

Health and Safety Law Developments

AOSH/IOSH

8th January 2015

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Health and Safety Offenses Guideline

Consultation of proposals 2014

Sentencing Council is an independent body responsible for developing guidelines to courts when passing a sentence – fines or custodial

Predecessor was Sentencing Guidelines Council (SGC)



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What offences does the consultation focus on?

The Sentencing Council is consulting on the draft guidelines for sentencing the following (not on the legislation that establishes these offences):

- Health and Safety Offences
- Food Safety Offences
- Hygiene Offences
- Corporate Manslaughter

The consultation lasts until 18 February 2015

Background



• In 2010 the SGC “Definitive Guideline” was introduced. Although not mandating any tariff, the guideline indicated that the appropriate fine for :

- fatal health and safety offences - ‘will seldom be less than £100,000’; and
- corporate manslaughter - ‘will seldom be less than £500,000 and may be measured in millions of pounds’

Health and Safety and Food Safety Offences



- There is very little specific guidance presently - usually have to extract applicable principles from sentencing in cases (*R v F Howe and Son [1999]*)
- Inconsistencies exist - lack of familiarity with such cases (only 420 H&S sentences in 2013)
- Fines criticised as too low relative to the harm caused, the culpability of the offender and on occasions, to the means of the offender
- Impact of Sellafield and Network Rail
- Impact of new Magistrates provisions



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Impact of Proposed Guidelines

- The proposed guidelines a departure from acceptance that health and safety cases arise out of a limitless range and variety of circumstances and seriousness
- This departure is in line with the recently published Sentencing of Environmental Offences
- They reflect a desire to help ensure greater consistency

BUT

- The main concern will be that the level of fines will be tied in to the corporate turnover resulting in significant increases, particularly for those involving large organisations.



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Overarching aims

S164 of CJA 2003 – fines should reflect seriousness of offence, financial circumstances

Council believes

- that fine should reflect extent fallen below required standard
- remove economic gain
- real economic impact
- Bring home to management and shareholders need to comply

Studies suggested that there was inconsistencies in achievement of the above aims in existing ‘non-tariff’ regime.

Categories of organisations



Large – Turnover or equivalent: £50 million and over

Medium – Turnover or equivalent: £10 million and £50 million

Small – Turnover or equivalent: between £2 million and £10 million

Micro – Turnover or equivalent: not more than £2 million

Charities

Where a fine falls on public or charitable bodies, the fine should normally be substantially reduced.



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Approach to Guidelines for health and safety offences

Organisations:

- **Step one:** Determining the offence category
 - Culpability
 - Harm: 1) Risk of harm created. 2) significant number exposed/ significant cause of actual harm
- **Step two:** Starting point and category range – financial information (turnover will be starting point), then consider aggravating and mitigating factors
- **Step three:** Check whether the proposed fine based on turnover is proportionate to the means of the offender (this provides some flexibility)
- **Step four:** Consider other factors that may warrant adjustment of the proposed fine. (e.g. innocent third parties) court should adjust to avoid any unjustified wider consequences (e.g. losses of jobs).
- **Step five to nine:** standard steps including reduction for early guilty plea.



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Approach to Guidelines for health and safety offenses

Individuals:

•Step one: Determining the offense category

- Culpability

- Harm: 1) Risk of harm created. 2) significant number exposed/
significant cause of actual harm

•Step two: Starting point and category range – financial information and the Court will identify a starting point and range then consider aggravating and mitigating factors

•Step three: Review any financial element of sentence (review quantifiable economic benefit)

•Step four to nine: standard steps including reduction for early guilty plea.

Obviously custodial sentence possible as well as fine!



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Step 1: Culpability categories - Organisations

- **Very high** – deliberate breach / flagrant disregard.
- **High** – offender fell far short of standard e.g. ignoring concerns raised by employees / allowing breaches to subsist over long period of time. Systematic failings.
- **Medium** – fell short of the appropriate standard.
- **Low** - did not fall far short of appropriate standard e.g. significant efforts made to address risk although they were inadequate / no prior warning.



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Step 1: Culpability categories - Individuals

- **Deliberate** – intentionally breached, or flagrantly disregarded the law.
- **Reckless** – actual foresight / wilful blindness.
- **Negligent** – act or omission which a person exercising reasonable care would not commit.
- **Low** - little fault e.g. efforts were made to address risk although inadequate / no prior warning / minor or not systematic.



