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HEALTH AND SAFETY COMMISSION

HSC RESPONSE TO SENTENCING ADVISORY PANEL CONSULTATION ON SENTENCING FOR CORPORATE MANSLAUGHTER, AND HEALTH & SAFETY OFFENCES INVOLVING DEATH

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Issue

1. HSC's response to the Sentencing Advisory Panel's consultation on sentencing for Corporate Manslaughter, and health and safety offences involving death.

Timing

2. Urgent. The timing of this paper is driven by an external deadline. The consultation paper was launched on the 15 November 2007 and the Sentencing Advisory Panel requires responses by the 7 February 2008.

Recommendation

3. The commission is invited to:
 - I. note the sentencing advisory panel's recommendations for sentencing for corporate manslaughter and health and safety offences involving death;
 - II. agree the draft response at **Annex 1**, which welcomes the general thrust of the recommendations, but notes issues arising from some of them.

Background

4. The Corporate Manslaughter and Corporate Homicide Act 2007 (www.opsi.gov.uk/acts/acts2007/20070019.htm) received Royal Assent on 26 July 2007 and will come into force on 6 April 2008 other than for deaths in

custody and the provisions on publicity orders. A summary of its main provisions is at **Annex 2**. HSC considered and responded positively to the proposals that led to the Act in 2005 (HSC/05/63).

5. As well as an unlimited fine, for the offence of corporate manslaughter courts will be able to impose a publicity order and/or a remedial order. Remedial orders are already available under existing legislation (e.g. HSWA section 42, though this particular power is rarely used), but the publicity order is new. As this is both a new offence and one for which a new sanction will be available, the courts will require guidance for sentencing.
6. The Sentencing Advisory Panel (SAP) has been asked by the Sentencing Guidelines Council to produce advice on guidelines for use in courts in England and Wales. The SAP's consultation on its proposals is available at <http://www.sentencing-guidelines.gov.uk/consultations/current/index.html>. The main recommendations on which comment is invited are set out below. There is no equivalent to the SGC in Scotland, but whilst not bound by SGC guidelines, courts in Scotland do have regard to sentencing guidelines in England and Wales.
7. The proposals in the SAP's consultation paper can be summarised as; when sentencing for an offence of corporate manslaughter, the starting point for the court's consideration should be:
 - the imposition of a publicity order; and
 - a fine of 5% of the offender's average annual turnover;
 - within a fine range of 2.5 to 10% of the average annual turnover
8. The new offence is intended to complement, not replace, existing health and safety offences. Organisations can still be prosecuted for these as an alternative, or in addition, to corporate manslaughter. To promote consistency and produce guidelines that reflect the seriousness of the management failings, SAP is also consulting on sentencing for health and safety offences involving death. The consultation draws on the guidance on sentencing for all health and safety offences in Magistrates' Courts and relevant Court of Appeal findings. Different guidelines are proposed for the two sets of offences.
9. The SAP consultation paper proposes that when sentencing for an offence under the HSWA involving death, the starting point should be:
 - a fine of 2.5% of defenders average annual turnover;
 - within a fine range of one to 7.5% of average annual turnover
10. The consultation paper focuses on the HSWA, and regulations made under it, as the overarching legislation on health and safety in the workplace. It does not deal specifically with other health and safety regimes within scope of the Corporate Manslaughter Offence, eg. Those enforced by ORR, MCA, CAA, FSA, VOSA, etc.

Argument

11. The consultation discusses the aims of sentencing an organisation for corporate manslaughter. A statutory basis for sentencing is already set out in Section 142 of the Criminal Justice Act 2003. Any sentencing guidelines developed for corporate manslaughter and health and safety offences involving death should be in line with those purposes:

Section 142(1) states that any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing;

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.

12. The Commission's views on the purposes of enforcement are set out in the introduction to the HSC Enforcement Policy Statement and are in line with the CJA purposes of sentencing. They state that the appropriate use of enforcement powers, including prosecution, is important, both to secure compliance with the law and to ensure that those who have duties under it may be held to account for failures to safeguard health, safety and welfare.

