

Sentencing Council

Research to support the development of a guideline for sentencing health and safety offences, corporate manslaughter and food safety and hygiene offences

Introduction

The Sentencing Council conducts research to support the development of its guidelines. This ensures guidelines are evidence-based and grounded in current sentencing practice.

Development of the guidelines for health and safety offences, corporate manslaughter and food safety and hygiene offences was supported by a small programme of research which was carried out during the consultation period¹. The research involved:

- Conducting sentencing exercises and group discussions at three, two hour long sessions held at consultation events with magistrates (attended by 19 magistrates in total, across the three different locations);
- Inviting 14 magistrates who had volunteered to be part of our research on this guideline to complete an online, scenario-based sentencing exercise, to which seven magistrates replied; and
- Conducting individual face-to-face interviews with four Crown Court judges who had recently sentenced a corporate manslaughter case, talking about the guideline in respect of their case.

Background

The Sentencing Council guidelines for sentencing health and safety offences, corporate manslaughter and food safety and hygiene offences replace the Sentencing Guidelines Council (SGC) guideline on corporate manslaughter and health and safety offences causing death (in force since 2010). The new guidelines also cover a wider range of offences than the SGC guideline.

Development of the guidelines involved a number of activities: consideration of case law; consideration of current sentencing practice, involving examination of transcripts of Crown Court judges' sentencing remarks; discussions with stakeholders and experts in the area; and original research with magistrates and Crown Court judges. The research into the '*health and safety offences and food safety and hygiene offences*' guidelines² focused on magistrates because the majority of these offences are sentenced in the magistrates' court³. The research on the '*corporate*

¹ The consultation period was 13 November 2014 to 18 February 2015.

² Each Sentencing Council guideline usually contains a number of guidelines, tailored to the particular offences within an offence group. The guidelines for sentencing health and safety offences, corporate manslaughter and food safety and hygiene offences contains five individual guidelines: health and safety offences – organisations; health and safety offences – individuals; breach of food safety and hygiene regulations – organisations; breach of food safety and hygiene regulations – individuals; and corporate manslaughter. Note that in this document, the two '*breach of food safety and hygiene regulations*' guidelines are referred to more succinctly as the '*food safety and hygiene offences*' guidelines.

³ See data tables to support the statistical bulletin for this guideline, available at:

<https://www.sentencingcouncil.org.uk/publications/item/health-and-safety-offences-corporate-manslaughter-food-safety-and-hygiene-offences-analysis-and-research-bulletin/>

manslaughter' guideline was conducted with Crown Court judges, because this is an indictable only offence hence only sentenced in the Crown Court. The aim in each case was to gain insight into how the guidelines might work in practice, sentencers' views on various aspects of the guidelines, and whether using the guidelines might have any unintended consequences.

To facilitate understanding of this report, the table and text in Annex A briefly outlines the structure of each of the five guidelines.

Approach

Research into the 'health and safety offence and food safety and hygiene offences' guidelines

During the consultation phase of guideline development, a series of events was held with magistrates around the country to tell them about the guidelines and garner their feedback. Research exercises were conducted at three such events (held in three different HM Courts & Tribunals Service regions). At each event, magistrates were split into small groups (usually groups of three, to reflect the composition of a bench) and asked to discuss an offence scenario and reach a hypothetical sentencing decision using the draft guideline⁴, recording both the sentencing decision and the decision-making process on a questionnaire-style pro-forma⁵. Members of the Office of the Sentencing Council also observed their discussions, and took notes about the process of their decision-making. At each event, two scenarios were sentenced in this way, and after each sentencing exercise the entire group came together to discuss the process and reflect more generally on the guidelines.

The research was structured as follows:

- One event focused on the two '*health and safety offences*' guidelines ('*health and safety offences – organisations*' and '*health and safety offences – individuals*'), with one scenario concerning the sentencing of an individual (scenario one – see Annex B), and one an organisation (scenario two – see Annex B).
- A second event focused on the two '*food safety and hygiene offences*' guidelines ('*breach of food safety and hygiene regulations – organisations*' and '*breach of food safety and hygiene regulations – individuals*'), with one scenario concerning the sentencing of an individual (scenario three – see Annex B), and one an organisation (scenario four – see Annex B).
- The final event focused on the guidelines for '*health and safety offences – organisations*' (scenario two) and '*food safety and hygiene offences – organisations*' (scenario four). The reason for focusing on the two '*organisations*' guidelines at this event was that these had provoked the most discussion in the earlier groups.

A small number of magistrates at other consultation events had volunteered to help with research on these offences, and they were approached to carry out the same sentencing exercises online, using a questionnaire which corresponded

⁴ The draft guideline can be viewed at: [//www.sentencingcouncil.org.uk/publications/item/health-and-safety-offences-corporate-manslaughter-food-safety-and-hygiene-offences-consultation/](http://www.sentencingcouncil.org.uk/publications/item/health-and-safety-offences-corporate-manslaughter-food-safety-and-hygiene-offences-consultation/)

⁵ A copy of the pro-forma is available on request.

closely to the pro-forma used in the group events. This gave a sense of how magistrates might respond to the guidelines on an individual level rather than as a group. Seven magistrates responded, carrying out 12 online sentencing exercises between them.

