

15 November 2007

Dear Colleague,

**CONSULTATION PAPER ON SENTENCING FOR  
CORPORATE MANSLAUGHTER**

The Sentencing Advisory Panel has been asked by the Sentencing Guidelines Council to produce advice on sentencing for the offence of corporate manslaughter. This new offence was created by the Corporate Manslaughter and Corporate Homicide Act 2007 (CMA), which is due to come into force on 6 April 2008; the full text of the CMA can be found at Annex A.

When sentencing an organisation for corporate manslaughter, a court will be able to impose an unlimited fine, a publicity order and/or a remedial order; the publicity order is new to England and Wales. As this is both a new offence and one for which a new sanction will be available, guidelines will be invaluable when the legislation comes into force.

The CMA was enacted in response to problems identified when seeking to apply the existing common law offence of manslaughter by gross negligence to organisations rather than to individual defendants. The CMA applies only to organisations and is thus designed to ensure that the application of the common law offence is restricted to individuals in future. This consultation is limited to corporate offending and does not, therefore, cover the offence of manslaughter by gross negligence.

The offence of corporate manslaughter is designed to secure, in a wider range of situations than under existing law, a conviction for a criminal offence that properly reflects the seriousness of the worst instances of management failure causing death. It is designed to complement, rather than replace, existing health and safety offences, for which organisations may still be prosecuted as an alternative to, or in addition to, the new offence. The Panel is consulting on sentencing for both corporate manslaughter and breaches of health and safety law that result in death, in order to promote consistency and

to produce guidelines that properly reflect the seriousness of the offending involved. There are many similarities between the two types of offence, and the consultation paper draws on existing guidance on sentencing offences involving death under health and safety law as a useful starting point for the approach to corporate manslaughter. However, as discussed in the paper, there are distinct differences between the two offences and separate guidelines are proposed.

The Panel is interested in receiving your views on the purposes to be achieved when sentencing both types of offence and the way in which the various sanctions available might be used to achieve those aims. A key issue is the setting of fines for the full range of potential offenders, from companies of small means to those with very large resources, or organisations funded from the public purse; the approach to the new publicity order is also discussed. Factors determining the seriousness of an offence are identified and sentencing starting points and ranges are proposed.

Questions are asked throughout the text and are listed together at the end of the paper. Please feel free to send in responses to all of the questions or to those most relevant to your area of work or interest. We hope that your answers will help to identify an approach to sentencing that can be used to guide decisions made in court.

Please send your response to Mrs Lesley Dix, Secretary to the Panel, at the Sentencing Guidelines Secretariat, either by post to 4th Floor, 8-10 Great George Street, London SW1P 3AE, or by email to [info@sentencing-guidelines.gsi.gov.uk](mailto:info@sentencing-guidelines.gsi.gov.uk). **Responses should be received by 7 February 2008.**

The names of those who respond to this consultation paper will be listed in the Panel's published advice to the Sentencing Guidelines Council. Responses are not routinely published but, in accordance with the provisions of the Freedom of Information Act 2000, the Panel is required to release copies upon request on request. **If anonymity is required, please make that clear in your response.**

Yours sincerely,

Professor Andrew Ashworth  
Chairman of the Sentencing Advisory Panel

# CORPORATE MANSLAUGHTER

## CONSULTATION PAPER

### A: INTRODUCTION

1. The Corporate Manslaughter and Corporate Homicide Act 2007 (CMA),<sup>1</sup> which is due to come into force on 6 April 2008, creates a new statutory offence of corporate manslaughter. When sentencing an organisation for this offence, a court will be able to impose an unlimited fine, a publicity order and/or a remedial order; publicity orders are a new sanction in England and Wales. As this is both a new offence and one for which a new sanction will be available, the Sentencing Guidelines Council has asked the Sentencing Advisory Panel to produce advice on guidelines for use by sentencers when the legislation is in force.

2. An organisation will be guilty of the new offence if the way in which it managed its activities both caused a person's death and was a gross breach of a duty of care that the organisation owed the deceased. Currently such circumstances may lead to corporate liability for the common law offence of manslaughter by gross negligence. The CMA applies only to organisations and not to individuals and is designed to ensure that the application of the common law offence is restricted to individuals. This consultation is limited to corporate offending and does not, therefore, cover the offence of manslaughter by gross negligence.

3. However, an organisation may still be prosecuted for breach(es) of health and safety law, as an alternative to, or in addition to, the new offence.<sup>2</sup> It

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<sup>1</sup> The offence is corporate manslaughter in England and Wales and in Northern Ireland and corporate homicide in Scotland.

<sup>2</sup> Where a work-related death occurs and evidence indicates that a serious criminal offence other than a health and safety offence may have been committed, the police, Crown Prosecution Service and the Health and Safety Executive, local authority or other enforcing authority must liaise with each other when making decisions regarding the investigation, charging and prosecution of offences. This may result in prosecution by both the CPS and the HSE: *Work-related deaths: A protocol for liaison*; HSE (2003); [www.hse.gov.uk](http://www.hse.gov.uk).

has been suggested that guidance on sentencing for these offences would be desirable to promote consistency and properly reflect the seriousness of the offending involved. The Council and Panel have agreed that it is appropriate to consult on sentencing for both corporate manslaughter and breaches of health and safety law resulting in death. There is no legal distinction between health and safety offences which do and do not result in death, but this consultation paper addresses sentencing only for offences committed by organisations and resulting in death, as they involve the same harm and type of offender as offences of corporate manslaughter.<sup>3</sup>

4. Between 1996 and 2006, 2721 workers and 4312 members of the public were killed in work-related or public incidents in the United Kingdom.<sup>4</sup> The rate of fatal injury to workers has fallen considerably over the last twenty years, and is now the lowest in the European Union.<sup>5</sup> The UK has a comprehensive legislative framework regulating risks to health and safety arising from work activity, with which the conscientious employer will comply. The Health and Safety Executive (HSE) can issue an improvement notice if inspectors consider that legislation is being contravened, or a prohibition notice if a work activity is creating the risk of injury. The HSE claims that the majority of workplace deaths are preventable;<sup>6</sup> it sees prosecution as an important deterrent against managing activities in a way that puts lives at risk, as well as leading to an appropriate punishment where the failures of an organisation have, in fact, resulted in death.

5. Very few organisations have been prosecuted for an offence of manslaughter by gross negligence,<sup>7</sup> and conviction is considered to be almost

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<sup>3</sup> The Panel has recently consulted on sentencing for all health and safety offences in magistrates' courts: *Revised Magistrates' Courts Sentencing Guidelines*, published February 2007; [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk). In 2004-05, the HSE brought 862 prosecutions in magistrates' courts and 212 prosecutions in the Crown Court: Written Parliamentary Answer, 22 February 2007; *Hansard* Column 862W.

<sup>4</sup> The latter figure includes acts of suicide and trespass on railway systems, which make up around two-thirds of these fatalities each year: Health and Safety Commission and National Statistics, *Statistics of fatal injuries 2006/07*; [www.hse.gov.uk](http://www.hse.gov.uk). Figures for 2006/07 are provisional.

<sup>5</sup> In 2003, the most recent year for which data are published across the EU, the average rate of workplace fatal injury was 2.5 deaths per 100,000 workers. The equivalent rate for the UK was 1.1; *ibid.*

<sup>6</sup> See e.g. *The role of managerial leadership in determining workplace safety outcomes* (2003), HSE; [www.hse.gov.uk](http://www.hse.gov.uk).

<sup>7</sup> The Government stated in 2005 that there had been 34 prosecutions since 1992, and only six convictions: *Corporate Manslaughter: The Government's Draft Bill for Reform* (2005) Cm 6497, para. 9. The Centre for Corporate Accountability website lists seven such convictions: [www.corporateaccountability.org](http://www.corporateaccountability.org).

impossible where a large organisation is involved. The main difficulty with the common law offence arises from the 'identification principle', according to which an organisation can only be convicted if a person identified as a 'directing mind' of the organisation can be proved to have had the knowledge and fault required for conviction. This may be possible in a case involving a small company with a basic management structure but in large organisations the lines of accountability are often unclear, with responsibilities delegated to lower level managers and/or shared between a number of individuals.