13. Analysis of the consultation paper has been conducted against this background and in the light of the HSC's role as the principal health and safety regulator, with an interest in seeing enforcement action result in credible sanctions which will play a role in delivering justice and ensuring compliance with the law, so improving standards.

14. A proposed response from the Commission to the Sentencing Advisory Panel is at **Annex 1**. This broadly welcomes the approach to sentencing for corporate manslaughter and health and safety offences involving death, but notes a number of points the Commission may wish to bring to the Panel's attention. Key issues are discussed below.

Hierarchy of fine levels

15. The sentencing guidelines being proposed advocate a higher level and range of fine for the offence of corporate manslaughter than for health and safety offences involving death (see Background above).
16. It is the Government and HSC's long held view that the offence of corporate manslaughter be seen as the appropriate 'top tier' offence when dealing with the most serious of corporate health and safety management failures resulting in a fatality. When sentencing for such a serious offence, there must be a credible sentencing regime that reflects its seriousness in the eyes of society. It follows that such a sentencing regime should be more severe than that for health and safety offences where death has also occurred.

Turnover as basis for sentencing

17. If a hierarchy of treatment in sentencing is accepted, then a proportionate basis for this is required. The proposed guidelines focus on the annual turnover of the defendant. As a health and safety regulator rather than a financial body, the Commission need not comment on the detail of calculating the approach, which seems reasonable, being in line with OFT powers under the Competition Act to impose penalties of up to 10% of worldwide turnover for offences under that Act. However, the draft letter highlights a number of issues for the panel to consider further:

- Careful thought is needed on the issue of analysing the structure of the business and the organisation of their finances. Companies (and public bodies) might be structured such that annual turnover and profitability is remote from the operational arm of the business. This might make it difficult to assess annual turnover, or even make an assessment inappropriate to form the basis of sentencing;
- Whilst the offence of corporate manslaughter is aimed at organisations, very small businesses of limited means could be subject to this offence, and are already subject to prosecution for breaches of health and safety offences. At the lower end, these may be individuals working as limited companies. So any sentencing guidelines must be flexible enough to appropriately punish such small enterprises, as well as large businesses;
- Who should assess turnover? HSE does not currently have the skills or resources to conduct the forensic examination of company finances that would be necessary, nor to make representations to a court regarding that company's profitability.

Impact on H&S sentencing where there has been no death

18. It is important that guidelines on sentencing for health and safety offences involving fatality do not have the unintended effect of compromising appropriate sanctioning following health and safety incidents where there has been no death. Such incidents can be extremely serious, as it can be a matter of chance whether death or serious injury results from a serious breach of health and safety legislation. Otherwise, sentencing might not be proportionate to the nature of the offence and the incident, nor be sufficient to respond to the public's concern over such events.

Aggravating and mitigating factors

19. The aggravating and mitigating factors listed at paragraph 32 of the consultation paper would appear to be equally relevant to both corporate manslaughter and health and safety offences. The defendant's level of co-operation should also be taken into account. A further aggravating factor could be the extent of any damage following an incident, along with the cost of rectification, eg. where there has been an environmental impact of a particular

health and safety incident.

Adjusting the level of fine

20. The consultation asks whether a fine should aim to eliminate any financial benefit resulting from an offence. The widely accepted view, highlighted by Hampton and Macrory, is that it should. However, calculating the financial benefit is likely to prove extremely difficult. HSE is not resourced to conduct the necessary forensic accounting that might be needed to establish what that alleged benefit might have been. The draft letter suggests the panel do more work to consider how this might be achieved in practice.
21. On the question of whether the courts should make any adjustment to a fine to take account of the possible impact on shareholders, customers and even the existence of the business, in the Howe case (Howe & Son (Engineers) Ltd 1999), which forms a basis for current health and safety sentencing, the court of appeal said; *“A fine needs to be to be large enough to bring the message home where the defendant is a company not only to those who manage it but also its shareholders...there may be cases where the offences are so serious that the defendant ought not to be in business.”*. On this basis, the Commission can support the Panel’s proposed approach to the impact of a fine on the offender, which is not to make any adjustment to the fine to take account of any such impact on shareholders.
22. Further, in line with the Commission support of the Government’s commitment to seek the removal of Crown immunity for health and safety offences, it is suggested that the Commission should agree that the courts treat all offenders consistently, whether or not they are publicly funded or providing a public service, but that the court should take account that where the offender is funded from the public purse, the fine will be paid with public money. This approach has been well established in the past, with the removal of Crown immunity from the NHS, and the Local Authority sector never enjoying such immunity, and should ensure proper accountability in both the public and private sectors.
23. On publicity orders for corporate manslaughter convictions, in the health and safety context the evidence collected as part of the Commission's formulation of its Enforcement Policy Statement and Strategy established that drawing attention to a conviction contributes to the aims of enforcement and sentencing. The Commission can therefore support the imposition of a publicity order in every case of a conviction for corporate manslaughter.

