Sentencing Council's consultation on health and safety offences, corporate manslaughter and food safety and hygiene guidelines.

Response from the Health and Safety Executive.

The Health and Safety Executive (HSE) welcomes the opportunity to comment on the Sentencing Council's consultation on health and safety, corporate manslaughter and food safety and hygiene offences. As HSE has no role in relation to food safety or hygiene, we do not intend to comment on that part of the consultation. We support the Council's aim to ensure that all sentences are proportionate to the offence committed and in relation to other offences.

In our experience, many judges and magistrates deal only infrequently with health and safety offences. Therefore, their familiarity with the offences and the sentences imposed for them is limited. As prosecutor we are sometimes asked by the court to provide an indication of the range of fine which may be appropriate. The absence of a definitive guideline makes this very difficult. Therefore, we support the additional guidance that the guideline will provide to courts and are very grateful to the Council for giving it priority.

We note that the Council's review and analysis of current sentencing practice concluded that, in some cases, the levels of fines appeared too low to meet the aims of sentencing in this area, particularly in the case of the more serious offences committed by larger organisations and that the starting point and ranges have been set at levels to remedy this. Ensuring that fines are proportionate both to the seriousness of the offence and the size and financial resources of the company is consistent with the principles contained within HSE's Enforcement Policy Statement.

We appreciate that the Council has developed a guideline which is intended to strike a balance between providing sufficient guidance to provide consistency and sufficient flexibility to provide for the wide range of circumstances, both of the offence and the offender which can arise in health and safety offences. We agree that the use of the turnover of an organisation as a measure to link to the starting points and ranges has merit and that step three can provide the necessary flexibility. However, we have some concerns as to how many cases there might be in which the turnover will not provide any meaningful indicator of the financial circumstances of the organisation and its ability to pay a fine particularly given the complexity of corporate structures which exist in many cases. If this were a significant number of cases, the court would have to move significantly away from the starting point and ranges so often as to make steps one and two pointless. We note that a similar model has been used in the guideline for environmental offences and believe that the Council intends to carry out a review of its operation after twelve months. We think it would be helpful if that review were carried out before any final decision is taken in relation to the health and safety offences guideline.

We also have some concerns that the existence of the guideline and its application will make health and safety prosecutions more complex with significant court time taken up in argument and possibly evidence being heard to determine how any case should be treated within the guideline. We are sure this was not the intention of the Council and wonder whether further guidance could be provided on the approach which courts should take regarding the practical application of the guideline.

We provide detailed comment on the majority of the consultation questions below. However, as far as those questions relating to the proposed starting points and ranges are concerned, we think it would be inappropriate for us to comment on those details although we agree with the principles that the Council proposes. We note the Council's statistical research of current sentencing practice which preceded the publication of the draft guidelines and would not disagree with its analysis of the current level of fines.

Question 1: Do you agree with the overarching principles for setting fines for those offences, set out in step three of the draft guidelines?

HSE agrees with the overarching principles. In particular, we agree with the statement that the fine must be "sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation". In our experience, in the case of large companies involving serious breaches, this has sometimes not been the case. We also agree that it should not be cheaper to offend than to take the appropriate precautions. We note that the court should have regard to "any quantifiable economic benefit derived from the offence". However, in the context of health and safety offences, it is often impossible to prove such a quantifiable benefit and to attempt to do so might involve HSE conducting extensive forensic examination of company accounts. We are concerned that courts may routinely require HSE to carry out these inquiries. We consider that the aggravating factor at step two of "cost cutting at the expense of safety" will give the courts sufficient flexibility to adjust the fine to ensure that it is not cheaper to offend.

