Tougher penalties proposed for corporate manslaughter & health and safety offences

New sentencing guidelines could see “large organisations” fined up to £20 million if convicted of corporate manslaughter and £10 million if convicted of health and safety offences.

On 13 November 2014, the Sentencing Council (“SC”) published for public consultation draft sentencing guidelines for corporate manslaughter, health and safety (irrespective of whether it was causative of death) and food safety offences. The proposals signal a significant increase in fines for serious offenders, particularly medium and large organisations. They follow an upward trend of increasing fines for these offences – although, any increase in the fines is relative to the financial position of each organisation and its ability to pay and whether they are classed as “micro” or “large”. The draft guidelines also apply to individuals as well as organisations for health and safety breaches.

February 2010 saw the current Definitive Guidelines for Corporate Manslaughter & Health and Safety Offences Causing Death (the “Definitive Guidelines”) come into operation. Published by the then Sentencing Guidelines Council (“SGC”) the Definitive Guidelines took into consideration concerns surrounding the appropriate level of fines for regulatory offences. The result was that the appropriate sentence “will seldom be less than £100,000” for health and safety offences and “will seldom be less than £500,000” for corporate manslaughter offences. Whilst this has been the mantra to date, for corporate manslaughter the reality has been that the size and financial strength of those prosecuted has hamstrung the courts from setting down penalties of £500,000 or more.

In response to SC’s concerns of a “lack of comprehensive guidance for sentencers” and concerns that sentences for more serious offences were “too low”, the new draft guidelines attempt to go further by seeking to introduce tougher sentences that achieve a fair and proportionate outcome to the offence committed.

“... The draft guidelines focus more closely on the financial circumstances of the offender with a shift to fines based on turnover of an organisation...”
The consultation paper which accompanies the draft guidelines sets out the SC’s overarching aims in sentencing for health and safety, corporate manslaughter and food safety offences. These are to ensure that sentences:

- Reflect the seriousness of the offence and take into account the circumstances of the offender;
- Reflect the extent to which the offender fell below the required standard; and
- Meet in a fair and proportionate way, the aims of punishment and deterrence.

The focus is on ensuring fines reflect the seriousness of the offence and account for the financial circumstances of the offender; they follow the same line of tariff based guidelines used in the recently published guidelines for environmental offences. This regime applies turnover linked fines assessed by consideration of an organisation’s annual turnover. SC member, Michael Caplan QC said “We want to ensure that these crimes don’t pay”. It is thought that with these new guidelines, serious offenders such as “businesses that put people at risk by flouting their responsibilities” will face tougher penalties.

For individuals, seriousness and likelihood of harm are factored into a “harm category”. This harm category is then considered along with the individual’s culpability to ascertain the starting point and range of penalties. Culpability is graded by breaches that are deliberate, reckless, negligent and low culpability.

It is hoped that the draft guidelines, which include the requirement for the courts to follow a methodical nine step process, will promote a consistent approach to sentencing in every case. Factors which the court will take into account include:

- The seriousness of the offence – by reference to a mechanism for determining the degree of culpability and risk of harm;
- The size of the organisation – the draft guidelines distinguish fine bands based on an organisation’s turnover; they provide specific starting points and ranges of possible fines for the courts. The draft guidelines have distinguished the following categories of organisations: micro organisations (turnover no more than £2 million); small organisations (turnover between £2 million to £10 million); medium organisations (turnover between £10 million to £50 million); and large organisations (turnover of £50 million and over); and
• Adjustment factors - whether the proposed fine based on turnover is proportionate and if there are any mitigating, aggravating or adjustment factors which make it more appropriate to move outside the recommended fine band.

However, by requiring a judge to conduct a forensic accounting exercise based on their interpretation of the culpability of the organisation (health and safety breaches) or offence category (corporate manslaughter), it is feared that the aims of the guidelines might not translate in practice.

A further issue, which ties in with a judge’s forensic accounting exercise, is what constitutes an organisation. No clear guidance has been given by the SC so it could be that the combined turnover of a group of companies is considered when deciding penalties, rather than of the company who committed the offence.

**Corporate Manslaughter**

The focus on sentences for corporate manslaughter offences are, amongst others; to ensure that sentences are “sufficiently substantial to have a real economic impact” in achieving a safer working environment. The SC considered it necessary that sentence levels under corporate manslaughter offences are consistent and proportionate to its proposals for health and safety offences given the close relationship between the two.

The starting point of the proposed changes is the seriousness of the offences between Category A (“very high” culpability/category 1 harm) and Category B.

Thereafter the level of fine will be dependent on the turnover of the company:

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<tr>
<th>Offence Category</th>
<th>Starting Point</th>
<th>Category Range</th>
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<tbody>
<tr>
<td><strong>Large companies (turnover of more than £50 million)</strong></td>
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<tr>
<td>A</td>
<td>£7,500,000</td>
<td>£4,800,000 - £20,000,000</td>
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<tr>
<td>B</td>
<td>£5,000,000</td>
<td>£3,000,000 - £12,500,000</td>
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<tr>
<td><strong>Medium companies (turnover of £10 million to £50 million)</strong></td>
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<tr>
<td>A</td>
<td>£3,000,000</td>
<td>£1,800,000 - £7,500,000</td>
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<tr>
<td>B</td>
<td>£2,000,000</td>
<td>£1,200,000 - £5,000,000</td>
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…it could be that the combined turnover of a group of companies is considered when deciding penalties, rather than of the company who committed the offence.
Small companies (turnover of £2 million to £10 million)

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<td>£800,000</td>
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<td>£540,000</td>
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Micro companies (turnover up to £2 million)

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<td>£450,000</td>
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<td></td>
<td>£350,000</td>
<td>£270,000</td>
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However it may be appropriate for a very large company to move outside the suggested range in order that the sentence is proportionate.

Courts are likely to scrutinise an organisation’s financial circumstances as well as director, partner and/or shareholder remuneration in order to assess the size of the organisation and appropriate fine band. This would suggest increased obligations on organisations to provide adequate financial records, leading to detailed forensic assessments by the courts.

**Health and Safety Offences**

Health and safety offences may be committed by organisations or individuals and the draft guidelines set out different guidelines for both. For example, medium sized organisations found guilty of a very high culpability health and safety offence could attract fines of up to £4 million whereas large organisations could face fines of up to £10 million.

Individuals found guilty of a health and safety offence could be subjected to community orders, custodial sentences as well as fines. The grades of culpability set out above will be based on a percentage of an individual’s weekly income. Depending on the seriousness of the offence, this could range from 25% to 700% of the individual’s weekly income.

What is clear from the proposed guidelines is that the SC is intent on setting sentences at a level which reinforces the responsibilities and standards required of organisations and their directors, partners and shareholders;

Organisations and their management are encouraged to reconsider their procedures to ensure they allow for adequate steps to keep people safe. Given the trend in tougher sentences for these offences, it is inevitable that grave failures by organisations and their management will result in extremely
serious consequences. The draft guidelines are an important reminder that the priority should be to ensure people are kept out of risk.

The draft sentencing guidelines are open for public consultation until 18 February 2015. During the consultation period, the SC will be organising a number of consultation events to seek the views of interested parties. Further details of these events and the consultation process can be found on the SC website at: www.sentencingcouncil.judiciary.gov.uk

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