



Document number	<b>15/05</b>
Date	<b>18 February 2015</b>
Response to	<b>Health and safety offences, corporate manslaughter, food safety and hygiene offences guidelines</b>
Issued by	<b>Sentencing Council</b>
Link to consultation	<a href="http://www.sentencingcouncil.org.uk/consultations/health-and-safety-offences-corporate-manslaughter-food-safety-and-hygiene-offences-guidelines-consultation/">www.sentencingcouncil.org.uk/consultations/health-and-safety-offences-corporate-manslaughter-food-safety-and-hygiene-offences-guidelines-consultation/</a>

---

The MA welcomes the opportunity to comment on these proposed guidelines. Health and safety, food safety and hygiene offences are among the more unusual cases in magistrates' courts. It will be good for courts to have clear guidelines to use when dealing with them, especially as magistrates' powers to issue fines are increased.

The MA has made no comments on the sections of this consultation relating to corporate manslaughter, as this is an indictable-only offence and therefore not within its remit.

### **Overarching aims**

*1. Do you agree with the overarching principles for setting fines for these offences, set out in step three of the draft guidelines?*

Yes.

### **Structure of the guidelines**

*2. Do you agree that the proposed structure of the guidelines for organisations provides the right balance of guidance and flexibility for sentencers?*

Yes.

### **Assessing the means of organisations**

*3. Do you agree with how turnover, profit and reference to other financial factors have been used in the guideline to assist sentencers in identifying fine levels? If not, what alternative to assessing the means of the offender would you suggest?*

The MA broadly agrees with this approach, but would comment that magistrates see a very wide range of circumstances within the 'micro-organisation' band. Anecdotally, a large proportion is likely to be in the bottom third of the band – small shopkeepers and take-away restaurants come to mind.

Clearly, if these guidelines are to be used effectively, it will be crucial for prosecutors to bring forward evidence relating to organisations' turnover and for defendants to engage with the question and bring forward appropriate evidence to substantiate or dispute the figures. As most health and safety, food safety and food hygiene cases are sentenced by means of fines, the court must be able to satisfy itself of the true means of the individual prior to sentencing.

*4. Do you agree that quantifiable economic benefit derived from the offence should be considered in calculating the fine?*

Yes. It is also worth mentioning that in many cases, there may be harm caused to individuals' income or property as well as to their health. The MA recognises why the categorisation of harm is rightly based on human health, but suggests other forms of loss could be considered as an aggravating factor once the range has been identified.

*5. Do you agree with the approach used for categorising micro, small, medium and large organisations at step two and the guidance provided for dealing with very large organisations?*

The MA would suggest that the category of 'micro-organisations' might be too broad. The majority of cases the magistrates hear are likely to involve small and medium-sized enterprises. Many individuals running companies will have a turnover little different from the income of an individual defendant in these cases. An overly broad category risks grouping too many different organisations together, with potentially unfair and inconsistent results.

One option to address this might be to create a further category for the very smallest organisations, which could be defined as 'turnover too low for the organisation to be VAT-registered'. In this circumstance, a band equivalent to a self-employed person would be more appropriate and could be used more effectively. Clearly, this has implications for other areas of the guidelines, but the MA hopes the practicalities of the current bands will be considered carefully.

The MA notes the allowance made for companies with low profit margins at Step Three, and would reiterate its importance. Allowance will sometimes need made for those companies whose high turnover is due to the capital value of the goods they sell (e.g. plant, machinery or vehicle sales) but whose profit and loss account and balance sheet may be weak.

*6. Do you agree with the wider factors set out in step four of the guidelines for organisations that the court should consider when finalising fines?*

Yes.

#### **Approach to guideline for individuals**

*7. Do you agree that the structure of the guidelines for individuals is appropriate?*

Yes.

*8. Do you agree that the correct factors relating to finalising a fine on an individual are included in step three?*

Yes.

*9. Do you agree with the decision not to include separate and specific steps for compensation and confiscation in the guidelines?*

Yes.