Whilst the guideline gives guidance on where a fine may put the offender out of business, it does not deal with the situation of companies which are already in administration or have become insolvent. In such cases, HSE considers carefully whether a prosecution is in the public interest. However, in cases where death or serious injury has been caused, HSE will often decide that a prosecution is in the public interest despite the company having no means to meet any fine or costs. The approach of the courts varies. Some judges impost a nominal fine, others impose the fine that would have been imposed had the company still been trading in order to mark and reflect the seriousness of the offence. HSE considers that the latter approach to be the more appropriate and would suggest that the guideline should give guidance on this issue.

We note that the factors to which a court should have regard in the case of organisations and individuals are different. Whilst the first bullet of the organisation guideline relating to profit might only be relevant to an organisation (but see below), the other two bullets would seem equally relevant to an individual.

In relation to step 3 of the guideline for individuals, more generally, we consider that it does not sufficiently take into account the broad range of individuals who may be sentenced under health and safety offences. They will range from:

- an individual who owns/runs a company which is not incorporated but which employs a large number of people (and therefore is little different to an organisation).
- A partner in a partnership.
- A director of a large company
- a self-employed person
- an employee (with varying levels of responsibility)

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

We broadly agree that the proposed structure provides the right balance of guidance and flexibility. Whilst we can see that, in some cases, turnover may not properly reflect the organisation's ability to pay, in most cases it will. This will be a significant improvement on the present position where there is little or no guidance on starting point and ranges. Step 3 will provide the necessary flexibility to make adjustment where there is a clear disconnect between turnover and ability to pay. We wonder, however, whether the guideline could provide further guidance on the circumstances and extent of the adjustment in step 3. For instance, in some cases, there may be cases where there is evidence of director's loans which have taken resources out of the company which otherwise would be available to meet a fine. Further guidance on the circumstances in which such arrangements can be taken into account would be welcomed.

Question 3: Do you agree with how the 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?

We agree that the use of turnover is the most straightforward measure to fix the starting point and ranges and, when combined with the guidance in step 3, will allow the court to properly assess the means of the offender.

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

See our comments under question 1.

Question 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?

We agree that use of the EU categories is sensible and it would be inconsistent to have different categories to those used under the environmental offences guideline. We note that the Council has reiterated the general principle that "normally only the financial information relating to the organisation before the court will be relevant unless it is demonstrated to the court that the accounts of a linked organisation are available and can properly be taken into account." We consider that there is a significant risk that organisations will organise themselves (either before or after any incident) in order to reduce the turnover of the organisation which has committed the offence. HSE considers that further guidance should be given as to the circumstances in which it would be proper to take into account the accounts of a linked organisation.

In relation to very large organisations, it might be helpful to give further guidance as to the extent to which the court might move outside the suggested range. This could be done by reference to a percentage.eg. for a very large company with a turnover of £100 million and over consider increasing the starting points and range by x%.

Question 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?

In the case of public or charitable bodies, we note that the guideline states that the fine should "normally be substantially reduced if the offending organisation is able to demonstrate that the proposed fine would have a significant impact on the provision of their services". This follows the wording of the environmental offences guideline. However, it differs from the existing position in the Guideline for Corporate Manslaughter and Health and Safety Offences Causing Death which provides that this is a factor simply to be considered amongst others. The existing guideline adds that such an organisation "must be treated the same as a commercial company where standards of behaviour to be expected are concerned". In view of the wide variety and size of public and charitable bodies which will all have very different funding arrangements, we consider that guidance to "consider" rather than "normally reduce" would be more appropriate to allow the court greater discretion to achieve the overarching aims in sentencing health and safety offences.

Also we do not consider that the impact of the fine on the offender's ability to comply with the law should be a relevant factor at all. We say this for two

reasons. Firstly, health and safety duties are normally qualified by requiring the control of risk so far as reasonably practicable. This means balancing the degree of risk against the time, trouble and cost of controlling the risk. Therefore, the conviction of the defendant has already taken into account the cost of compliance. Secondly, HSE will already have taken action to ensure compliance by the time any prosecution is brought by use of enforcement notices.

Question 7: Do you agree that the structure of the guidelines for individuals is appropriate?