6. Problems with the law were highlighted by the lack of successful prosecutions following a number of public disasters in the 1980s,<sup>8</sup> and led the Law Commission to propose a new statutory offence of corporate killing in 1996.<sup>9</sup> A long process of consultation and policy development has culminated in the CMA, which broadens the identification principle by introducing a test of 'senior management failure;' this aggregates the faults of a group of managers to facilitate prosecution. According to the Government, the new offence is designed to secure, in a wider range of situations, a conviction for a specific, serious criminal offence that properly reflects the gravity and consequences of the conduct involved in "the worst instances of management failure causing death."<sup>10</sup>

7. This consultation paper outlines the new offence of corporate manslaughter and existing offences under health and safety legislation, before turning to consider the factors which may influence an assessment of the seriousness of these offences. The Panel wishes to consult on the appropriate aims of sentencing for both types of offence and the way in which the various sanctions available might be used to achieve these aims. There are many similarities between the two types of offence, and the existing guidance on sentencing under health and safety law may provide a useful starting point for

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<sup>8</sup> Most notably the substantial loss of life when the *Herald of Free Enterprise* ferry foundered on 6 March 1987; the trial collapsed after Turner J directed the jury to acquit the company of manslaughter, principally because there was insufficient evidence to convict any of the most senior individual defendants of that offence: (1990) 93 Cr App R 72.

<sup>9</sup> Law Commission Report No 237, *Legislating the Criminal Code: Involuntary Manslaughter: Item 11 of the Sixth Programme of Law Reform: Criminal Law* (HC 171 1995-96).

<sup>10</sup> *Corporate Manslaughter: The Government's Draft Bill for Reform*, paras. 5-6; see fn. 7. The Regulatory Impact Assessment for the Bill estimates 10 to 13 additional prosecutions per year in the UK; [www.homeoffice.gov.uk/documents/ria-corporate-manslaughter.pdf](http://www.homeoffice.gov.uk/documents/ria-corporate-manslaughter.pdf).

the approach to corporate manslaughter. However they are separate and distinct offences, and the paper draws attention to differences which may be relevant to sentencing.

## B: THE OFFENCES

8. Section 1 of the CMA states that:

- (1) *An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—*
- (a) *causes a person's death, and*
  - (b) *amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.*

The legislation applies to all corporations and some unincorporated bodies such as trades unions, partnerships, employers' organisations and police forces. It also applies to most Crown bodies, although the CMA precludes a 'relevant duty of care' arising in respect of many of their activities.<sup>11</sup>

9. A gross breach is defined as conduct which falls far below what can reasonably be expected in the circumstances.<sup>12</sup> An organisation will only be guilty of the offence if the way in which its activities are managed or organised by its senior managers is a substantial element of the breach.<sup>13</sup> This test of 'senior management failure' was intended to ensure a wider application of the offence than was achieved under the common law, but it is not clear to what extent it broadens the requirement for a 'directing mind' into an aggregation of the conduct of a group of managers.

10. In deciding whether or not there was a gross breach the jury must consider whether the organisation failed to comply with relevant health and safety legislation and, if so, how serious that failure was and how much of a risk of death it posed.<sup>14</sup> The jury may also consider any relevant health and safety guidance and the extent to which the 'corporate culture' encouraged or

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<sup>11</sup> Activities excluded from the ambit of the offence include: public policy decisions; 'exclusively public functions'; certain military activities; policing and law enforcement; emergency service response; child protection and probation functions: ss.2-7. s.2(1) provides for a duty of care arising in respect of a person in custody, but the commencement of this section is subject to an affirmative resolution of both Houses of Parliament: s.27(2).

<sup>12</sup> CMA 2007, s.1(4)(b).

<sup>13</sup> *ibid.*, s.1(3).

<sup>14</sup> *ibid.*, s.8(2).

produced tolerance of the health and safety breach.<sup>15</sup> These factors will also be relevant to the assessment of the seriousness of an offence for the purposes of sentencing.

11. The new offence is designed to complement rather than replace existing offences under the Health and Safety at Work etc Act 1974 (HSWA), the overarching legislation governing health and safety in the workplace in the United Kingdom.<sup>16</sup> Breaches of the HSWA or health and safety regulations are offences under section 33, punishable by an unlimited fine in the Crown Court. In a magistrates' court, breach of any of the general duties under sections 2 to 6 is punishable by a fine of up to £20,000; for most other offences, including breaches of health and safety regulations, the maximum fine is £5,000.

12. Most prosecutions of employers under the HSWA are based on breaches of the general duties set out in sections 2 and 3. Section 2 states that it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees. Section 3 states that it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety. There is a significant overlap between these statutory duties and the 'duty of care' referred to by the CMA.<sup>17</sup> Unless otherwise specified, references to 'breach(es)' in this paper are intended to cover breaches of both types of duty.

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<sup>15</sup> *ibid.*, s.8(3).

<sup>16</sup> *Corporate Manslaughter: The Government's Draft Bill for Reform*, para. 5; see fn. 7.

<sup>17</sup> For more detail on this point and commentary on the CMA as a whole see *A guide to the Corporate Manslaughter and Corporate Homicide Act 2007* (October 2007), Ministry of Justice; [www.justice.gov.uk/docs/guidetomanslaughterhomicide07.pdf](http://www.justice.gov.uk/docs/guidetomanslaughterhomicide07.pdf).

## C: SERIOUSNESS

13. The seriousness of an offence is determined by an assessment of the culpability of the offender and any actual, intended or foreseeable harm involved in the offence.<sup>18</sup> Whilst corporate manslaughter is triable only upon indictment, health and safety offences are triable either way, indicating the wider range of seriousness that may be involved. In relation to the offences considered in this paper, this range will be reflected in the level of culpability, as the harm involved (the death of one or more person(s)) is the same.

### Culpability

14. The culpability of the offender should be the initial factor in determining the seriousness of any offence.<sup>19</sup> The critical factor will be the extent to which the conduct of the offender fell below the appropriate standard. A failure to keep pace with changing standards is likely to be one of the factors taken into account by the court. The degree of risk and the extent of danger will be relevant in assessing culpability, and it will be particularly significant whether the death was the result of an isolated breach of duty, several breaches occurring at around the same time, or breaches that took place over a period of time.<sup>20</sup>

15. Convictions for corporate manslaughter will always involve conduct that falls ‘far below what can reasonably be expected of the organisation in the circumstances.’ The offence of causing death by dangerous driving involves a similar standard of liability,<sup>21</sup> being ‘driving that falls far below what would be expected of a competent and careful driver’. The grading of offences covered in this paper and the issues arising from them bear many similarities to the death by driving offences on which the Panel has recently consulted.

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<sup>18</sup> Criminal Justice Act 2003, s.143.

<sup>19</sup> SGC Guideline, *Overarching Principles: Seriousness* (2004); [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

<sup>20</sup> *Howe and Son (Engineers) Ltd* [1999] 2 Cr App R (S) 37; *Balfour Beatty Rail Infrastructure Services Ltd* [2007] Cr App R (S).

<sup>21</sup> Road Traffic Act 1988, s.2A. See also the joint Parliamentary Select Committee report on the Draft Corporate Manslaughter Bill (HC 540 2005-06), para. 174.

16. Breaches of the duties under sections 2 and 3 HSWA involve failure to take all 'reasonably practicable' steps to ensure the safety of employees and/or the public. Therefore they will encompass a wider range of culpability than offences of corporate manslaughter, up to and possibly overlapping with the latter. For example, an offence under the HSWA may involve conduct falling far below the standard expected but the test of 'senior management failure'<sup>22</sup> may not be satisfied.