## **Health and safety offences: guidelines**

*10. Do you agree with the proposed scope of the health and safety guidelines for organisations and individuals?*

Yes, although the MA would mention that the guideline does not cover a number of health and safety offences which are entirely regulatory – such as failing to notify that an accident has occurred. With this sort of highly routine offence, the penalty is likely to be relatively standard, once adjusted for the size and means of the organisation or individual involved.

## **Health and safety offences: determining the offence category - culpability**

*11. Do you agree with the proposed culpability factors for organisations and individuals at step one of the health and safety guidelines? If not, please specify what you would change and why.*

Yes.

## **Health and safety offences: determining the offence category - harm**

*12. Do you agree with the overall approach proposed for assessing harm for health and safety offences?*

The MA agrees with a two stage approach to assessing harm – considering the risk of harm created by the offence first, and then whether it put a significant number of people at risk of harm and whether the offence was a significant cause of actual harm.

*13. Do you agree that the proposed factors for assessing risk of harm in the health and safety guidelines are clear and appropriately gradated? If not, what changes would you make?*

The factors themselves are appropriate, but the MA would question whether they would necessarily be used in the way the Sentencing Council expects. The detail of the specific risks will, of course, be critical in any given case.

The MA would suggest that example 2D could be clearer. On the information available, no level of harm higher than that which the Sentencing Council suggests has been proven. However, the nature of the incident suggests that more information might have indicated a higher category of harm, depending on the machine. Clearly, the sentencers could and should not assign the case a higher level of harm without proof, but this does emphasise the importance of accurate information about the risks faced, to avoid ambiguity.

*14. Do you agree with the factors included in the second stage of the assessment of harm process? If not, please identify what you would change and why.*

The MA would suggest greater clarity on the question of a ‘significant number’ of people being exposed to risk of harm. If the intention is to separate out the question of how many people were exposed to the risk from how serious the harm could have been, this should be made more explicit.

It may be that different numbers of people are exposed to different levels of risk within the same offence (usually with larger numbers of people being subjected to the lower levels of risk), so sentencers would also need to ‘step back’ and consider what, if any, further account should be taken of the number of people involved in that context.

## **Health and safety offences: starting points and ranges - organisations**

*15. Do you agree with the proposed starting points and ranges for micro organisations in the health and safety guideline?*

Yes, subject to the MA's response to question 5.

*16. Do you agree with the proposed starting points and ranges for small organisations in the health and safety guideline?*

Yes, subject to the caveat in question 14.

*17. Do you agree with the proposed starting points and ranges for medium organisations in the health and safety guideline?*

Yes.

*18. Do you agree with the starting points and ranges for large organisations in the health and safety guideline? Please consider the relevance of the top of the range given the guidance that: "where a defendant organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence."*

Yes, but the caveats about example 2D which were raised at question 13 still apply.

The MA agrees that, when dealing with a very large company it can be necessary for sentencers to move outside the suggested range to achieve proportionality. It would also suggest that, to provide an indicator for the most egregious cases, the Sentencing Council might like to consider referring to an indicative maximum percentage of organisations' turnover.

*19. What impact do you think the proposals will have on current sentencing practice for organisations that have committed health and safety offences?*

There is insufficient evidence to comment, but it would seem likely that the guidelines will tend to encourage the courts to sentence offenders more appropriately.

## **Health and safety offences: starting points and ranges - individuals**

*20. Do you agree with the proposed use of custodial starting points for individuals in the health and safety guideline?*

Yes: there could be negligent acts or omissions with aggravating features which would cross the custody threshold. The death by careless driving analogy is a well-chosen one.

*21. Do you consider the guidance regarding the use of community orders and fines in the health and safety guideline to be appropriate and sufficient?*

Yes: ancillary orders are now much more clearly set out in the proposed text of the guideline.

*22. Do you agree with the remainder of the proposed starting points and ranges for individuals in the health and safety guideline?*

Yes.

*23. What effect do you think the draft guideline will have on current sentencing practice relating to individuals who commit health and safety offences?*

There is insufficient evidence to comment, but it would seem likely that the guidelines will tend to produce a more consistent approach in sentencing.