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Step 1: Harm – 2 stages

First – risk of harm created by the offence:

1. The seriousness of the harm risked by the offenders breach (level A, B or C).
2. The likelihood of that harm arising (High, Medium, Remote).

Second:

• **Exposed a significant number of people** to the risk of harm.

AND

• **Whether the offence was a significant cause** of actual harm (more than minimal, negligible, trivial contribution).

Victims actions highly unlikely to be looked at

Step 1: Harm



Seriousness of harm risked				
Likelihood of harm		Level A: ∞Death ∞Physical / Mental impairment resulting in life dependency ∞Health condition resulting in significantly reduced life expectancy	Level B: ∞Physical / Mental impairment amounting to level A. ∞A progressive, permanent or irreversible condition	Level C: ∞All other cases not falling within level A / B
	High	Harm category 1	Harm category 2	Harm category 3
	Medium	Harm category 2	Harm category 3	Harm category 4
	Remote	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)



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- **Step five to nine:** standard steps including reduction for early guilty plea.

Step 2: Large companies over £50m



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	Starting point	Category range
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000

- High culpability
- Medium culpability

Low culpability		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000



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Step 2: Category Range

- Micro - turnover up to £2m: £50 (low culpability cat 4 - £450,000 very high culpability cat 1)
- Small - between £2m and £10m: £100 - £1,600,000
- Medium – between £10m and £50m: £1,000 - £4,000,000
- Large - £50m and over: £3,000 - £10,000,000

Step 2: Individual Ranges - Custodial



	Starting point	Category range
Deliberate		
Harm category 1	18 months' custody	1 – 2 years' custody
Harm category 2	1 year's custody	26 weeks' – 18 months' custody
Harm category 3	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 4	Band F fine	Band E fine – 26 weeks' custody
Reckless		
Harm category 1	1 year's custody	26 weeks' – 18 months' custody
Harm category 2	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 3	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 4	Band E fine	Band D fine – Band E fine
Negligent		
Harm category 1	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 2	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 3	Band E fine	Band D fine or low level community order – Band E fine
Harm category 4	Band D fine	Band C fine – Band D fine
Low culpability		
Harm category 1	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 2	Band D fine	Band C fine – Band D fine
Harm category 3	Band C fine	Band B fine – Band C fine
Harm category 4	Band A fine	Conditional discharge – Band A fine



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Step 2: Aggravating and mitigating factors for individuals and organisations – Movement within range

- **Factors increasing seriousness** – previous convictions, cost cutting, obstructions of justice, poor record, falsification of documents / licenses, deliberate failure to obtain / comply with licenses
- **Factors reducing seriousness or reflecting personal mitigation** – no previous, steps taken to remedy, cooperation, good record, acceptance of responsibility



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Step 2: Additional factors for individuals– Movement within range

- **Factors increasing seriousness – whilst on bail**
- **Factors reducing seriousness or reflecting personal mitigation – good character, inappropriate degree, learning disability etc.**



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Steps 3 - 9:

- **Step 3:** Proposed fine based on turnover is proportionate to the means of the offender – court to ‘step back’ and adjust e.g. profit margins, economic benefit, put out of business.
- **Step 4:** Other factors that may warrant adjustment of the proposed fine – public or charitable bodies e.g. impact on employment, customers and local economy (but not shareholders or directors).
- **Step 5:** Consider any factors which indicate a reduction for assistance to the prosecution – e.g. assistance given to the prosecutor.



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Steps 3 – 9:

- **Step 6:** Reduction for guilty pleas
- **Step 7:** Compensation and ancillary orders – corporate manslaughter, includes publicity, remediation
- **Step 8:** Totality principle
- **Step 9:** Reasons

Corporate Manslaughter



- a) **How foreseeable was serious injury?** – more foreseeable the graver, failure to heed warnings or respond to “near misses”.
- b) **How far short of the appropriate standard did the offender fall?**
– Lack of adherence, inadequacy of training, supervision and arrangements.
- c) **How common is this kind of breach in this organisation?** – Was it isolated, indicative of systematic failings.
- d) **Was there more than one death, or a high risk of further deaths, or serious personal injury in addition to death?**

Category A = More serious offence

Category B = Serious offence

Corporate Manslaughter



Large Turnover more than £50 million		
Offence category	Starting point	Category range
A (more serious offences)	£7,500,000	£4,800,000 – £20,000,000
B	£5,000,000	£3,000,000 – £12,500,000

- Medium – turnover £10m to £50m
- Small – £2m to £10m

Micro Turnover up to £2 million		
Offence category	Starting point	Category range
A (more serious offences)	£450,000	£270,000 – £800,000
B	£300,000	£180,000 – £540,000



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Very Large Organisations

- 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.
- For health and safety offences and corporate manslaughter.