## **Harm**

17. An offence of corporate manslaughter or a breach of the HSWA resulting in death involves actual harm of the highest level: the death of one or more person. These offences generally will not involve any intention to cause harm, but in most cases harm (if not death) will have been foreseeable. The extent of the risk of death posed by any breach of health and safety legislation is a factor the jury must consider when deciding whether an offence of corporate manslaughter has been committed. The extent of foreseeable harm involved in the offence will also be relevant to the assessment of seriousness for the purposes of sentencing.

## **Aggravating and mitigating factors**

18. In light of the above paragraphs, there are a small number of particular factors that may aggravate or mitigate the seriousness of an offence of the type covered in this paper.<sup>23</sup> The proposals for sentencing set out later in this paper relate to a first time offender pleading not guilty. However, where there is a guilty plea to an offence under the HSWA it is now common practice for the prosecution to serve a 'Friskies schedule',<sup>24</sup> setting out the aggravating and mitigating features of the case for agreement with the defendant.

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<sup>22</sup> See para. 6 above.

<sup>23</sup> See Annex C for the Council's list of general aggravating and mitigating factors.

<sup>24</sup> The schedule has come to be known by this name since the decision in *Friskies Petcare Ltd* [2000] Cr App R (S) 401, when the Court of Appeal recommended that the defence and prosecution should set out these features in advance.

### *Aggravating factors affecting the level of harm*

#### More than one person killed as a result of the offence

19. In *Balfour Beatty*, the Court stated that an offence under the HSWA involving more than one death must be regarded as more serious, by analogy with cases of causing death by dangerous driving.<sup>25</sup> It is clear that the level of harm is higher where more than one death has resulted. However, whilst some breaches obviously produce a risk of harm to a large number of people, in others the number of deaths likely to result is not so obvious. Offences will be most serious where a number of deaths occur *and* that would reasonably have been foreseeable as a result of the breach.

#### Serious injury caused to one or more others, in addition to the death(s)

20. As well as the death caused by the breach, there may be serious injury caused to other people. Indeed, it is often a matter of chance whether or not injuries are so severe as to result in death. It is clear that such injuries increase the harm caused by the offence and so increase the seriousness of the offence whether under the CMA or HSWA.

### *Aggravating factors affecting the degree of culpability*

#### Failure to act upon advice, cautions or warning from regulatory authorities

21. If the offending organisation was warned of the inadequacies of its safety standards by the regulatory authorities but took no action before the death(s) occurred, this will clearly increase culpability.<sup>26</sup> In 1997, for example, inspectors from the HSE had spoken to English Brothers Ltd construction company about a gang foreman working without the correct safety equipment. Nothing was done to improve the situation, and two years later the same employee fell through a fragile roof to his death. The company pleaded guilty to manslaughter under the common law<sup>27</sup> and was fined £25,000.<sup>28</sup>

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<sup>25</sup> This factor and the others referred to as aggravating an offence of causing death by dangerous driving would aggravate any 'death by driving' offence.

<sup>26</sup> *Howe*; see fn. 20.

<sup>27</sup> See para. 5 above.

<sup>28</sup> [www.corporateaccountability.org](http://www.corporateaccountability.org).

22. As the HSE notes in relation to sentencing for health and safety offences,<sup>29</sup> other warnings to which an organisation should have responded may include previous incidents of a similar nature. In 2001 the London Borough of Hammersmith and Fulham was fined £350,000 for offences under the HSWA, following the death of two council tenants from carbon monoxide poisoning as a result of a faulty boiler that was overdue its annual safety check. The sentencing judge condemned the offender for ‘prolonged dereliction of duty’, noting that an earlier death in the same circumstances “provided the plainest salutary lesson imaginable”, which regrettably had not been learned.<sup>30</sup>

#### Failure to heed relevant concerns of employees or others

23. Specific warnings may originate from sources other than the authorities and, if unheeded, also may increase culpability and so aggravate the seriousness of an offence where it is apparent that action should have been taken. The first company to be convicted of manslaughter under the common law was OLL Ltd, which operated an activity centre in Lyme Regis. In 1992 two instructors resigned in protest at poor safety standards, one warning the managing director in writing that lives might be endangered if standards were not improved. A year later four school pupils drowned during a canoeing trip. The company was fined £60,000 and the director was sentenced to three years imprisonment, reduced to two years on appeal.<sup>31</sup>

#### Offender carrying out operations without an appropriate licence

24. Licensing systems exist to help ensure safety in the workplace for employees and other members of the public. Organisations working with hazardous substances such as asbestos or explosives, or in a hazardous industry such as construction or diving, are generally required to hold a relevant licence. Operating without a required licence will usually constitute a separate offence, but will also increase culpability in relation to an offence of corporate manslaughter and/or an offence under the HSWA involving death.

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<sup>29</sup> [www.hse.gov.uk/enforce/enforcementguide/court/sentencing/factors.htm#P3\\_586](http://www.hse.gov.uk/enforce/enforcementguide/court/sentencing/factors.htm#P3_586).

<sup>30</sup> Gerard Forlin and Michael Appleby, *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (2003).

<sup>31</sup> *Kite* [1996] 2 Cr App R (S) 295.

### Action or lack of action prompted by financial or other inappropriate motives

25. If the appropriate standard of care has been breached deliberately with a view to profit, this will be a seriously aggravating feature.<sup>32</sup> For example, in 2004 Keymark Services haulage company pleaded guilty to common law manslaughter after one of its lorry drivers fell asleep on the motorway and collided with seven vehicles, killing himself and two other drivers. The subsequent investigation revealed that employees regularly tampered with tachographs and falsified records in order to work grossly excessive hours. This conduct appeared to be financially motivated.<sup>33</sup> The company was fined a total of £50,000 for both manslaughter and health and safety offences; the managing director was sentenced to 7 years imprisonment.<sup>34</sup> This is one of the longest sentences imposed for the common law offence,<sup>35</sup> reflecting the gravity of risking death in order to profit financially.

26. Organisations such as charities and public bodies do not make profits, but might still deliberately compromise safety standards.

### Corporate culture encouraging or producing tolerance of breach of duty

27. Under the CMA, factors that the jury may consider when deciding whether a gross breach has been committed include whether there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged or produced tolerance of the relevant failure.<sup>36</sup> These were found to aggravate the offences of manslaughter committed by Keymark Services (see above), where every driver employed by the company was found to have been involved in falsifying records. The sentencing judge is reported to have described the scale of the offence(s) as “shocking”, saying it was “hard to imagine a more serious case of its type”.<sup>37</sup>

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<sup>32</sup> *Howe, Balfour Beatty*; see fn. 20.

<sup>33</sup> [news.bbc.co.uk/1/hi/england/4066331.stm](http://news.bbc.co.uk/1/hi/england/4066331.stm).

<sup>34</sup> [www.northants.police.uk/extranet2/default.asp?action=article&ID=6633](http://www.northants.police.uk/extranet2/default.asp?action=article&ID=6633).

<sup>35</sup> Following the Tebay rail deaths in 2004 the owner and operator of the machinery company responsible was sentenced to 9 years, reduced to 7 on appeal: *Connolly* [2007] EWCA Crim 790. The jury found that the defendant had deliberately disabled the braking system and then concealed the disablement. The motive for this conduct was said by Holland J to be “solely profit”, and this was the first aggravating factor mentioned by the judge when sentencing the defendant at first instance.

<sup>36</sup> CMA 2007, s.8(3).

<sup>37</sup> See fn. 33 above.

## *Mitigating factors*

### Breach due to employee acting outside authority or failing in duties

28. The immediate cause of many safety-related incidents involving organisations is employee behaviour rather than failure of systems or equipment. However, the HSE is of the view that such incidents usually stem from organisational failures which are the responsibility of management, and an offence under the HSWA will be made out if the organisation did not take all reasonably practical steps to avoid safety risks, through measures such as the training and supervision of employees.<sup>38</sup> An employer will not have a defence to a health and safety prosecution because of any act or default by an employee.<sup>39</sup> Nevertheless, if the failure of an employee has been a contributory factor it may be considered appropriate for this to mitigate the seriousness of an offence under the HSWA involving death.

