

The Sentencing Council Consultation Document relating to Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Guidelines: 'Up Up and Away'!

By Gerard Forlin, QC, Cornerstone Barristers

The Sentencing Council Consultation was published on November 13, 2014 and, most importantly, the consultation period ends on February 18, 2015. The purpose of this short article is merely to highlight some of the key points of this 122-page document, and to incite interested parties to make representations on the myriad of questions posed by the Council—because the issues discussed in it are important. A fuller and more detailed article will be published once the eventual guidelines have been published and been brought into force. When exactly this will happen is still uncertain—but there is a general sense (derived partly from a joint Bar/Eversheds meeting in January 2015) that it will be in the summer or the early autumn. What is certain, however, is that this is the last chance to affect the shape of them by making representations.

The Council states that “there was a need to review whether sentences imposed on offenders in these cases, in particular fines on larger organisations, were fulfilling the purposes of sentencing in these cases”. It also states that “... [they] would be useful to sentencers dealing with these relatively unfamiliar cases”. This was important, it explains, because of:

- A) recent Court of Appeal decisions, particularly in *Sellafield and Network Rail* [2014] EWCA Crim 49 (LCJ);
- B) the July 2014 Guidelines on Environmental Offences, in the light of which it “... [wished] to put in place guidance for related offences to ensure that sentences in these areas were consistent and proportionate with those for environmental offences ...”; and
- C) s.85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which, when fully in force, will allow magistrates to impose unlimited fines in many cases, including successful prosecutions for health and safety and hygiene offences.

The Council explains that “...[it] wishes to ensure that guidance is in place to assist Magistrates in applying fair and proportionate sentences when their new fining powers come into effect”.

This short comment will not attempt to discuss all the key proposals in this complicated document. Instead, the aim is just to show how what is currently proposed would be a real “game changer” in the sentencing of these offences.

The section on health and safety sets out a matrix of offending for both organisations and individuals. For organisations the breach is ranked from very high to low and for individuals from deliberate to low. It also sets out a table

in relation to seriousness of harm. Seriousness of harm is ranked alongside likelihood of harm, which itself is further split into three levels—namely “High”, “Medium” and “Low”. The idea, according to the Council, is that “... By identifying the severity of the harm risked by the offence ... and the likelihood of that harm ... the court will be able to use the table to identify a harm category”.

More significantly, the Council also sets out new starting points and ranges for penalties for health and safety offences in relation to four types of organisations.

In relation to very large organisations with a turnover of £50 million and above, in the case of very high culpability the starting point proposed is £4 million and the category range goes from £2.6 million to over £10 million. Unless the writer's maths has failed him, on the basis of current sentencing this represents an eye-watering (about) tenfold increase (or greater) in certain cases.

For individuals, the Council sets out a further table at p.37. In category 1 harm offences, the starting point here is 18 months and the custody range is 1–2 years.

For corporate manslaughter cases involving very large organisations with turnover above £50 million, in the most serious cases the starting point proposed is £7.5 million and the category range is £4.8 million to £20 million or above.

This again is a huge ramping up from the current position. This must surely raise a legitimate concern as to whether, in some cases, the new levels might cause organisations, particularly very large ones, to consider whether they will continue to operate from the UK, especially with the huge adverse publicity a fine of this size would create.

The future will inform us—but it also seems highly probable that these new guidelines, as currently proposed, will trigger more contested trials (for organisations and particularly individuals), and more Newton and Goodyear hearings involving more expert (including medical) evidence. Lengthy and complex legal submissions as to banding might become the norm.

There are other similar sections on food hygiene and food safety.

This is an important consultation and should be taken extremely seriously. Responses to the 49 specific questions should be sent by February 18, 2015 to Pat Scicluna, Office of the Sentencing Council, Room EB20, Royal Courts of Justice, Strand, London WC2A 2LL; DX: 44450 RCJ/Strand; email: consultation@sentencingcouncil.gsi.gov.uk; tel: 020 7071 5793.