

The Sentencing Council published draft sentencing guidelines for health and safety, corporate manslaughter and food safety and hygiene offences on 13 November 2014. Following the closure of its consultation period on 18 February 2015, the Sentencing Council, on 3 November 2015, published the new [definitive guidelines](#) along with supporting documents, including the [response to the consultation](#).

The new guidelines will apply to organisations in England and Wales who are sentenced on or after 1 February 2016 (regardless of the date of the offence) and to all individual offenders aged 18 and over. The guidelines do not apply to Scotland. A new Sentencing Council for Scotland came into existence on 19 October 2015 but it remains to be seen how they will approach the sentencing of health and safety offences; until Scottish guidelines are produced, it may be that Scottish Courts will refer to the new guidelines for England and Wales.

The intention is that the new guidelines will replace the previous guidelines which provided that fines should seldom be less than £500,000 for corporate manslaughter and £100,000 for health and safety offences causing death. They did not cover other health and safety or food safety and hygiene offences.

The Sentencing Council believed that the new guidelines were required for a number of reasons, including the inconsistency in sentences being imposed by Courts for these types of offences and the fact that Courts were often unfamiliar with these types of offences and needed guidance. There were also concerns that the sentences being imposed were too low, thus failing to have any significant economic impact on the organisations on which they were imposed and failing to meet the requirements of sentencing set out in Section 164 of the *Criminal Justice Act 2003*, which states that fines must reflect the seriousness of the offence and take into account the financial circumstances of the offender. Under the new guidelines, “[p]articular attention should be paid to turnover; profit before tax; directors’ remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet” when determining the level of the fine to impose.

The Sentencing Council received 104 responses to the consultation.

According to Lord Justice Treacy, the Chairman of the Sentencing Council: “The general approach outlined in the consultation has been maintained, with a number of amendments made to improve the efficacy of the guidelines”. The Response to Consultation explains that: “a number of minor changes have been made across the guideline to improve clarity. The changes relate to a number of culpability and harm factors within the guideline; the structure of the health and safety harm assessment; aggravating and mitigating factors being added or amended; greater clarity of the assessments to be made and factors to consider in various steps across the guideline”.

The tables setting out starting points and ranges for sentences for the various offences have not changed from the draft guidelines. This means that, for example, large organisations (those with a turnover of £50 million or more) could face fines of up to £10 million for health and safety offences and £20 million for corporate manslaughter. It will be at the Court’s discretion to go above these figures if they consider a case to be exceptional. This is significantly more than the £100,000/£500,000 figures provided in the previous guidance.

The Sentencing Council has published a series of case studies to assist the Courts in imposing sentences for the various offences. They consider the steps in the guidelines and the facts that should be taken into account at each of the key steps. They confirm which range and starting point is appropriate but don’t actually recommend what fine should be imposed. The [case study](#) for organisations convicted of health and safety offences makes it clear that:

1. If there is a risk of death, harm should be category 1. If injury actually occurred, even if there was no death, as category 1 is already the highest, the Court should move up within the fine category range.
2. Any arguably negligent actions by an injured employee, the example in the case study being the decision to work on a dormer roof without the necessary scaffolding and protection, would not be relevant to sentencing as they would have been reasonably foreseeable to the employer.
3. Culpability would be high if the company failed to put in place measures that are recognised standards in the industry.
4. Steps taken to remedy the failings, acceptance of responsibility, a good health and safety record and a lack of previous convictions would all be mitigating factors.

One of the key areas that still lacks clarity is how the Courts should treat and define “very large organisations” (i.e. those organisations with a turnover or equivalent that very greatly exceeds the threshold for large organisations), in relation to which the new guidelines state that it may be necessary to move outside the suggested range to achieve a proportionate sentence. It is likely that the Courts will utilise the environmental case of *Thames Water (R. v Thames Water Utilities Ltd* [2015] EWCA Crim 960 (CA (Crim Div)), where it was stated that very large companies who are involved in cases of serious [environmental] crime could face fines of up to 100% of the company’s pre-tax net profits – even if this results in fines of more than £100 million.

The Response to Consultation confirms that the Council will monitor the impact of the new guidelines following their introduction. It is not clear how or when this monitoring will take place or whether the results of the monitoring will be made public.

It is clear that sentences are going to increase for offences sentenced after 1 February 2016. Organisations that are currently being prosecuted may therefore decide to enter guilty pleas simply to try to get their case sentenced before the new guidelines come into force.

What remains to be seen is whether the new guidelines will help Magistrates to impose sentences for these offences and actually encourage them to retain the less complex cases for sentence, rather than commit them to the Crown Court. This is particularly relevant given that Magistrates are now able to impose unlimited fines for serious offences committed on or after 12 March 2015 (Section 85 of The Legal Aid, Sentencing and Punishment of Offenders Act 2012).

It will be key for organisations sentenced after 1 February 2016 to try to demonstrate that culpability and the risk of harm in their case falls into the lower categories, and therefore into the lower ranges for fines. This will be no easy task as prosecutors will be doing their best to persuade the Court that the higher levels of culpability and harm are applicable. Michael Caplan QC, a member of the Sentencing Council, has stressed the importance of a “consistent approach to sentencing”, but how the Courts will apply the new guidelines in the early days, when they will have few cases to provide them with guidance, remains to be seen.

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