We agree that the structure is appropriate. However, in view of the wide range of individuals who may fall for sentence, we are not convinced that use of a percentage of weekly income will enable the court to fully assess the individual's financial position or ability to pay. In particular where the individual is running a substantial business with significant turnover and assets, reference to individual weekly income is unlikely to properly reflect that person's financial resources and ability to pay a fine.

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

As mentioned under the answer to question 6, we do not consider it will normally be necessary or appropriate to have regard to the impact of any fine on an individual's ability to comply with the law.

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

Yes we agree. It would add unnecessary complexity to the guideline which is not justified when issues of compensation and confiscation are very rare in health and safety offences.

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

We agree with the scope of the guideline. In particular, we agree that breaches of all health and safety regulations which are made an offence by Section 33(1)(c) HSWA should be included. They carry the same maximum penalty as breaches of the general duties under Section 2 and 3 HSWA and therefore, it is appropriate to include them in the guideline. Not to do so would leave the court without assistance for a large range of health and safety offences. We agree that the guideline will generally be able to embrace the broad circumstances covered by the regulations. However, there is one area where we have concerns. The Control of Major Accident Hazards Regulations 1999 (COMAH) deal with the safety and environmental risks posed by large chemical establishments. The regulations are enforced by the competent authority which consists of the Environment Agency and HSE acting jointly. Under regulation 4 COMAH there is a general duty on every operator to "take all measures necessary to prevent major accidents and limit their

consequences to persons and the environment". By regulation 20 COMAH section 33 HSWA applies to the regulations as if they were health and safety regulations. So breach of regulation 4 COMAH is an offence contrary to Section 33(1)(c) HSWA and will be covered by the guideline. However, a breach of regulation 4 COMAH may involve consequences not just in terms of safety to persons but also to the environment. Indeed, in some cases, the offence may exclusively relate to risks or damage to the environment. Therefore, we do not think that the guideline will provide the necessary assistance to the courts in such cases. In particular, the court will not be able to assess the seriousness or "harm risked or caused" because the descriptors all relate to the risk of harm to individuals rather than the environment.

However, we would not want COMAH to simply be removed from scope because this would leave the courts without guidance on how to sentence some of the most serious breaches of regulations often committed by the largest organisations. A solution could be to allow reference to certain factors in the environmental offences guideline in such cases. We would be willing to work with the Council to identify a solution and also to identify other health and safety regulations which also relate to preventing environmental damage.

Question 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?

We agree that categorising culpability by reference to "mens rea" terms such as deliberate, reckless and negligent would be inappropriate for organisations. However, in the context of health and safety offences we think that such terms will generally be inappropriate for individuals too. As mentioned in our answers to question 1, the type of individual prosecuted may vary considerably but, in some cases, the person may be the effective embodiment of an organisation. Therefore, we can see no reason to distinguish the factors relating to culpability. In the case of individuals convicted under Section 7 or Section 37 HSWA, we also have concerns as to how the culpability factors would work. For instance, in the case of section 7 HSWA, the offence is committed by a failure to take reasonable care. It is difficult to see, therefore, how any offence could be categorised by way of culpability as anything other than "negligent". We would suggest, therefore, that categorisation of culpability as very high/high/medium/low should be used both for organisations and individuals.

We also have some concerns about the descriptors and the way they are to be used to determine culpability.

One of the descriptors for low culpability for organisations and for individuals is that "there was no prior event or warning indicating a risk to health and safety". However, this may be the situation in many cases. Management of risk is based on the carrying out of risk assessments to identify risks and put in place appropriate control measures. Waiting for an event to happen is not an appropriate system to manage risk and we are concerned that categorising

cases in which there was no such event as of low culpability will undermine these principles.

