

Harm

Health and safety offences are concerned with failures to manage risks to health and safety and do not require proof that the offence caused any actual harm. The offence is in creating a risk of harm.

**Comment [C1]:** Suggestion that this is amended to 'The seriousness of the offence is in the creation of the risk of harm'

First, the court should identify an initial harm category by assessing the risk of harm created by the offence. There are two dimensions to risk–

- 1) the seriousness of the harm risked (A, B or C) by the offender's breach and
- 2) the REASONABLY FORSEEABLE likelihood of that harm arising (high, medium and low).

**Comment [C2]:** See para 3.4

**Comment [C3]:** Amended to a list format per para 3.2

Seriousness of harm risked					
Likelihood of harm		Level A	Level B	Level C	
		<ul style="list-style-type: none"> <li>• Fatality</li> <li>• Physical or mental impairment resulting in lifelong dependency on third party care</li> <li>• Health condition resulting in significantly reduced life expectancy</li> </ul>	<ul style="list-style-type: none"> <li>• Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work</li> <li>• A progressive, permanent or irreversible condition</li> </ul>	<ul style="list-style-type: none"> <li>• All other cases not falling within Level A or Level B</li> </ul>	
	High Likelihood of harm	Harm category 1	Harm category 2	Harm category 3	<b>Comment [C4]:</b> Added to clarify subject of assessment
	Medium Likelihood of harm	Harm category 2	Harm category 3	Harm category 4	<b>Comment [C5]:</b> As C2
Low Likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)	<b>Comment [C6]:</b> Changed from 'remote' <b>Comment [C7]:</b> As C2	

**3) The court must next consider if the following factors apply which increase the seriousness of the harm. These two factors should be considered in the round in assigning the final harm category. If already in harm category 1 and wishing to move higher, move up within the category range at step two.**

**Deleted: Second,** the court should consider the following two factors

- i) Whether the offence exposed a number of people to the risk of harm.

If a number of workers or members of the public was exposed to the risk created by the offender’s breach, the court must consider either substantially moving up within the category range or moving up a harm category. The greater number of people, the greater the risk.

**ii) Whether the offence was a significant cause of actual harm.**

- Where the offender’s breach was a **significant cause**<sup>1</sup> of actual harm, the court must consider moving up within the category range or moving up a harm category, depending on the extent to which other factors contributed to the harm caused. Actions of victims are unlikely to be considered contributory events for sentencing purposes. Offenders are required to protect workers or others who may be neglectful of their own safety in a way which should be reasonably foreseeable.
- The court should not move up a harm category if actual harm was caused but to a lesser degree than the harm that was risked, as identified on the scale of seriousness above.

**Comment [C8]:** Suggested amendment to ‘where the offender is responsible for causing actual harm of the degree which was risked and was likely then upward adjustment should be made’.

**Comment [C9]:** As agreed at May meeting, removed as a separate bullet point and ‘sentencing purposes’ reference added to give greater clarity. ‘Reasonably foreseeable’ replaces ‘in a way which should be anticipated’.

**Comment [C10]:** Suggestion that this is rephrased to “If the actual harm caused was less severe than the harm risked the court should not move up a harm category”

**Deleted:** These two factors should be considered in the round in assigning the final harm category. If already in harm category 1 and wishing to move higher, move up within the category range at step two.¶

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<sup>1</sup>A significant cause is one which more than minimally, negligibly or trivially contributed to the outcome. It does not have to be the sole or principal cause.