Research into the ‘corporate manslaughter’ guideline

To supplement informal consultation with judges on the corporate manslaughter guideline, four⁶ in-depth interviews were carried out with Crown Court judges who had sentenced a corporate manslaughter case within the last three years. In each case, the judge was asked to re-sentence their case using the draft guideline, having been sent a transcript of their original sentencing remarks in advance. The judges were also asked for their more general views on each section on the guideline⁷.

Analysis

The data on the sentencing of the scenarios were tabulated and then examined to see the extent to which sentencing was consistent across participants and consistent with the researcher’s expectations, and the sources of these similarities and differences. General commentary on the process of sentencing under the draft guidelines and general observations were collated and analysed thematically, again in a table format, and this was used as the basis for a narrative account of the findings, which is summarised below.

Limitations of the research

The research provided some valuable information to support development of the guidelines. However, it must be acknowledged that there are limitations to the work, which comprised several very small-scale exercises that were designed within the constraints of the resources available. In particular, sample sizes were small and those taking part were self-selecting. This means that the findings cannot be said to be representative of the judiciary and magistracy as a whole. Rather, they represent the views of an interested few, and, as such, can only give an indication of how sentencers *may* respond to the new guidelines in practice. The changes that were made between the draft and definitive guidelines are attributable in large measure to the Council’s consideration of the high number of consultation responses that were received for this guideline. This research supplemented the consultation exercise.

Findings

An overarching finding across the ‘*health and safety offences*’ and ‘*food safety and hygiene offences*’ guidelines was that magistrates generally had very little experience in hearing or sentencing these types of case and so did not have a clear sense of the norms in sentencing them. Given this, they welcomed the introduction of the guidelines, although, as explored in more detail below, they were unused to some of the concepts in the guidelines (for example, sentencing

⁶ Although at face value this would appear to be a very small sample, it should be borne in mind that these cases are relatively rare. The Sentencing Council’s 2014 analysis and research bulletin on health and safety offences, corporate manslaughter and food safety and hygiene offences notes that since enactment of the Corporate Manslaughter and Corporate Homicide Act 2007, less than 10 organisations have been sentenced for Corporate Manslaughter under section 1 of the Act.

⁷ The discussion guide is available on request.

primarily on the basis of the risk of harm caused, rather than the actual harm caused).

The findings for the two *'health and safety offences'* guidelines, then the two *'food safety and hygiene offences'* guidelines, and finally the *'corporate manslaughter'* guideline are discussed in turn. This analysis does not cover all parts of the five guidelines. Rather, it concentrates on areas of the guidelines where, in this research, there appeared to be issues worthy of noting in the context of guideline development.

1. The 'health and safety offences' guidelines

1.1 Harm, culpability and sentence outcomes in the 'individuals' guideline

The table of sentences relating to the *'health and safety offences – individuals'* guideline (scenario one) is set out below (Table 1).

Table 1: Sentencing for scenario one ('health and safety offences – individuals')

| <u>Group/online respondent</u> | <u>Culpability category</u> | <u>Harm category</u> | <u>Final sentence (pre guilty plea)⁸</u> |
|--------------------------------|-----------------------------|----------------------|---|
| Group 1 ⁹ | deliberate | 3 | Band F fine |
| Group 2 | deliberate* | 3 | Band F fine |
| Respondent 1 | reckless | 3 | Band E fine |
| Respondent 2 | deliberate | 3 | Medium level community order |
| Respondent 3 | reckless | 3 | High level community order |
| Respondent 4 | deliberate | 3 | High level community order |

* however, one out of the three magistrates in this group felt strongly that the offender was reckless.

In this guideline, harm was firstly assessed across two dimensions – seriousness of harm risked, and likelihood of harm occurring – with actual harm caused being assessed after that. The magistrates in the groups, unused to sentencing primarily on the basis of *risk* of harm (which is central to the offence), needed to read the guideline carefully before coming to a harm assessment. However, once they had read and understood the requirement, their assessments were fairly consistent. As can be seen in Table 1, the sentencing exercise for this guideline resulted in consistent categorisation of harm as level 3, and pre-guilty plea sentences of high fines and medium to high community orders.

Opinion was, however, more divided over culpability, with two out of the four online respondents seeing the defendant as reckless, and two deliberate (see Table 1). There was also considerable debate in the groups between the precise meanings of 'deliberate' and 'reckless'. This linked to a sense of frustration that some magistrates felt about the guideline's use of terms which they felt were unclear, or open to wide interpretation, requiring them to pause and think about meaning before getting on with the job of sentencing:

I found it very convoluted mainly because we're having to apply definitions to the various words you've used in here (magistrate, group discussion).

⁸ In this guideline, the fines in the table of starting points and ranges are expressed in bands.

⁹ In each table, 'group' indicates the decision of one of the groups of 2 or 3 magistrates at a given event. 'Respondent' is the individual decision of one of the online respondents.