Consultation

24. Enforcement Policy Unit has consulted with Legal Advisors’ Office, FOD Legal & Enforcement, OPSD, Communications Directorate, Strategy Division, NSD, HID, Resource & Planning Division and LACORS. It is understood that LACORS will make its own response.

Presentation

25. The Commission's response may be of particular interest to those organisations that are active in relation to work related deaths, eg. The Centre for Corporate Accountability (CCA), Families Against Corporate Killers (FACK), the Hazards campaign, the TUC, etc.
26. The TUC has welcomed the new law but trades unions are continuing to press for specific legal health and safety duties on directors of companies and for tougher penalties for directors including imprisonment.
27. The CBI considers it important that the new law be enforced proportionately and for charges under the offence to be brought in a very limited number of cases. In a recent article in the Financial Times, the CBI criticised the SAP's plan to fine companies between 2.5 and 10 per cent of annual turnover. They considered that the crude use of this figure could lead to fines which were out of proportion and stated that it would be unfair to impose a fine linked to global sales, as the actions that led to corporate manslaughter would often relate specifically to a single unit of a business.
28. The Health & Safety Offences Bill has again been put forward as a Government Handout Bill and has been picked up by Keith Hill, MP for Streatham, and is due to receive its second reading on 1 February. As a result, the Commission's response on sentencing for health and safety offences (involving death) may be raised in any debates in Parliament.
29. There is likely to be interest in the guidelines from national, regional and trade and specialist papers. Press Office will be aware of the Commission's response, as well as the SAP's guidelines when published. Press Office may consider publicising the final guidelines proactively.

Costs and Benefits

30. The benefits to society of appropriate sentencing for this very serious offence are not quantifiable. However, the purposes of sentencing are set out in Section 142 of the Criminal Justice Act 2003 (see para 10 above). These align with the aims of enforcement set out in the Commissions Enforcement Policy Statement. The benefits to society should therefore arise from achieving these purposes.

Financial/Resource Implications for HSE

31. There will potentially be some ongoing costs to HSE from future liaison with the Sentencing Advisory Panel and Sentencing Guidelines Council. There have been minor staff costs to date in providing SAP with information and preparing this Commission paper. Estimated resource demand to HSE, in both cases, is approximately £5,000 at full economic cost. Total estimated cost is therefore £10,000.

32. The costs and benefits of the proposals themselves are not quantified in the consultation paper. Some increased costs may fall on investigators/prosecutors if a more detailed examination of company (defendant) accounts becomes necessary to establish annual turnover. This is not something that HSE has the resources or skills to do. It is likely that other health and safety regulators, including Local Authorities, may well face similar problems. Some of these costs might be recoverable from the defendant.

Environmental Implications

33. No direct implications.

Other Implications

34. As noted elsewhere in the paper, other health and safety regulators, including Local Authorities, will have an interest in these proposals and in the Commission's response to them.

Action

35. To agree the suggested response to the Sentencing Advisory Panel at **Annex 1**, which is broadly positive about their consultation paper, but sets out some concerns with their detailed recommendations.

DRAFT LETTER FROM THE CHAIR TO THE SENTENCING ADVISORY PANEL

I am replying, on behalf of the Health and Safety Commission, to the Sentencing Advisory Panel's consultation paper on sentencing for corporate manslaughter and health and safety offences resulting in death. The Commission's role encompasses the aims and purposes of the Health and Safety at Work Act and related provisions and oversight of the work of HSE and Local Authorities in applying that Act.