29. The requirement under the CMA for senior management failure to be a substantial cause of the breach is designed to exclude liability of an organisation for “immediate, operational negligence causing death or indeed for the unpredictable, maverick acts of its employees.”<sup>40</sup> If a death has resulted from the actions of a maverick employee acting outside authority, in most cases the offence of corporate manslaughter will not be made out. However, there may be convictions under the CMA where the immediate failure of an employee (whether or not the person who died) also contributed to the offence. In such a case the court will take the contributory conduct into consideration, but the fact that the offence involves a gross breach of the relevant duty of care suggests that any impact on sentence will be limited.

## **Offender mitigation**

### *Ready cooperation with authorities*

30. Ready cooperation with the relevant authorities and steps taken to

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<sup>38</sup> *Successful health and safety management*, HSE (1997).

<sup>39</sup> Management of Health and Safety at Work Regulations 1999 (SI 1999/3242), reg. 21.

<sup>40</sup> *Corporate Manslaughter: The Government's Draft Bill for Reform*, para. 26; see fn. 7.

remedy safety failures as soon as possible after the offence will constitute general offender mitigation. However, it should be noted that a court is likely to give credit only where the offender has initiated remedial action of its own volition rather than under pressure from the enforcement authorities.

*Good previous safety record*

31. One of the mitigating factors listed in *Howe* and endorsed in *Balfour Beatty* is a good safety record. An excellent record might be considered relevant for some offences under the HSWA involving death, but there may be few (if any) cases where an organisation in gross breach of its duty of care would have such a record or, even if it did, where it should have a significant effect on sentence.

**Summary**

32. The primary factor in assessing the seriousness of an offence of corporate manslaughter or of an HSWA offence that has resulted in death is the extent to which the conduct of the offender fell below the appropriate standard of care. The following aggravating or mitigating factors are relevant:

*Aggravating factors increasing the level of harm*

- more than one person killed
- serious injury to one or more person(s)

*Aggravating factors affecting the degree of culpability*

- failure to act upon advice, cautions or warning from regulatory authorities
- failure to heed relevant concerns of employees or others
- carrying out operations without an appropriate licence
- financial or other inappropriate motive
- corporate culture encouraging or producing tolerance of breach of duty

*Mitigating factor*

- employee acting outside authority or failing in duties

*Offender mitigation*

- ready co-operation with authorities
- good safety record

**Question 1**

***Do you agree with the approach to the assessment of seriousness?***

**Question 2**

***Is each of the above aggravating and mitigating factors relevant to sentencing for a) an offence of corporate manslaughter and b) an offence under the HSWA involving death? Are there any other factors which may aggravate or mitigate either or both of these types of offence?***

## D: AIMS OF SENTENCING

33. There are three sanctions available to the court when sentencing for the new offence of corporate manslaughter: unlimited fine, publicity order and remedial order. Under the HSWA only an unlimited fine and a remedial order are available;<sup>41</sup> the court has no power to make a publicity order, although the HSE website contains a public database of organisations convicted under the Act since 2000, which has become known as the 'name and shame' list.<sup>42</sup>

34. The offence of corporate manslaughter is intended to reflect the gravity of the most serious instances of management failure resulting in death.<sup>43</sup> The joint Parliamentary Select Committee report on the Draft Corporate Manslaughter Bill viewed the seriousness of the offence as equivalent to that of causing death by dangerous driving, and proposed the same maximum sentence (14 years imprisonment) if the offence were to apply to an individual.<sup>44</sup> As mentioned above, the courts have imposed substantial prison sentences on company directors found guilty of the common law offence of manslaughter by gross negligence. The CMA applies only to organisations and, therefore, imprisonment is not an option, but it is important that the sanctions that *are* available reflect adequately the perception of seriousness of the offence.

35. As well as enabling the punishment of organisations in such circumstances, the possibility of a conviction for the new offence is expected to provide an extra deterrent against unsafe working practices.<sup>45</sup> General and individual deterrence are also important aims of prosecutions for regulatory offences under the HSWA, which is designed to protect employees and the wider public. In contrast to individual offenders,<sup>46</sup> it is widely agreed that

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<sup>41</sup> Under s.42, where it appears to the court that it is in the offender's power to remedy any matters in respect of the offence, the court can (in addition to or instead of any other sentence) order the offender to take steps to remedy those matters.

<sup>42</sup> Gerard Forlin and Michael Appleby, *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (2003).

<sup>43</sup> *Corporate Manslaughter: The Government's Draft Bill for Reform*, para. 32; see fn. 7.

<sup>44</sup> Para. 314; see fn. 21.

<sup>45</sup> *Corporate Manslaughter: The Government's Draft Bill for Reform*, para. 6.

<sup>46</sup> See e.g. Halliday report *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, Home Office (2001), which reviewed the evidence for the deterrent effects of sentencing individuals.

deterrent sentencing can be effective for corporate offenders.<sup>47</sup>

36. The availability of a range of sanctions thus enables a court to further four of the purposes of sentencing set out in the Criminal Justice Act (CJA) 2003: punishment of offenders and reduction of crime through the punitive and deterrent effects of fines and publicity orders, reform and rehabilitation of offenders through remedial orders, and the protection of the public through both deterrence and remedial action. The fifth aim of reparation by offenders to those affected by the offence can be addressed by a remedial order or a compensation order, which are discussed further below.<sup>48</sup>

37. These aims may be of varying importance depending on whether the sentence is imposed for an offence of corporate manslaughter or an offence under the HSWA involving death. For example, punishment may be considered to be more relevant when deciding the most appropriate sentence for corporate manslaughter as it will involve a higher level of culpability at senior management level.<sup>49</sup>

38. When sentencing for either type of offence, the court will be alert to the possibility of conflict between these aims. For example, a fine set at a high level to punish the offender may make it difficult for the organisation to invest in improved health and safety practices that prevent further offending and protect the public. A publicity order that leads to loss of business may exacerbate this situation by indirectly reducing the resources of the organisation still further.

### **Question 3**

***What do you consider should be the main aim of sentencing an organisation for an offence of corporate manslaughter or an offence under the HSWA involving death? Should there be any difference between the two types of offence and, if so, why?***

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<sup>47</sup> Hazel Croall, *Penalties for Corporate Homicide*, published as Annex B to *Corporate Homicide: Expert Group Report*, Scottish Executive (2005); [www.scotland.gov.uk/Resource/Doc/76169/0019246.pdf](http://www.scotland.gov.uk/Resource/Doc/76169/0019246.pdf).

<sup>48</sup> Paras. 84-89 below.

<sup>49</sup> See para. 9 above.

## **E: THE SANCTIONS AVAILABLE AND THE PANEL'S PROPOSALS**

### **Fines**

39. The maximum fine is unlimited for offences under the CMA, as it is for offences under the HSWA when sentenced in the Crown Court. The basic approach to fixing any fine is the same whether the offender is an organisation or an individual. The amount of the fine must reflect the seriousness of the offence<sup>50</sup> and the court must take into account the financial circumstances of the offender.<sup>51</sup> The information about financial circumstances may have the effect of either increasing or decreasing the amount of the fine.<sup>52</sup> Considerations that may arise where the offender is a publicly funded body are discussed below.<sup>53</sup>

### **Current practice**

40. Fines imposed on organisations for offences of manslaughter by gross negligence and for offences under the HSWA involving death have been criticised as being too low in relation to the harm and culpability concerned.<sup>54</sup> The information available on current practice is very limited: the CMA is not yet in force, and the recording of sentences under the common law does not distinguish manslaughter by gross negligence from other types of manslaughter. The HSE provides some data on fines imposed following work-related fatalities, but this does not distinguish between individual offenders and organisations.