#### **Health and safety offences: aggravating and mitigating factors**

*24. Do you agree with the proposed aggravating and mitigating factors in the health and safety guideline?*

Yes, but the MA would suggest that more clarity over 'poor/good health and safety record' might encourage the right questions to be asked, given that sentencers are unlikely to be specialists in this area. An explicit mention of breaches of health and safety orders (improvement or prohibition notices, for instance) would help the court to ensure the right information is put before it. Such orders could be considered analogous with formal police cautions: a formal record is kept, and they appear on a public register.

*25. Is the guidance provided on ancillary orders and compensation in the health and safety guidelines for organisations and individuals appropriate and sufficient?*

Yes, although fuller clarity over the extent of disqualification powers might be of help.

#### **Food safety and hygiene offences: guidelines**

*34. Do you agree with the proposed scope of the food safety and hygiene offences guideline?*

Yes.

#### **Food safety and hygiene offences: culpability and harm**

*35. Do you agree with the proposed culpability categories for organisations and for individuals in the draft food safety and hygiene offences guideline?*

Yes.

*36. Do you agree with the proposed harm factors in the draft guideline for food safety and hygiene offences?*

Yes: we agree that assessing harm by the type of illness which might potentially result from a given offence relies on too many hypotheticals and could put magistrates in the position of trying to adjudicate on the likelihood of a wide range of different medical conditions.

#### **Food safety and hygiene offences: starting point and ranges - individuals**

*37. Do you agree with the proposed starting points and ranges for individuals in the food safety and hygiene guidelines?*

The MA would question the starting point of nine months as a starting point for deliberate harm in category 1. This will inevitably raise issues when magistrates are considering the mode of trial and also create ambiguity in the process. The MA is not aware of another offence with a starting point of nine months.

38. *What effect do you think the proposed starting points and ranges will have on current sentencing practice for individuals convicted of food safety and hygiene offences?*

In general, it would seem more likely than not that more appropriate sentencing would be imposed, especially on larger organisations. However, not enough information is available to come to a firm conclusion.

#### **Food safety and hygiene offences: starting point and ranges – organisations**

39. *Do you agree with the proposed starting points and ranges for micro organisations in the food safety and hygiene offences guideline?*

Yes, subject to the MA's response to question 5.

40. *Do you agree with the proposed starting points and ranges for small organisations in the food safety and hygiene offences guideline?*

Yes.

41. *Do you agree with the proposed starting points and ranges for medium organisations in the food safety and hygiene offences guideline?*

Yes.

42. *Do you agree with the proposed starting points and ranges for large organisations in the food safety and hygiene offences guideline? Please consider the relevance of the top of the range given the guidance that: "where the defendant organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence".*

Where the defendant organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it should be necessary to move outside the suggested range to achieve a proportionate sentence. It may include unlimited fines where very high culpability.

43. *What effect do you think the proposals will have on current sentencing practice for organisations convicted of food safety and hygiene offences?*

It would seem likely that the result would be more appropriate sentencing for those offences, but there is insufficient evidence to give a clear view.

#### **Food safety and hygiene offences: aggravating and mitigating factors**

44. *Do you agree with the proposed aggravating and mitigating factors in the food safety and hygiene offences guidelines?*

Yes.

45. *Is the guidance provided on ancillary orders and compensation in the guidelines for food safety and hygiene offences appropriate and sufficient?*

Yes.

*46. Do you agree that the proposed guidance on totality in the food safety and hygiene offences guideline is appropriate and sufficient?*

Yes: the MA is clear that sentencers need to be able to consider the principle of totality. The quoted guidance from the definitive guideline on totality is particularly helpful.

*47. Are there further ways in which you think victims can or should be considered?*

There is no mention of Victim Personal Statements in the guideline. This should be remedied as a priority: a VPS should be an option in all cases where there is a known victim or victims. Community Impact Statements should also be considered: some health and safety and food offences can have a significant wider impact.

*48. Are there any equality or diversity matters that the Council should consider? Please provide evidence of any issues where possible.*

No.

*49. Are there any further comments you wish to make that have not been covered elsewhere in the consultation?*

No.