The Commission's views on the purposes of health and safety enforcement are set out in the introduction to our Enforcement Policy Statement. The appropriate use of enforcement powers, including prosecution, is important, both to secure compliance with the law and to ensure that those who have duties under it may be held to account for failures to safeguard health and safety. It is the Commission's view that these intents are in line with the purposes of sentencing as set out in Section 142 of the Criminal Justice Act 2003 and that any sentencing guidelines for corporate manslaughter and health and safety offences involving death should be in line with those purposes.

In 2005 the Commission expressed its strong support for the proposal of a new statutory offence of corporate manslaughter. The extra deterrent effect of a corporate manslaughter conviction when an organisation has failed to meet the proper standards of health and safety will provide a further driver for ensuring safe working practices. A further important aim of the Corporate Manslaughter and Corporate Homicide Act is to deliver greater justice: companies and other organisations must be properly held to account for gross failings that have had fatal consequences. Appropriate sentencing is an essential element in achieving these aims and so the Panel's consultation is very welcome.

The parallel production of sentencing guidelines for health and safety offences involving death is also to be welcomed. It is right that those offences be treated with appropriate seriousness as well. The Commission is particularly keen to see an increase in the level of fines awarded by the courts for health and safety offences. As Professor Macrory found in his review of regulatory sanctions, these fines are often considerably below the maximum available and may not be sending a strong enough deterrence signal. This view is now widely held and these guidelines have an important part to play in helping to address the issue.

It is the Government and HSC's long held view that the offence of corporate manslaughter be seen as the appropriate offence when dealing with the most serious of corporate health and safety management failures resulting in a fatality. When sentencing for such an offence, there must be a credible sentencing regime that reflects its seriousness in the eyes of society, whilst taking appropriate account of the defendants resources. It follows that such a sentencing regime should be more severe than that for health and safety offences where death has also occurred and so we support this principle put forward in your proposals.

Once the proposed hierarchy of treatment in sentencing is accepted, then a proportionate basis for this is required. The proposed guidelines focus on the annual turnover of the defendant. This seems reasonable, being in line with OFT powers under the Competition Act to impose penalties of up to 10% of worldwide turnover for offences under that Act. However, there are a number of issues the Commission would wish the panel to consider further:

- Careful thought is needed on the issue of analysing the structure of the business and the organisation of their finances. Companies (and public bodies) might be structured such that annual turnover and profitability is remote from the operational arm of the business. This might make it difficult to assess annual turnover, or even make an assessment inappropriate to form the basis of sentencing;
- Whilst the offence of corporate manslaughter is aimed at organisations, very small businesses of limited means could be subject to this offence, and are already subject to prosecution for breaches of health and safety offences. At the lower end, these may be individuals working as limited companies. So any sentencing guidelines must be flexible enough to allow appropriate punishment of such small enterprises, as well as large businesses;
- Who should assess turnover to enable the court to consider the appropriate sentence? The commission would like to emphasise that HSE does not currently have the skills or resources to conduct the forensic examination of company finances that would be necessary, nor to make representations to a court regarding that company's profitability.

With regards to publicity orders for corporate manslaughter convictions, in the health and safety context, the evidence collected as part of the Commission's formulation of its Enforcement Policy Statement and Strategy established that drawing attention to a conviction contributes to the aims of enforcement and sentencing. We would therefore support the imposition of a publicity order in every case.

In the context of widespread concerns about the often inadequate level of penalties awarded for health and safety offences, it is important that the Panel is sure that its proposed guidelines on sentencing for health and safety offences involving fatality do not have the unintended effect of compromising appropriate sanctioning following health and safety incidents where there has been no death. Such incidents can be extremely serious, as it can be a matter of chance whether death or serious injury results from a serious breach of health and safety legislation. Otherwise, sentencing in non fatal cases might not be proportionate to the nature of the offence and the incident, nor be sufficient to respond to the public's concern over such events.

With regards to the proposed aggravating and mitigating factors, those listed in your paper would appear to be equally relevant to both corporate manslaughter and health and safety offences. We would further suggest that the co-operation of a defendant during an investigation be taken into account, as should a lack of such cooperation. A further aggravating factor could be that of the extent of any damage following an incident, along with the cost of rectification, eg. where there has been an environmental impact.