1.2 Harm, culpability and sentence outcomes in the ‘organisations’ guideline

The table of sentences relating to the ‘*health and safety offences – organisations*’ guideline (scenario two) is set out below (Table 2).

Table 2: Sentencing for scenario two (‘*health and safety offences – organisations*’)

| <u>Group/online respondent</u> | <u>Culpability category</u> | <u>Harm category</u> | <u>Final sentence (pre guilty plea)¹⁰</u> |
|--------------------------------|-----------------------------|----------------------|--|
| Group 1 | Medium to low | 1 to 2 | Fine of £40,000 |
| Group 2 | Medium to high | 2 | Fine of £45,000 |
| Group 5 | Medium | 2 | Fine of £24,000 |
| Group 6 | High | 2 | Fine of £33,000 |
| Group 7 | High | 1 | Fine of £30,000 |
| Respondent 3 | Medium | 2 | Fine of £15,000 |
| Respondent 2 | Medium to low | 2 | Fine of £20,000 |
| Respondent 4 | Medium | 3 | Fine of £20,000 |

The scenario used for examining the ‘*health and safety offences – organisations*’ guideline resulted in quite variable classification across culpability, although all the online respondents and three out of the five groups centred their responses on medium (see table 2). As per the ‘*individuals*’ guideline, harm was firstly assessed across two dimensions (risk of harm and likelihood of harm), factoring in actual harm caused after that. The groups and respondents almost universally saw the seriousness of harm risked as of the highest level (i.e. death), although opinion on the likelihood of harm, in the absence of expert advice, varied more, resulting in the different categorisations (1 to 3). The fines set by the individual respondents were lower than those set by the groups: in all three cases the individual respondents brought the fine down on the basis of considerations at steps three and four¹¹ (e.g. profit margin and ability to pay), whereas the groups that gave the high sentences of around £40,000 did not appear to do this, perhaps because of lack of time in the context of a group event.

In this scenario, the actual harm caused (an injury) was lower than the generally agreed risk of harm (death) and several magistrates in the various groups showed a tendency to want to lower the categorisation of harm on the basis that harm caused was less than harm risked. It needed to be pointed out that the guideline explicitly stated at several points that the offence is in causing the *risk* of harm, and actual harm caused can only take the harm categorisation upwards (if actual harm is particularly severe) rather than downwards (if actual harm is less severe). Having missed or almost missed this particular point when carrying out the sentencing exercise, in the discussion afterwards a couple of the magistrates felt that the point that the offence is in causing the risk of harm, separate to the actual harm caused, could be made even more forcefully in the guideline. One or two felt that the guideline should remind the sentencer that this is an offence for which there is no requirement to show that the offender intended or foresaw the consequences of his action.

¹⁰ In this guideline, the fines in the table of starting points and ranges are expressed as amounts.

¹¹ At steps three and four of this guideline the court is required to ‘step back’ and review, and, if necessary, adjust the fine based on turnover to ensure that it fulfils the objectives of sentencing and to take into consideration the wider financial circumstances of the company.

The issue of contributory negligence was raised in relation to this scenario, with a very small number feeling strongly that if the victim had clearly contributed to the outcome (e.g. by ignoring warnings), they would find it hard to follow the guideline's prescription *not* to take this into consideration. This may have implicitly affected the judgement of one or two of the magistrates who argued for more lenient categorisation and lower sentences than the majority.

1.3. Other aspects of the two 'health and safety offences' guidelines

Several respondents and one group tempered their sentence for the company in scenario two on the basis of the company's ability to pay, based on the directions in step three of the '*organisations*' guideline, mentioning, for example, that they wanted to make sure the company stayed in business. Generally speaking, this step seemed to work well in the guideline, with magistrates considering this a good reminder of the other corporate finance related factors they should be thinking about when setting such a fine. For example, one magistrate noted the importance of the direction to add in the sum 'of any quantifiable economic benefit derived from the offence' to the fine at this point, noting that in the building trade, companies will sometimes cut costs by making savings on health and safety issues (e.g. quoting for work without costing in scaffolding) to bring in a contract.

2. The 'food safety and hygiene offences' guidelines

2.1 Harm, culpability and sentence outcomes in the 'individuals' guideline

The table of sentences relating to the '*food safety and hygiene offences - individuals*' guideline (scenario three) is set out below (Table 3).

Table 3: Sentencing for scenario three ('food safety and hygiene offences – individuals')

| <u>Group/online respondent</u> | <u>Culpability category</u> | <u>Harm category</u> | <u>Final sentence (pre guilty plea)</u> |
|--------------------------------|-----------------------------|----------------------|---|
| Group 3 | deliberate | 2 | Band F fine |
| Group 4 | deliberate | 2 | Band F fine |
| Respondent 5 | deliberate | 2 to 3 | Band E fine |
| Respondent 6 | deliberate | 2 to 3 | Band E fine |

Group and online respondents universally saw the culpability of the offender in this scenario as deliberate: the decision appeared to be quite clear cut because the offender had previously been warned by inspectors that he needed to improve food safety and hygiene standards in his restaurant. Likewise the decision over harm clustered around level 2, because there was generally felt to be a high risk of harm, but no actual harm was caused. These categorisations resulted, overall, in a Band E or F fine.