41. The fines imposed in cases of corporate manslaughter under the common law of which we are aware have ranged from £4,000 to £90,000 (the latter also including fines for health and safety offences). It should be noted that the offenders were all small companies, as the identification principle

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<sup>50</sup> CJA 2003, s.164(2).

<sup>51</sup> CJA 2003, s.164(3).

<sup>52</sup> CJA 2003, s.164(4).

<sup>53</sup> See paras. 71-74.

<sup>54</sup> In *Howe*, for example, the Court acknowledged that fines were too low for health and safety offences in general; see fn. 20.

referred to above<sup>55</sup> has effectively prevented convictions of larger organisations.

42. When discussing health and safety offences in *Colthrop Board Mills Ltd*<sup>56</sup> the Court stated: “it appears from the authorities that financial penalties of up to around half a million pounds are appropriate for cases which result in the death even of a single employee.” The Court was considering a review of reported HSWA cases made in the judgment of *Friskies Petcare (UK) Ltd*,<sup>57</sup> which had concluded that “fines in excess of £500,000...tend to be reserved for those cases where a major public disaster occurs.” Leaving aside the exceptional cases mentioned below, fines for corporate offences under HSWA involving death appear to range from £15,000 to £750,000.<sup>58</sup> When both corporate and individual convictions are taken into account, the average fine imposed following work-related fatalities in the UK in 2004/05 was £29,867.<sup>59</sup>

43. Over the last decade, high-profile health and safety cases involving multiple deaths have resulted in increasingly high fines. Great Western Trains was fined £1.5 million following the 1997 Southall train crash in which seven people died and 150 were injured. The train collision at Ladbroke Grove in which 31 people died and over 400 were injured in 1999 resulted in fines of £2 million for Thames Trains and £4 million for Network Rail.<sup>60</sup> Following the Hatfield train derailment in 2000, in which four people died and 102 were injured, Network Rail was fined £3.5 million and maintenance firm Balfour Beatty was fined £7.5 million.<sup>61</sup>

## **Aims of the fine**

### *Reflecting serious concern at the loss of life*

44. The Court stated in *Howe* that the fine should “reflect public disquiet at the unnecessary loss of life” where a death has occurred, although it is not

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<sup>55</sup> See para. 5.

<sup>56</sup> [2002] EWCA Crim 520 (a health and safety case that did not involve death).

<sup>57</sup> [2000] 2 Cr App R (S).

<sup>58</sup> Gerard Forlin and Michael Appleby, *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (2003).

<sup>59</sup> *Health and Safety Offences and Penalties 2004/05*, HSE; [www.hse.gov.uk](http://www.hse.gov.uk).

<sup>60</sup> Formerly Railtrack.

<sup>61</sup> This was originally £10 million but was reduced upon appeal: *Balfour Beatty Rail Infrastructure Services Ltd* [2007] Cr App R (S).

possible to incorporate a financial measure of the value of human life in the fine imposed for an offence.<sup>62</sup> In the *Balfour Beatty* judgment the Court said that the fine must reflect both the degree of fault and the consequences of the breach so as to raise appropriate concern on the part of any shareholders. It was asserted that such an approach would ensure that the sentence serves the aims of both punishment and deterrence.

#### *Ensuring future compliance with safety standards*

45. In *Balfour Beatty* the Court also endorsed the statement in *Howe* that the ultimate objective of a fine for a health and safety offence in the workplace is to achieve a safe environment for employees and the public, through encouraging compliance with the offender's legal duties. The Court stated in *Howe* that the fine for an offence under the HSWA involving death needs to be large enough to "bring that message home" to those responsible for the governance of the organisation, not only managers but also any shareholders who may be able to influence company policy and practice. It was noted that, as well as deterring an individual organisation from future breaches of its duties, such a fine may provide a deterrent to other organisations.

46. The approach to the aim of a fine outlined above may also be appropriate for offences of corporate manslaughter. However, as an offence under the CMA will involve a *gross* breach of an organisation's duty of care, this will indicate higher culpability than that involved in many offences under the HSWA involving death and, therefore, a greater degree of seriousness. Moreover, 'bringing the message [of safety] home' to an organisation is a broad aim which the courts will bear in mind throughout the sentencing process rather than an approach which assists in the actual calculation of the fine.

#### *Eliminating financial benefit*

47. A more specific approach has been suggested as providing an individual and general deterrent from offending. The recent Macrory review of regulatory

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<sup>62</sup> *Friskies Petcare Ltd* [2000] Cr App R (S).

penalties<sup>63</sup> recommended that these should aim to eliminate any financial gain or benefit resulting from non-compliance with safety standards. If the expected penalty cost does not outweigh the expected gain from the offence, an organisation might choose to take the risk of being detected and prosecuted.

48. The Panel has previously stated that, in principle, it should not be cheaper to offend than to prevent the commission of an offence.<sup>64</sup> However, whilst eliminating any financial benefit from the offence is a desirable aim, it is unlikely to be achievable in all circumstances. A court should request details of any gain made from the offence if such information is available, but it is not clear how profits made or costs that have been avoided, deferred or saved would be calculated. In some circumstances, a remedial order may be the most appropriate way to deal with this issue, indirectly eliminating financial benefit by compelling the offender to invest in bringing safety systems up to the appropriate standard.

49. In summary, the aims of the fine described above require that the amount should be sufficient:

- a) to reflect serious concern at the consequences of the breach;
- b) to ensure that those responsible for governance of the organisation are properly aware of the need to ensure a safe environment; and
- c) if possible, to eliminate any financial benefit from the offence.

In fulfilling this aim, the court is obliged to have regard to both the seriousness of the offence and the financial circumstances of the offender.

#### **Question 4**

***Do you agree that the aims of the fine should be to ensure future safety and reflect serious concern at the unnecessary loss of life? Should there be any difference in aim when imposing a fine for corporate manslaughter or for an offence under the HSWA involving death?***

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<sup>63</sup> Richard Macrory, *Regulatory Justice: Making Sanctions Effective* (2006); [www.cabinetoffice.gov.uk/regulation/reviewing\\_regulation/penalties/index.asp](http://www.cabinetoffice.gov.uk/regulation/reviewing_regulation/penalties/index.asp).

<sup>64</sup> Sentencing Advisory Panel, Advice on *Environmental Offences* (2000), para.16; [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

### Question 5

*Do you agree that a fine imposed for an offence of corporate manslaughter or an offence under the HSWA involving death should aim to eliminate any financial benefit resulting from the offence? If so, what information would be necessary, and how could this be obtained?*

#### **Methods of calculation**

50. The comments made in the cases cited in paragraph 42 above indicate the desire for a consistent method of calculating the fine to reflect the seriousness of the offence and the financial circumstances of the offender. A lack of consistency in fines imposed was found by the Macrory review to be a major concern of bodies such as the HSE.<sup>65</sup> In 2004/05, for example, the average penalty following all HSE prosecutions in England was £20,647, while in Wales it was £8,189.<sup>66</sup> However, consistency of *approach* rather than *outcome* (i.e. quantum) is the aim, as the organisation's ability to pay must be taken into account. The Panel has considered a number of methods that could be used to develop a consistent approach to the setting of financial penalties for the offences covered in this paper.

#### *Optimal Penalties Model*

51. This controversial approach for sentencing corporate offenders is based on the premise mentioned above,<sup>67</sup> that organisations that breach their legal duties do so on the basis of a calculation that the expected benefits of offending outweigh the expected costs. Under this model a court bases the amount of the fine on both the 'value' of all harm caused by the offence and the probability of conviction, often expressed as the multiplier of the chances of punishment; the total fine is equal to the harm divided by the probability of punishment. Both of these calculations present considerable practical challenges, and this model (which has been rejected both by the United States Federal Sentencing Commission and the Law Reform Commission of New South Wales) can result in fines that are no less arbitrary than penalties determined by a less

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<sup>65</sup> See fn. 63 above.