As to whether a fine imposed for the offence of corporate manslaughter, or for a health and safety offence involving death, should aim to eliminate any financial benefit resulting from that offence, the Commission's view is yes, in principle it should. However, calculating the financial benefit might prove to be extremely difficult. And regulators such as HSE are not resourced to conduct the forensic examination of company accounts and finances that would be necessary to establish financial benefit and provide the information needed by the sentencing court to judge what level of fine might be appropriate. More thought is needed on how this might be achieved.

We agree with the Panel's view that the courts should not make any adjustment to a fine so as to take account of the possible impact on shareholders. We also agree that the courts should treat all offenders consistently, whether or not they are publicly funded or providing a public service, while taking account that where the offender is funded from the public purse, the fine will be paid with public money. This should ensure appropriate accountability in both the public and private sectors.

In conclusion, the Commission would again want to voice its support for this new offence and, subject to our comments above, to the broad thrust of your proposals. HSE officials are more than happy to assist further in your detailed considerations.

MAIN PROVISIONS OF THE CORPORATE MANSLAUGHTER & CORPORATE HOMICIDE ACT 2007.

1. The text of the Act is available at <http://www.opsi.gov.uk/acts/acts2007/20070019.htm>. HSE's webpages on the Act and its implications for HSE can be found at <http://www.hse.gov.uk/corpmanslaughter/index.htm>.
2. The new offence replaces the common law offence of corporate manslaughter. It applies only to organisations, and does not affect the individual offence of gross negligence manslaughter. Nor does it affect the ability to prosecute organisations and individuals under existing Health and Safety law. It aims to improve the existing common law position, where it was hard to secure a corporate manslaughter conviction against all but very small companies because of the difficulty of identifying a single "directing mind" as culpable.
3. A workable offence of corporate manslaughter is necessary to deal with serious corporate health and safety management failures. It will be an important addition to the range of enforcement options that are available when a fatality results from such failures. The extra deterrent effect of a corporate manslaughter conviction, when an organisation has failed to meet the proper standards, should provide a further driver for ensuring safe working practices, both in that organisation and in the wider work setting.
4. A further aim of the Corporate Manslaughter and Corporate Homicide Act was to deliver greater justice, so that organisations can be properly held to account for gross failings that have had fatal consequences, so restoring public confidence in this aspect of the criminal justice system.
5. The Act's application to the management of custody will not be brought into force in 2008. The Government has undertaken to report annually to Parliament until it is ready to bring this into force – and has indicated this is likely to be in three to five years' time.
6. Under the Act, a judge will determine whether the defendant (the company or organisation) owed a duty of care to its employees or to other persons working for the company or organisation or performing services for it. If so, the jury must consider if the breach of that duty of care was a 'gross breach' and that this was the result of the way the company or organisation's activities were managed or organised by its senior management. In reaching a decision, a jury must consider whether the evidence in a case shows that a defendant has failed to comply with any health and safety legislation, and can consider their attitude, culture and policies etc. and may also have regard to any relevant health and safety guidance.
7. The Act largely removes the Crown immunity that applied to the existing common law corporate manslaughter offence. This is consistent with Government and HSC policy to secure the eventual removal of Crown immunity for health and

safety offences. The Act provides a number of specific exemptions that cover defence and policing, public policy decisions and the exercise of core public functions.

8. HSE, LAs and other health and safety regulators (eg. ORR, MCA, CAA, FSA, VOSA) may be asked to provide information or evidence to enable the police to help juries to decide whether an organisation has failed to comply with any relevant health and safety legislation. They may also be consulted by the courts about the terms of any subsequent remedial and publicity orders that may be imposed, and may have a role in policing compliance with them and reporting back to the courts. Further, cases for alleged offences under health and safety legislation may be taken at the same time as the corporate manslaughter case, or afterwards if the defendant has been found guilty of that offence.
9. When sentencing an organisation for corporate manslaughter, a court will be able to impose an unlimited fine, a publicity order and/or a remedial order. The publicity order, requiring the organisation to publicise details of its conviction and fine, is new to England and Wales and will be commenced at a later date when sentencing guidelines are available (expected in autumn 2008).