2.2 Harm, culpability and sentence outcomes in the 'organisations' guideline

The table of sentences relating to the '*food safety and hygiene offences - organisations*' guideline (scenario four) is set out below (Table 4).

Table 4: Sentencing for scenario four ('food safety and hygiene offences – organisations')

| <u>Group/online respondent</u> | <u>Culpability category</u> | <u>Harm category</u> | <u>Final sentence (pre guilty plea)</u> |
|--------------------------------|-----------------------------|----------------------|---|
| Group 3 | Medium | 1 | Fine of £9,000 |
| Group 4 | Medium | 2 | Fine of £6,000 |
| Group 5 | Low to medium | 3 | Fine of £3,500 |
| Group 6 | Low | 2 | Fine of £7,500 |
| Group 7 | Low | 2 | Fine of £1,500 |
| Respondent 1 | Low | 3 | Fine of £300 ¹² |
| Respondent 5 | Low | 2-3 | Fine of £1,700 |
| Respondent 7 | Low | 3 | Fine of £1,000 |

The classifications of harm and culpability were more varied for this guideline compared to the 'individuals' guideline, and some of the final fines were very low, given that the defendant was found guilty of five offences and a customer was hospitalised as a result of listeria, traceable back to a product sold in one of the defendant's three shops. The discussions and responses suggested several reasons for this, discussed below:

2.2 (i) Issues around the word 'systemic' in culpability: Group participants and respondents showed a tendency to see the company's failings as 'not systemic', which resulted in the categorisation of culpability as low, since the lowest culpability category in the draft guideline included the factor 'evidence that failings were minor and not systemic'. Participants in the group discussions were divided as to whether a breach in one out of three stores could be seen as a systemic problem, with most feeling that it was not. There was also uncertainty around the situation where a company has a system in place, but has not made sure it is universally implemented:

This company has three branches, two of which are absolutely fine, and it's all gone tits up on the third. So the systems were in place but they weren't being followed, so is that a systemic failure of the company or something of that particular branch?
(magistrate, group discussion).

2.2 (ii) Magistrates in the groups displaying a high threshold for considering a breach as harmful: in spite of the fact the store's breach resulted in actual harm in the scenario (an unusual circumstance, since the source of a food safety and hygiene related illness is hard to trace) some participants rated the harm as low (category 3). Participants often focused on the fact that there was just one victim, who made a full recovery (even though he was hospitalised). A member of one group of magistrates, asked what harm they might consider to be enough to put the offence in category 1, replied: "*serious impact on the health of a number of people, being hospitalised*" (magistrate, group discussion).

2.3. Other parts of the 'food safety and hygiene offences' guidelines

With the 'individuals' guideline, it was noted in one group that magistrates rarely give fines of this magnitude (Bands E and F), and therefore may be reluctant to give seemingly very high fines in practice. Likewise, the magistrates in this exercise did not seem to have a clear barometer for the magnitude of fine they should give an

¹² In this online response, it was not clear whether this figure was per offence, or for all five offences.

organisation, and hence were accepting of seemingly low fines which some arrived at based on unexpectedly low categorisation when sentencing the company in scenario four. In one magistrate's words:

As someone who has never dealt with these cases I've no idea what the fine should be (magistrate, group discussion)

In one of the groups, magistrates questioned the phrase that 'the fine *must* be sufficiently substantial to have a real economic impact' within the *organisations* guideline. The word 'must' was seen as making the sentence sound particularly punitive.

3. The 'corporate manslaughter' guideline

3.1 Harm and culpability in the 'corporate manslaughter' guideline

Overall, three of the four judges were generally accepting of the '*corporate manslaughter*' guideline, but one judge felt that the draft guideline had made the sentencing exercise too prescriptive and laborious in introducing the A/B decision at step one¹³ and having multiple steps thereafter. He preferred the discursive and less directional approach of the earlier Sentencing Guidelines Council (SGC) guideline.

Three of the four cases re-sentenced were judged to fall under category A, and these judges found it quite difficult (although not impossible) to envisage an offence which would constitute corporate manslaughter but fall into B, since to be corporate manslaughter an offence has to be extremely serious, being the cause of death and incorporating a gross breach of a duty of care towards the victim. However, one of the re-sentenced cases was judged to fall into category B, on the basis that it only fulfilled the criteria of being foreseeable:

Because although the injury was very foreseeable I didn't think the falling short of the appropriate standard, given that it was corporate manslaughter, went any further than the simple finding that it was a case of corporate manslaughter. The breach was not common and it was impossible on the evidence to say that was more an extended risk to employees generally as opposed to individual who happened to be killed in it.
(Judge 2)

The other judges conveyed a sense that most cases of corporate manslaughter would fall into A. Given this, one judge felt that the dichotomous choice at step one did not discriminate sufficiently across the range of cases that might fall into A, in terms of allowing some gradation of culpability and harm. His was a particularly grave case in which the company had clearly flouted health and safety regulations and he wished to adjust the sentence starting point upwards accordingly, at step one, but felt constrained in doing this. However, another judge spontaneously adjusted the starting point of his case, which he considered to be a 'low A', downwards at step one.