Corporate Manslaughter



R v Lion Steel Equipment

- Fine was £480,000 + £84,000
- Turnover of around £10m
- Just fits??



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Environment Agency and Health and Safety Sentencing Guidelines

- Very similar steps for organisation sentencing.
- Compensation and confiscation highlighted more within EA guidelines.
- Starting point and category range – Organisations: Health and Safety fine amounts for organisations much higher than Environment Agency.
- Starting point and category range – Individuals: Very similar ranges for fines and custody sentences.
- Aggravating and mitigating factors: Same for both.



BIM, CDM and other scary acronyms – threats and opportunities



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BIM and CDM

- Building Information Modelling (BIM) - 3 dimensional modelling – cradle to grave, design prepare, build, maintain, refurbish, demolish.
- 2016 government procurement programme
- BIM an opportunity for all (including accident investigation inspectors!)



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BIM and CDM

- HSE
- How will they use BIM?
- Construction (Design and Management) Regulations 2007 (1994)
- BIM and CDM

CDM



- CDM 'Step Change' in 1994
- CDM has had critics since 1994
- One set of regulations to fit all?

CDM Regs 2007



Specifically criticised by Professor Lofstedt

– “...Concerns...over the effectiveness of the regulations in minimising bureaucracy, bringing about integrated teams and addressing issues of competence...”

- CDM goes further than required by the EC Directive
- Proliferation of accreditation schemes
- ACoP over complicated.

CDM Regs



- HSE planned to amend the CDM 2007 in 2014?— (2015)
- 2012 HSE's, "Evaluation study, Evaluation of Construction (Design and Management) Regulations 2007"

The study demonstrated that:

- CDM 2007 gone a long way to meeting their objectives but still concerns
- Site practices improved between 2006 and 2010 (accident shift -2/3 on small sites)
- Cost in complying with the CDM 2007, but benefits outweigh the costs.
- Industry practices have "significant influence" on CDM 2007, especially during the current economic downturn when price / competence balance influential.

New CDM Reg Consultation



Press release

" The main proposed changes are to:

- make the Regulations easier to understand;*
- replace the CDM co-ordinator role with the principal designer;*
- replace the ACOP with targeted guidance;*
- replace the detailed and prescriptive requirements for individual and corporate competence with a more generic requirement;*
- align notification requirements with the Directive and apply the Regulations to domestic clients but in a proportionate way".*

Also to fit in with 'Government's strategy on Construction 2025'

CDM Regs



- ❑ Notification – 30 days **with 20 workers** or 500 person days
- ❑ Domestic client key duties default to contractor or pc
- ❑ ACOP goes to 'aimed' guidance
- ❑ Generic competence
- ❑ New Principal Designer replacing CDMC

Principal Designer v CDMC - 1



CDMC = CDM Coordinator

Reg 20(1) - CDMC shall

- Give suitable and sufficient advice to client....
- Ensure suitable arrangements are made and implemented for co-ordination.....during planning and preparation for the construction phase...cooperation and coordination
- Liaise with PC...health and safety file...info for construction phase plan....

20(2)

- Take all reasonable steps to identify...collect information, promptly provide

Principal Designer v CDMC - 2



Draft Regs

9. A Principal Designer must plan, manage, monitor and coordinate the pre-construction phase....to ensure that

- So far as is reasonably practicable, the project is carried out without risks to health or safety
- Identification, elimination, or control, of foreseeable risks to H or S of any person: carrying out..., affected..., maintaining..., cleaning, working

Principal Designer v CDMC - 3



Existing regs

22. The Principal Contractor shall plan manage, monitor and coordinate the construction phase....which ensures that, safe, it is carried out without risks to health or safety.....

- Learned the lessons of Terminal 5, Olympics – do the good work before the construction starts!
- Reflection of pc
- Present CDM-Cs, comfortable? Threat or opportunity?

CDM Regs



Where we are at:

- CD released on 31st March 2014!
- Consultation to 6th June
- In force April 2015????