<sup>66</sup> *Health and Safety Offences and Penalties 2004/05*, HSE; [www.hse.gov.uk](http://www.hse.gov.uk).

<sup>67</sup> See para. 47 .

complicated approach.

*US Federal Sentencing Commission organisational guidelines*

52. The model adopted by the US Federal Sentencing Commission in its organisational sentencing guidelines involves:

a) determining a base fine, which is the greater of: the guidelines-prescribed minimum for the offence; any pecuniary gain to the organisation; or any pecuniary loss to others from the offence, to the extent the loss was caused intentionally, knowingly or recklessly;

b) multiplying the base fine by a 'culpability score,' which takes into account the following aggravating and mitigating factors: the level of authority of the employees involved; size of the organisation; any previous convictions; breaches of court orders; the presence of an effective programme to prevent breaches of the law; and whether the organisation cooperated with or obstructed the authorities.

The fine may be reduced if it is likely to impair the organisation's ability to make restitution or jeopardise the existence of the organisation.

53. The Law Reform Commission of New South Wales reviewed the US model and concluded that it adheres to the traditional sentencing principles of proportionality and deterrence.<sup>68</sup> There is some evidence that the guidelines have resulted in higher fines and lower levels of corporate offending.<sup>69</sup> However, as presently constructed they leave little room for judicial discretion and can arguably lead to undue rigidity, reasons given by the Law Reform Commission for rejecting such an approach to sentencing organisations.

54. Nevertheless, it may be possible to utilise the principles to assist in constructing sentencing ranges and starting points. The Panel has considered the pecuniary gain to the offender as mentioned in point a) above, and has asked consultees how this could be eliminated. The aggravating and mitigating

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<sup>68</sup> *Sentencing: Corporate Offenders*, Report 102 (2003); [www.agd.nsw.gov.au](http://www.agd.nsw.gov.au).

<sup>69</sup> Hazel Croall, *Penalties for Corporate Homicide*; see fn. 47.

factors listed in b) have been taken into account in the discussion of seriousness above, with the exception of the size of the organisation.

*Fine expressed as percentage of turnover or profits*

55. The size of the organisation is primarily relevant in terms of the financial resources available to the offender with which to pay the fine. As a general principle the Panel has previously stated that fines should be devised to have an equal economic impact on organisations of different sizes.<sup>70</sup> Such an approach would require an agreed method of calculation to determine an organisation's ability to pay. The principal measures by which this ability can be assessed are turnover, profitability and liquidity.

56. In 1994, the Criminal Bar Association suggested that the maximum penalty for a proposed offence of corporate killing should be the greater of either a percentage of average profit in the 3 years preceding the offence or a percentage of turnover during the same period (tentatively 50 and 5 per cent respectively).<sup>71</sup> In 2005 the joint Parliamentary Select Committee report on the Draft Corporate Manslaughter Bill noted that many of their consultees had suggested 10 per cent of annual turnover as an appropriate fine for the new offence.<sup>72</sup>

57. Turnover is the aggregate of all sums of money received by an organisation during the course of its business (whether a private company, charity or public body) over an annual period. It compares closely with the income of an individual, which is typically the primary measure used to assess an individual offender's ability to pay a fine. It is also the measure already used by the Office of Fair Trading (OFT) when imposing financial penalties on companies that have infringed competition law. The OFT calculates the starting point with regard to a) the seriousness of the infringement and b) the company's turnover in the product market and geographic market affected by the infringement in the last business year.<sup>73</sup> Aggravating and mitigating factors

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<sup>70</sup> Sentencing Advisory Panel, Advice on *Environmental Offences* (2000), para. 22.

<sup>71</sup> As cited by the Centre for Corporate Accountability: [www.corporateaccountability.org/dl/SentCCAresponse.pdf](http://www.corporateaccountability.org/dl/SentCCAresponse.pdf).

<sup>72</sup> Para. 264; see fn. 21.

<sup>73</sup> *OFT's guidance as to the appropriate amount of a penalty* (2004); [www.oft.gov.uk](http://www.oft.gov.uk).

such as the duration of the infringement are then taken into account, but in any event the fine must not exceed ten per cent of the company's worldwide turnover. Ten per cent of global turnover is also the maximum fine the European Commission can impose for breaches of European Community competition law.<sup>74</sup>

### **The Panel's proposals**

58. The Panel's provisional view is that annual turnover is the most appropriate measure of an organisation's ability to pay a fine, and thus the starting points and ranges<sup>75</sup> proposed below are expressed as percentages of annual turnover. It would be for the prosecution to provide evidence of particularly high profitability if it considered the fine indicated by annual turnover to be too low, or for the offender to provide evidence of low liquidity if it considered the fine indicated by annual turnover to be too high.

59. The statutory offence of corporate manslaughter has been created for the most serious instances of management failure resulting in death. The Panel's view is that a fine imposed for an offence under the CMA should be set at a level significantly higher than for an offence under the HSWA involving death.<sup>76</sup> The fine levels proposed below for offences of corporate manslaughter are based on the assumption that a publicity order will be imposed on the offender.

60. The Panel's provisional starting point for an offence of corporate manslaughter committed by a first time offender pleading not guilty<sup>77</sup> is a fine amounting to 5 per cent of the offender's average annual turnover during the three years prior to sentencing (see paragraph 64 below). The court will then take into account any aggravating and/or mitigating factors as set out above,<sup>78</sup> arriving at a fine which will normally fall within a range of 2.5 to 10 per cent of average annual turnover. Significant aggravating factors or previous

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<sup>74</sup> Regulation 1/2003; [www.europa.eu](http://www.europa.eu).

<sup>75</sup> See Annex B for explanations of 'starting point', 'range' and 'first time offender'.

<sup>76</sup> This was also the view of many of the witnesses who gave evidence to the joint Select Committee's consultation on the Draft Bill: see para. 264 of the report cited at fn. 21.

<sup>77</sup> For guidance on the appropriate discount to be made where the offender has entered a guilty plea, see the revised Council Guideline: *Reduction in Sentence for a Guilty Plea* (2007); [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

<sup>78</sup> These are summarised at para. 32.

convictions may take the fine beyond the range. The court will then consider any mitigation related to the offender (rather than the offence), which may take the fine below the range.

61. The Panel's provisional starting point for an offence under the HSWA involving death is a fine amounting to 2.5 per cent of average annual turnover during the three years prior to the offence. The fine will normally fall within a range of 1 to 7.5 per cent of average annual turnover.

62. Where the offender is a very large organisation, the Panel's provisional approach would result in larger fines than have been imposed previously by the courts. The largest fine imposed to date for a health and safety offence in the UK was that of £15 million in the Scottish case of Transco, for breaches of regulations which led to the deaths of four members of the same family in a gas explosion. The fine represented 5 per cent of the company's after-tax profits and less than one per cent of annual turnover. Although in that instance the offender did respond appropriately to the incident, it has been suggested that the fine in itself could be easily absorbed and may not have provided an effective individual or general deterrent as described above.<sup>79</sup> A fine expressed as a percentage of average annual turnover is designed to have an equal economic impact on all sizes of organisation, in order to reflect the seriousness of the offence even where the offender has large financial resources.

63. Conversely, where the offender has a very low annual turnover, it is possible that the Panel's provisional approach would result in smaller fines than those currently imposed in some cases, at least for offences under the HSWA resulting in death. The apparent disparity in actual terms between fines imposed on very small and very large offenders is an inevitable result of an approach designed to have a consistently equal economic impact. However, it may be thought appropriate to set a minimum fine for corporate manslaughter or for offences under the HSWA involving death, in order to ensure that the harm involved in such offences is properly reflected in the sentence.

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<sup>79</sup> *Regulatory Justice: Making Sanctions Effective*, para. 1.23; see fn. 63.