¹³ In the consultation guideline, the judge is required to make an overall assessment of the harm and culpability of the defendant based on four questions which address harm and culpability in tandem: 1. How foreseeable was serious injury? 2. How far short of the appropriate standard did the offender fall? 3. How common is this kind of breach in the organisation? 4. Was there more than one death, or high risk of further deaths, or serious personal injury in addition to death? The answers to these questions direct the judge to categorise the offence as either A, or, less seriously, B, with the subsequent starting points and ranges being higher for offences falling under A than B.

Several judges felt that there was a risk of double counting across culpability and aggravating factors. For example, it was felt that 'poor health and safety record' (an aggravating factor) might be a symptom of overall culpability which would have already placed the defendant in category A. However, the judges noted such double counting as a risk rather than something they would be likely to do in practice.

3.2 Deciding the level of fine at step two in the 'corporate manslaughter' guideline

The starting point for the level of fine in this guideline is the company's turnover. Where it was possible to compare the fines given under the SGC guideline with the hypothetical fines given under this guideline (e.g. in cases where the defendant was not insolvent) the final sentences did not deviate appreciably from the sentences that were actually given by the judges in the cases they reviewed. However, this seemed to be largely due to the financial circumstances of the offender (considered at steps three and four in the guideline) rather than particular agreement between the turnover-based starting points and ranges and the level the judges had previously set as a fair fine¹⁴.

The judge who preferred the SGC guideline felt that using turnover as the main basis for setting the fine¹⁵ was misguided, given the multiplicity of factors that indicate an organisation's financial position. Another judge raised the importance of the overall financial circumstances of the company early on in the interview, when asked if he had any general comments on the guidelines:

The key issue for me is how you take into account the financial health of the company because, I mean, I think it is helpful to look at the micro, the small, the medium and the large in terms of turnover, but that won't necessarily tell you what the profit is and therefore the extent to which you can bear these fines... (Judge 3)

With the exception of the judge who was most critical of the guideline, the judges were supportive of the inclusion of the table of starting points and ranges in the draft guideline, which is a departure from the discursive SGC guideline. One judge said:

'If the cases are relatively rare then no one's got a proper feel and they need as much help as they can get' (Judge 2)

However, there was some sense that the starting points were high: one judge felt that the starting points were *'slightly on the high side'*, although the ranges were wide enough to allow *'plenty of room for manoeuvre'* (Judge 3, who adjusted the starting point at step one). Another judge felt that starting points of 15 to 40 per cent of turnover for companies at the lower boundary of each category were very high (i.e. companies with turnovers of £2 million, £10 million and £50 million, classified as 'small', 'medium' and 'large' respectively, have starting points of £800,000 (40%), £3 million (30%) and £7.5 million (15%) for a category A offence, respectively). Another judge was unsure why the proportions of starting points in relation to turnover differed across categories.

The judge who was most critical of the guideline was re-sentencing a company with a turnover which overlapped two categories in the table of starting points and ranges

¹⁴ The sentences the judges gave under the draft guideline may also have been directly influenced by the original sentence they gave, so there may have been an element of fitting the guideline to the end sentence as judges subliminally sought consistency across the two sentences.

¹⁵ The table of starting points and ranges in this guideline is based on turnover i.e. a company's turnover determines whether it is categorised as micro, small, medium or large. For each category, the starting points and ranges for an offence categorised as 'A' are higher than those categorised as 'B'.

and he felt he could neither categorise it as one nor the other¹⁶, so approximated a starting point between the two, which appeared to make the process unwieldy and imprecise. However, when the issue of companies on the cusp of two groupings was discussed with other judges and magistrates (with reference to the *'health and safety offences - organisations'* guideline), there was a sense that they would place the company in either one or the other, depending on a general, global judgement of whether it seemed to be small or micro, small or medium and so on.

3.3 Aggravating and mitigating factors in the 'corporate manslaughter' guideline

The judges generally did not adjust their fines appreciably because of aggravating factors in the four specific cases they re-sentenced using the new guideline. Whilst this was probably largely due to the specific details of these cases, the disinclination to double count (discussed above) may also have been a contributory factor.

The judges seemed more inclined to use the mitigating factors, although one judge listed these but did not reduce the sentence accordingly, again because of double-counting: *"Well I think a lot of mitigation has been taken into account in getting to category B"* (Judge 2). One judge also noted that the notion of 'self-reporting' felt strange in the context of a death, and he could not really envisage a case of a health and safety death that would not be self-reported immediately.

The issue of contributory negligence on the part of the victim was touched on by one judge, whose case involved the victim ignoring a warning. He seemed to feel that this should be considered for inclusion as a mitigating factor in this guideline, as it is in the SGC guideline for death by dangerous and careless driving.

