/default/files/publications/Monitor. Detailed analysis of expenditure or reserves is unlikely to be called for.

Note that Monitor has significant regulatory powers including over membership of the boards of directors or governors.
5. *For "third sector" organisations:* it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.