Rumours that revised regs published on 9th Jan!!



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BIM / CDM Regs – Key areas

- Wider applications to just building modelling – whole workplace design
- BIM principles been around for a long time in the refineries and process industries
- Could be the equivalent of the HAZOP
- Model to be the first port of call for accident investigation?
- To some a threat to some an opportunity

BIM Issues



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- Who owns the model? IP, Confidentiality?
- Only as good as the raw data shared
- Who updates the model?
- New spirit of cooperation/coordination?
- BIM applies outside construction – risk management
- The future looks like this – HSE/Robocop?

Changes to Health and Safety in NHS & Care Homes

The CQC

Mid Staffs – Fallout (Francis Report) Proposals for England



- Regulatory gap
- Liaison agreement between the Care Quality Commission, the Health and Safety Executive and the Local Authorities in England –
1st April 2015

Mid Staffs Fallout (Francis Report)



CQC – now (previous HSE under HSW) lead enforcement under the Health and Social Care Act 2008 –

- safety and quality of treatment and care matters for patients and service users in receiving of health or adult social care service from a provider registered with CQC
- Where patients are harmed or injured due to unsafe care falls to CQC to act - scalding, infections, choking, inappropriate restraint
- Prosecution factors e.g. gravity of incident, multiple breaches, failure to register with CQC, obstruction etc.

Mid Staffs Fallout (Francis Report)



- New offence of 'ill treatment/wilful neglect' enforced by CPS/police aided by CQC (not HSE)
- **HSE/LA** - lead enforcement for health and safety matters involving patients and service users who are in receipt of health or care service from providers not registered with CQC
- **HSE/LAs** – lead inspection and enforcement bodies for health and safety matters involving workers, visitors and contractors – manual handling, scaffolding etc.



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Mid Staffs Fallout CQC – Introducing The Statutory Duty of Candour

- Key recommendation of Francis report.
- Requirement on providers of health and adult social care to be open with their patients when things go wrong
- Implemented in November 2015 with ‘fit and proper person provisions’ – full legislation in April 2015



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The Statutory Duty of Candour

- Openness
- Transparency and
- Candour – relevant person harmed informed and remedy offered whether or not complaint

Health and Safety Bulletin

What's new in health and safety?



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- Asbestos – campaign

Formal launch of Hidden Killer asbestos campaign was on 9 October 2014. The £1.1. million campaign seems to be going well and will run until April 2015

- Confined spaces – ACOP

On 3 December 2014 the HSE Board approved the ACOP and guidance on Confined Spaces Regulation 1997. the revisions arise from the recommendation in Professor Lofstedt's report that the HSE should review all ACOPs. Aim is for identification to be easier and misidentification is reduced.

- Lifting - ACOP

On 3 December 2014 the HSE Board approved revised ACOP on Lifting Operations and Lifting Equipment Regulations 1998 – content is to be simpler and clearer.

- Healthcare – enforcement

The first 4 months of 2015 will see major changes to the HSE's enforcement of health and safety at healthcare premises in England... I will go on to discuss

Health and Safety Reviews



DWP's Kim Archer's review into HSE's approach to implementing EU legislation – March 2014

- Remarkable consistency
 - Little evidence of unjustified gold plating
- TUC suggested government not publicise enough

FFI Independent Review Panel – first 18 months (June 2014)

21261 invoices, £10.5m, average invoice £502

- Achieving overarching aims
- Not always 'popular' but consistently applied
- Costs in terms of HSE/dutyholder relationships
- No compelling evidence of 'cash cow'



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Self-employed persons and S.3 (2) Health and Safety at Work etc. Act 1974 changes



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The current position

- S3(2) of HSWA, places general duties on everyone “at work” including the self-employed. Section 3(2) states:
- “It shall be the duty of every self-employed person to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health and safety.”



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The Proposed Change

- Aims to exempt self employed people from that general duty unless they are on a *prescribed* list.
- This list will be regulated by the Secretary of State who will have the power to bring self employed persons within the scope of S 3(2).
- The four criteria that do not exempt a self employed worker:
 - High numbers of sel-employed workers / High numbers of fatalities (e.g. agriculture)
 - Significant risk to the public (fairgrounds)
 - Potential for mass fatalities (explosives)
 - European obligation to retain the general duty in specific directives (CDM)

Questions

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