3.4 Steps three and four in the 'corporate manslaughter' guideline

The judges took considerable notice of directions at steps three and four, and these other financial factors heavily influenced the final hypothetical fines. For example, one judge began with a starting point of £750,000, but, due to the circumstances of the company, reduced this to £300,000 at step three.

Finally, one judge noted that in his case, he had stipulated that the fine should be paid in instalments over five years, but he felt his judgment on this was quite arbitrary, and he said he would also appreciate further guidance on how to structure fines and appropriate periods in which to pay. He also said he would like to see guidance (or *'specific criteria'*) as to when it may or may not be appropriate to allow a company to go out of business.

Conclusion

As a result of some of these findings, in tandem with consideration of responses to the consultation, a number of changes were made to each of the guidelines¹⁷. The changes influenced by the research were:

¹⁶ A micro company is defined in the consultation guideline as having a turnover of up to £2 million, small is £2 million to £10 million, medium is £10 million to £50 million and so on. Therefore the categories are not mutually exclusive.

¹⁷ All of the research findings were considered in the course of guideline development, alongside other information and data. However, only those changes that were taken forward by the Council are discussed here.

- Clarification of the process of deciding harm across the two *'health and safety'* guidelines: this included flagging, more clearly, that the offence is in creating a *risk* of harm; and numbering the two stages of the process.
- Simplification of some the language in the two *'individuals'* guidelines, including changing the descriptors under culpability from deliberate, reckless, negligent and low to very high, high, medium and low.
- Re-consideration of the term 'systemic' in the two *'organisations'* guidelines: the phrase 'not systemic' was removed from the low culpability category of both guidelines, and under medium culpability a new factor, 'systems were in place but these were not sufficiently adhered to or implemented' was added¹⁸.
- Signposting the requirement to consider the financial circumstances of the company, at step three, more clearly and more prominently at step two of the *'health and safety offences – organisations'* guideline and the *'corporate manslaughter'* guideline.
- In the light of concerns around contributory negligence, changing the wording of a mitigating factor in order to make it clear that actions of victims are unlikely to be considered contributory events other than in circumstances where their actions were not reasonably foreseeable.

The research also helped to build confidence that the guidelines should work as anticipated: for example, magistrates understood the two dimensional, two stage assessment of harm in the health and safety guidelines and judges could envisage corporate manslaughter cases which would fall into category B, albeit that they found this quite difficult, with one of the four judges interviewed categorising his case as such. Monitoring and evaluation work once the guideline has been implemented will provide further information on the extent to which it is meeting its aims.

Acknowledgements

Our thanks go to the magistrates and judges who kindly gave their time to participate in this research and who gave valuable feedback on the draft guidelines. We would also like to thank colleagues in the Office of the Sentencing Council for helping with the group discussions and interviews.

¹⁸ Where findings were raised in relation to one guideline, but were also applicable to another, they have been transferred across.

Annex A: Culpability, harm and starting points across the draft guidelines

| | |
|---|---|
| <i>Health and safety - individuals</i> | Culpability is categorised as deliberate, reckless, negligent or low. Harm is categorised according to the seriousness of the harm risked (level A, B or C) and the likelihood of harm arising (high, medium or remote) to give four overall harm categories. The court then considers (1) whether the offence exposed a significant number of people to the risk of harm; and (2) whether the offence was a significant cause of actual harm before assigning the final harm category. The guideline contains 16 starting points based on four levels of harm, within the four culpability categories; the starting points and ranges include both fines and other types of sentence. |
| <i>Health and safety - organisations</i> | Culpability is categorised as very high, high, medium or low. Harm is categorised as per the <i>'individuals'</i> guideline above. Starting points are based on company turnover, which defines whether a company is large, medium, small or micro in size, having turnover of £50 million and over, £10 million to £50 million, £2 million to £10 million and under £2 million respectively. Within each of the four size bands, there are 16 starting points for fines based on four levels of harm within the four culpability categories; the starting points and ranges include only fines. |
| <i>Breach of food hygiene and food safety regulations - individuals</i> | Culpability is categorised as deliberate, reckless, negligent or low. Harm is categorised into three levels, on the basis of factors relating to both actual harm and risk of harm. The guideline contains 12 starting points based on three levels of harm, within the four culpability categories; the starting points and ranges include both fines and other types of sentence. |
| <i>Breach of food hygiene and food safety regulations - organisations</i> | Culpability is categorised as very high, high, medium or low. Harm is categorised as per the <i>'individuals'</i> guideline above. Starting points are based on company turnover (large, medium, small and micro) as described for <i>'health and safety – organisations'</i> , above; the starting points and ranges include only fines. |
| <i>Corporate manslaughter</i> | Offence is categorised into A or B, where A indicates a higher level, on the basis of four questions which together address harm and culpability : How foreseeable was serious injury? How far short of the appropriate standard did the offender fall? How common is this kind of breach in this organisation? Was there more than one death or a high risk of further deaths, or serious personal injury in addition to death? Starting points are based on company turnover (large, medium, small and micro) as described for <i>'health and safety – organisations'</i> , above, yielding 8 starting points on the basis of turnover and A/B categorisation of harm and culpability. The starting points and ranges include only fines. |

Thereafter, the guidelines follow the standard steps within a Sentencing Council guideline (e.g. considering aggravating and mitigating factors, reduction in sentence for a guilty plea) with one important exception: in each case at step three the court is required to 'step back' and review the fine, based on the general principles to follow when setting a fine and the financial circumstances of the offender. Step four of the *'health and safety – organisations'* and *'corporate manslaughter'* guidelines further requires the court to consider the wider impacts of the fine on ability to deliver services (public or charitable bodies) and the wider impacts within the organisation

and to innocent third parties (e.g. employment of staff). At these steps, the court may further adjust the sentence.