### Question 6

*Do you agree with the Panel's proposed starting points and ranges for a) offences of corporate manslaughter and b) offences under the HSWA involving death? If not, what alternative approach would you suggest for the fining of organisations for these offences?*

### Question 7

*Do you agree that it is for the prosecution and defence to raise issues of profitability and liquidity? What impact should these factors have on the calculation of the fine?*

### Question 8

*Do you consider that there should be a minimum fine for a) offences of corporate manslaughter and b) offences under the HSWA involving death? If so, what amount do you think would be appropriate?*

### **Provision of financial information**

64. It is common practice for an organisation to supply its accounts to the court in order to demonstrate its ability to pay a fine for an offence under the HSWA, as otherwise the court is entitled to assume that the organisation can pay any fine it chooses to impose.<sup>80</sup> Under the Panel's proposed approach an offender should be required to provide comprehensive accounts for a three-year period, to enable the court to make an accurate assessment of its financial status. This period will usually be the last three financial years, but the court should be alert to the possibility that the organisation may try to rearrange its finances in order to receive a lower fine, particularly where several years have passed between the offence and the imposition of sentence. Where three years or more have passed in the interim, the court may also wish to examine accounts from a period prior to the offence.

65. In *Howe* the Court recognised that it can be difficult to obtain 'timely and accurate' information about the offender's resources, and there have been

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<sup>80</sup> *Howe*; see fn. 20.

suggestions that courts should receive a form of ‘pre-sentence report’ including such details. The Law Reform Commission of New South Wales recommended that, where necessary, the court should be able to request a professional assessment of an offender’s finances from a relevant expert, paid for where appropriate by the offender itself.<sup>81</sup> The Commission received positive responses to this suggestion in its consultation,<sup>82</sup> and the joint Select Committee report on the Draft Corporate Manslaughter Bill stated that it would be useful for such a ‘pre-sentence report’ to be provided for each offender, despite the risk that this might increase the delays already associated with the conduct of these cases. The Panel considers such a report to be desirable in principle, but it is unclear how and by whom it would be provided.

### **Question 9**

***Do you consider that a report on each offender should be prepared for the court with full details of financial status? If so, how would this be provided?***

### **Potential reasons for deviating from the proposed fine levels**

#### *The ‘deterrence trap’*

66. As mentioned above, a fine set at a high level may hinder other aims of sentencing – the prevention of offending and the protection of the public - by reducing the resources available to the organisation to invest in improved health and safety practices. This ‘deterrence trap’ is of particular relevance where the organisation has a very small profit margin and is therefore less able to absorb the impact of paying a large fine.

#### *The ‘spill-over’ effect*

67. Another concern associated with large fines is the potential ‘spill-over’ effect on third parties such as employees, customers, and shareholders. First, where the organisation has no choice but to reduce its staffing budget in order to pay the fine, wage levels will be affected and jobs will be threatened. In some cases the court may be willing to take this into account, particularly where

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<sup>81</sup> *Sentencing: Corporate Offenders*; see fn. 68.

<sup>82</sup> Hazel Croall, *Penalties for Corporate Homicide*; see fn. 47.

individuals have also been convicted of offences and where the organisation has not, in fact, benefited from the conduct.<sup>83</sup>

68. Secondly, the organisation may consider it necessary to increase the price of its goods or services as a result of paying a large fine. Depending on the business environment in which the offending organisation operates, customers may have the option of taking their custom elsewhere. However, this choice would be severely limited if the offender was a rail company, for example. Where the organisation is a public body the issue of price rises will not generally arise, but a large fine may force it to reduce its services, which will have an adverse impact on users (see further below). In these circumstances, the court may contemplate a reduction in fine, although it should first consider whether spreading the payment of the fine would be a more appropriate course of action.

69. Thirdly, it has been argued that the imposition of large fines can unfairly penalise shareholders who may be remote from the actions leading to a death and who may have little power to affect day-to-day management. On the other hand, shareholders have voluntarily taken a risk by investing, may actually profit from offences, can have an impact on management decisions and thus should not be protected from the effect of those decisions.<sup>84</sup> The Panel's provisional view is that the court should not make any adjustment to the fine to take account of a possible impact on shareholders.

70. Finally, in *Howe* the Court stated that in general a fine for a health and safety offence should not be so large as to imperil the commercial survival of the organisation, but that there may be cases where the offender ought not to be in business. Whilst the court will not aim directly to shut down an organisation, it may be less concerned at this prospect where an organisation has committed the offence of corporate manslaughter. Moreover, the Court of Appeal has established that, where appropriate, payment of the fine can be

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<sup>83</sup> New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, para. 6.11; see fn. 68.

<sup>84</sup> Hazel Croall, *Penalties for Corporate Homicide*; see fn. 47.

spread over a number of years.<sup>85</sup>

### *Offenders providing public services*

71. Particular issues arise when the offending organisation is a public body, or a private or hybrid body providing what is considered to be a public service. In *Jarvis*, a health and safety case which did not involve death, the Court considered itself entitled to take a more severe view of breaches where there is a “significant public element”, particularly where public safety is entrusted to companies such as those maintaining the railways. However, the courts have also reduced fines where the funds needed to pay the fine would otherwise be spent on public safety, for example in the case of Railtrack following the Ladbroke Grove disaster.

72. Crown bodies such as Government Departments are not currently subject to statutory enforcement or prosecution under the HSWA;<sup>86</sup> instead of a fine the only sanction available is a ‘Crown censure.’ The CMA applies to most Crown bodies but, as it precludes a ‘relevant duty of care’ arising in respect of many of their activities, the scope for conviction is limited. Where the offending organisation is a Crown or other publicly funded body such as a local authority or hospital trust any fine imposed may be considered an inefficient recycling of money or worse, if public services suffer as a result. However, it is important that a body that has committed an offence under the CMA or the HSWA does not escape sanction.<sup>87</sup> The Government has stated that the courts are alert to the issue of diverting resources and are able to set fines accordingly.<sup>88</sup>

73. Where an offence under the CMA or the HSWA has involved foreseeable harm to a large number of people, such as a group of train passengers, this will

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<sup>85</sup> *Rollco Screw & Rivet Co Ltd* [1999] 2 Cr App R (S) 436. In that case the Court reduced the payment period from six years and five months to five years and seven months.

<sup>86</sup> The Government made a commitment in 2000 to remove Crown immunity: *Revitalising Health and Safety Strategy Statement*, DETR (2000); this document can be found at [www.hse.gov.uk/revitalising/strategy.pdf](http://www.hse.gov.uk/revitalising/strategy.pdf).

<sup>87</sup> This was the view of a majority of those who responded to the Government’s consultation on the Draft Corporate Manslaughter Bill and those who gave evidence to the joint Select Committee; see, respectively, the *Summary of Responses* at [www.homeoffice.gov.uk/documents/cons-2005-corporate-manslaughter/draft-bill-responses-2005-cons](http://www.homeoffice.gov.uk/documents/cons-2005-corporate-manslaughter/draft-bill-responses-2005-cons), and fn. 22 above.

<sup>88</sup> *Government Reply to the first Joint Report from the Home Affairs and Work and Pensions Committees 2005-06 HC 540* (2006) Cm 6755, para. 46.

be reflected in the level of seriousness as discussed above.<sup>89</sup> Actual harm such as multiple fatalities and/or serious injury will aggravate the offence. The objectives of the fine as discussed above, to reflect public concern at the harm caused by the offence and to deter the offender from breaching its duties in the future, are just as important whether fining a public body or a private company.

74. In summary, the assessment of financial circumstances will seek to ensure that:

- a) the fine is sufficient to have the required impact, in most cases without imperilling either the existence of the organisation or the funds necessary to remedy defective systems; and
- b) where the offender is funded from the public purse, it is recognised that the fine will be paid with public money.