Whilst we do not disagree with the other descriptors, we are concerned about how the courts will use them. For instance, there are four examples of how an offender might fall far short of the appropriate standard such that culpability is assessed as high. Whilst we agree with these examples as demonstrating high culpability, what if all examples are present? Will that allow the court to assess the culpability as very high? We think it may be better to give the court more flexibility to assess culpability by removing the examples from each level, but listing them (and perhaps others) as matters to which the court should have regard in assessing culpability.

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

We understand the challenge faced by the Council in identifying the harm caused in health and safety offences which do not require any proof of actual harm. We agree that the first step must be consideration of the risk of harm. Equally, the fact that harm has actually been caused is an important and relevant factor which will often make the offence more serious. We think that the two-stage approach will ensure that courts can impose appropriate penalties in both types of case.

Question 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?

Whilst we agree that the proposed factors are appropriately gradated, we have some concerns as to how the courts will assess the seriousness of the "harm risked" and the likelihood of that harm arising. We are concerned that in many cases courts may require expert evidence to determine these issues. In particular, we think that further assistance will be needed as to how the courts assess the likelihood of harm and it could be that use of other descriptors may help. HSE already uses similar factors to assist it to make consistent enforcement decisions by applying the Enforcement Management Model (EMM): http://www.hse.gov.uk/enforce/emm.pdf

In considering the likelihood of harm arising, inspectors look at the probability of the event happening gradated as "probable/possible/negligible". When considering the risk and potential consequences, the test we apply is "is it credible that death could occur" etc. This difficultly can be illustrated by reference particularly to Case Study 2B where the Council has categorised the likelihood of the harm occurring as "remote". We would have thought that any escape of gas would involve more than a remote likelihood of an explosion and under our EMM would categorise this as at least "possible".

Question 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.

We agree with the factors included in the second stage. However, we consider that the guideline should go further than only requiring that the court "must consider" moving up within the category range or moving up a harm category. As these are factors which clearly increase the seriousness of the offence, we think that the guidance should say that, in these circumstances, the court "should" or "should normally" move up within the category range or harm category.

We make these further comments.

The first further factor relates to the number of persons exposed at one time to the risk of harm. There is reference to a "significant" number of persons being exposed to risk of harm. It is likely that there will be argument as to the number of persons that is required to be "significant". We would suggest either that the word "significant" is omitted or that some guidance is given as to the number of persons that would be likely to be considered "significant".

We welcome the assistance which is given as to the meaning of a "significant cause" of actual harm and that the actions of victims are highly unlikely to be considered contributory events.

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

See our introduction on page 2.

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

See our introduction on page 2.

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

See our introduction on page 2

Question 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.

See our introduction on page 2.

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

We think that application of the guideline will, in most cases, result in a higher fine. In the case of large or very large organisations we expect fines to be considerably higher.

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

Yes we do. This guidance will assist courts and, particularly, magistrates to take a consistent approach to when to impose a custodial sentence.

Question 21: Do you consider the guidance regarding the use of community orders and fines in health and safety guidelines to be appropriate and sufficient?

Yes we do, but see our comments under question 7 in relation to the appropriateness of using a percentage of weekly income to calculate the starting point and ranges for fines in health and safety cases.

Also we note the statement under step two and immediately before the table (page 92 of the consultation document) – “Even where the community order threshold has been passed, a fine will normally be the most appropriate disposal where the offence was committed for economic benefit”. We cannot understand why, if the community order threshold has been passed, a court should reduce the level of penalty to a fine where there exists an aggravating factor that a defined economic benefit has been obtained by the commission of the offence.

Question 22: Do you agree with the remainder of the starting points and ranges for individuals in the health and safety guideline?

See our introduction on page 2

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

The absence of guidance has made courts reluctant to impose custodial sentences for health and safety offences. We think that this structured guidance may lead to more custodial sentences being imposed.

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

We make the following comments on the aggravating and mitigating factors:

Breach of any court order – this is unlikely to be relevant to those charged with health and safety offences (although not impossible). However, in our view another aggravating factor should be a breach of an enforcement notice.