Annex B

Scenario 1

K, a plumber, has been convicted for a series of offences involving breaches of gas regulations.

K provided a householder with a quote to install a gas-fired central heating system on headed paper with a Gas Safe Register logo. On completion of the work he provided further paperwork that included a gas boiler system commissioning checklist which included a Gas Safe Register number.

A Regional Investigations Officer employed by Gas Safe happened to inspect the property a fortnight later. He identified three defects in the way the central heating system had been installed one of which was classified as constituting a “danger to life or property”. In particular, the appliance had not been installed according to the manufacturer’s instructions. However, it was accepted that the likelihood of any of the defects causing danger was low.

An investigation revealed that K’s Gas Safe registration had expired six months previously. The Gas Safe Register number he provided belonged to an unconnected engineer who had not given permission for his number to be used and had no knowledge of K’s installation.

K has pleaded guilty at the first hearing to the following three offences:

- Regulation 3(1) of the Gas Safety (Installation and Use) Regulations 1998: “No person shall carry out any work in relation to a gas fitting or gas storage vessel unless he is competent to do so.”
- Regulation 3(7) of the Gas Safety (Installation and Use) Regulations 1998: “No person shall falsely pretend to be a member of a class of persons required to be approved under paragraph (3) above.”
- Regulation 26(1) of the Gas Safety (Installation and Use) Regulations 1998: “No person shall install a gas appliance unless it can be used without constituting a danger to any person.”

In mitigation K stated that he had let his registration lapse when he was unable to work through illness. When he recovered, he was in debt and needed to start earning as soon as possible and so was tempted to undertake gas fitting work without reapplying for registration. Although he fully accepted that he had deliberately deceived the householder into thinking he was registered, he was horrified to learn that his work was defective and was very remorseful.

K has no previous convictions. He has now obtained work with a building firm installing kitchens and bathrooms in new houses and is earning £400 per week.

Scenario 2

Dove Construction Ltd is a small construction company who had an excellent HSE inspection record. It was contracted to make repairs to a residential property.

The project involved building a dormer roof extension on the back of the house, and repairing the whole roof.

Dove Construction Ltd built scaffolding to gutter level at the front of the house, and a tower scaffold at the back of the house to build the dormer extension. Dove Construction's employee, G, an experienced roofer, was tasked with the job along with another colleague.

G worked on the project for a number of days. Having completed the dormer extension using the tower scaffold, G started work to fix the rest of the roof.

G accessed the front roof using the scaffolding placed at the front. However, following the completion of the dormer extension G could no longer reach the back part of the roof using the tower scaffold. Therefore, G used the scaffolding at the front of the house, climbed over the ridge of the roof using a ladder, before climbing down onto the dormer roof to access the remaining area.

One day G was working on the dormer roof when he started to feel dizzy. He called to his colleague who was unable to reach G before he fainted. G fell off the dormer roof which had no protection at all to guard against falls, into the garden 8 metres below.

G suffered a fractured skull, a fractured pelvis and broke two vertebrae in his back. He suffered neck injuries and later had to have a kidney removed. G was in hospital for 8 weeks. He was unable to return to work for 4 months.

G is now working again for Dove Constructions Ltd but he is unable to undertake roof work or any heavy lifting. This has inhibited the range of work he is able to perform in the construction industry. G suffers pain and stiffness from time to time, and has regular hospital check ups on his remaining kidney.

HSE inspectors established that the risk assessment undertaken by Dove Construction Ltd and the scaffolding and safety measures provided at the beginning of the project were sufficient and met standards. However, once the dormer roof had been completed the safety requirements on the project changed and the scaffolding and safety measures became inadequate and insufficient. The HSE stated that Dove Construction Ltd should have reviewed the measures in place once the dormer extension had been completed and modified arrangements to fit the new circumstances. As it was, there was nothing protecting G against a fall.

Dove Construction Ltd has pleaded guilty at the first hearing to the following offence:

- Regulation 6(3) of the Work at Height Regulations 2005: "Where work is carried out at height, every employer shall take suitable and sufficient measures to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury."