Poor health and safety record – in our opinion a further aggravating factor should be the previous service of any enforcement notices (with due regard, as with previous offences, to the nature and relevance of the notice and the time that has elapsed).

Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities – we would suggest the removal of the words "in order to avoid scrutiny by authorities" as the aggravation is provided by the failure to obtain or comply with the licence rather than any intention to avoid scrutiny.

Evidence of steps taken to remedy problem – this already appears to have been considered as part of culpability under step one as "significant efforts were made to address the risk, although they were inadequate on this occasion", is an example of low culpability.

Effective health and safety procedures in place – if this were the case, then it is difficult to see how there will have been a prosecution or conviction.

Self-reporting, co-operation and acceptance of responsibility – in certain situations (and most of those which result in prosecution) the defendant will be under a statutory obligation to report the incident under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR). Therefore, it does not seem to us that self-reporting should be a mitigating circumstance. Co-operation and acceptance of responsibility are caught under other mitigating factors.

High level of co-operation with the investigation beyond that which will always be expected – clarification as to what level of co-operation is expected and what sort of co-operation would be a "high level" such as to amount to a mitigating factor would be helpful. Also, we could suggest that there should be a matching aggravating factor relating to a failure to co-operate.

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

In relation to the ancillary order of remediation under Section 42(1) HSWA, we think it might be helpful to provide some further guidance to avoid courts spending too much time considering such orders. In view of the powers of HSE inspectors to issue enforcement notices, it is likely that action will have already been taken to remedy the breach. We would suggest addition of words to say that a remedial order need only be considered if, at the time of sentence, the defendant has not remedied any specific failings.

Also, in the guideline for individuals, it would be helpful if further guidance could be given as to the circumstances in which it will be appropriate for a court to make an order disqualifying a director of a company.

Finally, we note that there is no reference to costs. This is currently referred to in the guideline for health and safety offences causing death and we would suggest the inclusion of the words used there: “the defendant ought ordinarily (subject to means) to be ordered to pay the properly incurred costs of the prosecution.”

Question 26: Do you agree with the overall approach to assessing the offence seriousness at step one of the corporate manslaughter guideline?

Whilst we agree that even with a serious offence such as gross manslaughter, there can be different levels of seriousness and culpability, we do not think it is necessary to prescribe two levels. As the category ranges already overlap significantly, we think that the guideline could provide one starting point and range for each size of organisation. The court could then take into account the various factors set out in the guideline to determine where on the range the case should fall.

Question 27: Do you agree with the proposed questions relating to culpability and harm in step one of the corporate manslaughter guideline?

These questions are contained in the existing guideline and relate to the assessment of seriousness for both corporate manslaughter and health and safety offences which cause death. Some of them may not be appropriate for a guideline dealing only with corporate manslaughter. For instance, in considering how far short of the applicable standard the offender fell, the court will be starting from the position of an offender which has been found to have committed a gross breach of its duty. Surely, it will always have fallen far short of the appropriate standard?

Question 28: Do you agree with the proposed starting points and ranges for micro organisations in the corporate manslaughter guideline?

See our introduction on page 2.

Question 29: Do you agree with the proposed starting points and ranges for small organisations in the corporate manslaughter guideline?

See our introduction on page 2.

Question 30: Do you agree with the proposed starting points and ranges for medium organisations in the corporate manslaughter guideline?

See our introduction on page 2.

Question 31: Do you agree with the proposed starting points and ranges for large organisations in the corporate manslaughter 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.

See our introduction on page 2.

Question 32: Do you agree with the proposed aggravating and mitigating factors for corporate manslaughter?

We repeat the comments which we made in relation to the proposed aggravating and mitigating factors for health and safety offences under question 24 as they apply equally here.

Question 33: Do you agree that the guidance on ancillary orders and compensation in the corporate manslaughter guideline is appropriate and sufficient?

Yes we do, save for the point which we make in relation to costs under question 25.