Dove Construction Ltd has provided the following profit and loss account.

| | 2013 £ | 2012 £ |
|--|-----------|-----------|
| TURNOVER | 1,015,720 | 928,472 |
| Cost of Sales and Other operating income | 891,073 | 813,942 |
| Administrative expenses | 100,499 | 112,067 |
| OPERATING PROFIT / (LOSS) | 24,148 | 2,463 |
| Interest receivable | 4 | 5 |

| | | |
|---|--------|--------|
| Interest payable and similar charges | (54) | (67) |
| PROFIT / (LOSS) ON ORDINARY ACTIVITIES BEFORE TAXATION | 24,098 | 2,401 |
| Tax on profit/(loss) on ordinary activities | 5,589 | 120 |
| PROFIT/ (LOSS) FOR THE FINANCIAL YEAR | 18,509 | 2,281 |
| Balance brought forward | 27,878 | 25,597 |
| Balance carried forward | 46,387 | 27,878 |

Dove Construction Ltd employs 7 full time construction staff, 1 full time and 1 half time administrative staff and there is 1 Director.

They state that 2013 was an unusually good year for them owing to a particularly cost-effective project but the calendar year 2014 has been difficult. They may have to make staff cuts if substantial sums are levied.

Scenario 3

R is an individual who owns and runs the Mountain Grill restaurant.

In February of this year, the Council's environmental health officers performed an unannounced inspection of the Mountain Grill. Officers found that there was a build up of dirt, grease and food throughout the premises. Raw meats were stored next to and on top of salads and cans of drinks, meaning that bacteria and blood mixed with the raw food. Equipment was dirty and broken and food handlers were untrained in food hygiene matters. The officers witnessed an employee handling raw meat and then handling salad containers without first washing his hands. The foods were not refrigerated adequately and no disinfection of the work surfaces had been carried out.

The Mountain Grill had been visited on 4 occasions previous to this visit. On each occasion, officers had spoken to R and emphasised the need to improve standards, providing advice on how this could be achieved. The officers had highlighted the free training courses that were available to food handlers.

Officers have emphasised the difficulty of identifying quantifiable economic benefit to R in this case. They estimate that salary paid for workers attending free training courses as opposed to attending work would have amounted to £250. They consider that the broken equipment could have been replaced for a total of £175.

R **pleaded guilty** at the first hearing to 9 offences under the regulations relating to these failings, the most serious relating to the unsafe storage of food. He has no previous convictions.

The business is operating at a small profit. R's income for the last tax year was the equivalent of £200 per week. He lives in a small flat above the restaurant. He has only minimal savings.

Scenario 4

Delish Ltd owns a chain of three delicatessens that operate in several towns in the region.

An elderly customer, W, bought beef tongue from one of Delish Ltd's stores. W became sick and was admitted to hospital suffering with severe vomiting and

diarrhoea and an aching neck. The hospital diagnosed W with listeriosis, an infection commonly caused by the bacterium listeria. W was treated for the infection and for dehydration, he made a complete recovery.

The cause of the listeria was traced back to the beef tongue sold in Delish Ltd's store. Inspectors testing the tongue found that it was infected with listeria.

Inspectors also found some minor faults in the way in which the shop stored "ready to eat" products, for example, that there was no clear system of stock rotation. Inspectors also reviewed Delish Ltd's other two stores. They did not find any failings in these branches.

The beef tongue was supplied to Delish Ltd by Offally Good Ltd. As soon as the incident happened Delish Ltd withdrew any stock supplied by Offally Good Ltd from their three stores. Delish Ltd accepted that they had not fully investigated the procedures and testing regime used by Offally Good Ltd and since this incident have ceased trading with them.

It was accepted that Delish Ltd's central policies regarding the storage of ready-to-eat items and stock rotation were up to date and consistent with best practice, but that the store in question had failed to comply with these instructions. However, Delish Ltd emphasise that these were minor failings and it was accepted that there was no evidence that harm had resulted from the failings. Since the incident, Delish Ltd has sent the store manager at the relevant store on advanced training courses and has improved its systems of reporting and supervision to ensure that hygiene and safety standards are being maintained. Delish Ltd has accepted the advice of inspectors on other matters brought to its attention and is implementing the recommendations.

Delish Ltd have pleaded guilty at the earliest opportunity to:

- 3 offences under the regulations relating to the tongue infected with listeria
- 2 offences under the regulations relating to the storage of ready-to-eat products

Delish Ltd have provided the following accounts (see over):

| | 2013/14 £ | 2012/13 £ |
|--|--------------|--------------|
| REVENUE | 1,855,700 | 1,740,654 |
| Cost of Sales | (1,654,751) | (1,575,221) |
| Administrative expenses | (75,700) | (60,231) |
| OPERATING PROFIT / (LOSS) | 125,249 | 105,202 |
| Finance income | 3,200 | 4,500 |
| Finance costs | (16,400) | (15,700) |
| PROFIT / (LOSS) BEFORE TAXATION | 112,049 | 85,002 |
| Tax on profit/(loss) on ordinary activities | (24,568) | (19,940) |
| PROFIT/ (LOSS) FOR THE FINANCIAL YEAR | 87,481 | 65,062 |
| Balance brought forward | 140,383 | 75,321 |
| Balance carried forward | 227,864 | 140,383 |

Delish Ltd employs 9 sales staff in its stores, one administrator in a central office and has two directors who are also the shareholders.