#### **Question 10**

*Do you agree with the Panel's approach to the impact of the fine on the offender, its employees, customers and shareholders? If not, why not?*

#### **Question 11**

*Do you agree that the court should treat offenders consistently, whether or not they are publicly funded or providing a public service? If not, how do you think that considerations specific to public bodies should be reflected?*

#### **Publicity orders**

75. However large current fines may be, concerns remain over the sufficiency of their impact on large companies. The CMA provides for a publicity order through which a court will be able to require an organisation convicted of corporate manslaughter to advertise the fact of its conviction, specified particulars of the offence, the amount of any fine imposed, and the terms of any

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<sup>89</sup> See para. 17.

remedial order that has been made. This is a new power in the UK,<sup>90</sup> although it is already available for various offences in Canada, the United States and Australia. The normal expectation is that a publicity order would be imposed alongside a fine but there is nothing to prevent a court making a stand-alone order.

76. A publicity order is considered to be an effective deterrent, potentially exceeding the effect of a fine, as it can impact upon the public reputation of an organisation through damage to consumer confidence, market share and equity value. The HSE's 'name and shame' database launched in 2000 serves a similar purpose in relation to health and safety offences, providing a public record of all successful prosecutions and the names of convicted companies. However, the courts are not involved in the HSE database and it is not considered further here.

77. Prior to imposing an order the court will be required to ascertain the views of the appropriate regulatory authority, and also to have regard to any representations made by the prosecution and defence. In practice, the wording of the order usually will be suggested to the court by the regulator or prosecution following consultation with the victim's family. The order must specify the period within which the advert is to be placed and the court may require the organisation to supply evidence of compliance with the order to any regulator it has consulted. Failure to comply with an order will be an offence punishable on indictment by an unlimited fine.

78. Given the guidance on the face of the CMA and the involvement of the regulator and/or prosecution, the Panel does not consider it necessary or appropriate to consult on the content of a publicity order. However, it may be helpful for the court to have guidance on *whether* an order should be made, the extent of the publicity, and what effect (if any) it should have on the overall sentence.

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<sup>90</sup> Similar provisions were available in the 19th century that allowed courts to order the publication of certain details of convicted offenders and their offence. For example, in cases where the offender adulterated bread, statute provided for the offender's name, abode and offence to be published in a local newspaper, the cost of publication being deducted from the fine also imposed: London Bread Act 1822, s.10; Bread Act 1836, s.8: New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*; see fn. 68.

## **Whether an order should be made**

79. The order is primarily intended as an additional deterrent designed to put offenders at a disadvantage in comparison with competitors who do not break the law. The Law Reform Commission of New South Wales has suggested<sup>91</sup> that publicity orders may lose their efficacy if they are imposed on every organisation convicted of any type of offence but identified the following situations in which they might be most useful:

- the court has reduced a fine due to the organisation's financial circumstances
- the organisation has a poor record of compliance with the law (a publicity order may increase the pressure on the organisation to comply)
- it is considered that the organisation's customers, creditors and/or shareholders should know about the conviction, or where news coverage is likely to be insufficient (although it might be argued that most cases of corporate manslaughter would attract publicity).

80. The potentially 'desensitising' effect on the public of a regular use of publicity orders may be of less relevance to cases of corporate manslaughter. If it does serve a deterrent purpose, an order might be considered appropriate in most cases where the offender is operating in a competitive market. The Panel's provisional view is that, in principle, a publicity order should be imposed on every offender convicted of corporate manslaughter. However, there may be cases where the making of an order may be less appropriate, for example where the offender is providing a local public service in relation to which the public cannot exercise choice.

### **Question 12**

***Do you agree that, when sentencing an organisation for an offence of corporate manslaughter, the court should impose a publicity order?***

## **The extent of publicity**

81. A court may order that the details of an offence are published in any 'specified manner', giving the court scope to ensure that the publicity reaches

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<sup>91</sup> *Sentencing: Corporate Offenders*; Report 102 (2003); see fn. 68.

its intended audience. Options for the form of the order include:

- publication on television/radio and/or in a local/national/trade newspaper, including relevant broadcaster/newspaper websites;
- publication on the organisation's website and in its annual report, informing (potential) customers and those who might be interested in investing in the organisation;
- notice to shareholders; and
- letters to customers and/or suppliers of the organisation.

82. In light of the range of offenders, the Panel does not consider it sensible to seek to provide detailed guidance on the extent of publicity, but it may be possible to set some minimum standards. For example, if the offender is a local organisation, it might normally be appropriate to require publication in the local media; in the case of a large national organisation, publication in national media would be more effective. In both cases, a notice in all relevant trade journals should be required. Any shareholders should be notified in order that they may press for enhanced health and safety standards and publication should always be required in an annual report.

### **Question 13**

***What should the extent of the publicity be and how (if at all) will this differ between cases of corporate manslaughter?***

#### **Effect on overall sentence**

83. The requirements of a publicity order will entail both direct and indirect costs for the offending organisation. The direct costs to the offender of placing the advertisement and notifying shareholders are likely to be relatively small and easy to calculate. The indirect costs in the form of loss of custom and/or investment are potentially much larger and more difficult to estimate. However, as the Panel's proposed starting point and range for the financial penalty are based on the premise that a publicity order will be imposed in every case of corporate manslaughter, the court should not need to give any further consideration to the effect of such an order on the overall sentence. As mentioned earlier in paragraph 59, where a publicity order is not imposed, the

court should consider whether a higher fine would be appropriate.

#### **Question 14**

***Do you agree that the making of a publicity order should not lead to a reduction in the level of fine imposed on an organisation for an offence of corporate manslaughter?***

#### **Remedial orders**

84. Both the CMA and the HSWA provide for rehabilitation of the offender through a remedial order, setting out steps to be taken to ensure that the failures that led to the death are addressed. Failure to comply with an order under the CMA will be an offence punishable on indictment by an unlimited fine. The availability of this sanction has been widely welcomed, even though it is unlikely to be used often in practice. The similar order available for offences under the HSWA<sup>92</sup> is itself rarely used, as by the time an organisation is sentenced for an offence, the regulatory authorities are likely to have taken any appropriate action.

85. The remedial order will provide an additional safeguarding power for a limited number of cases where the offender has failed to respond to other interventions. Therefore the Panel does not consider it to be necessary to consult on the situations in which it would be appropriate for a court to impose either this order or the order available under the HSWA. As a remedial order will only be imposed after consultation with a relevant regulatory body and will be highly case-specific, the Panel also does not consider it necessary to consult on the content of such an order.

86. With regard to the effect on overall sentence, the Panel's provisional view is that the costs involved in complying with the remedial order should not lead to a corresponding decrease in any fine imposed for the same offence. The order is rehabilitative rather than punitive, and merely requires the offender

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<sup>92</sup> s.42.

to take steps to comply with the health and safety standards already required by law. Any reduction in the fine would reward unfairly the few organisations that have resisted compliance with those standards, and would lead to inequitable treatment of the majority of organisations that have taken remedial action before the point of sentence.

### **Question 15**

***Do you agree that the making of a remedial order should not lead to a reduction in the level of fine imposed on an organisation for an offence of corporate manslaughter or an offence under the HSWA involving death?***

### **Compensation orders**

87. The court has the power to make an order requiring the organisation to pay compensation for any personal injury, loss or damage resulting from the offence,<sup>93</sup> and must give reasons for its decision if it does not make such an order.<sup>94</sup> A compensation order can be made in favour of the relatives and dependants of the deceased, in respect of bereavement and funeral expenses.<sup>95</sup> An order in respect of funeral expenses can be made for the benefit of anyone who has incurred them,<sup>96</sup> but compensation for bereavement can only be made in favour of persons who could claim damages for bereavement under the Fatal Accidents Act 1976,<sup>97</sup> namely the spouse of the deceased or, in the case of a minor, his/her parents. The maximum sum which may be claimed for bereavement is £10,000.<sup>98</sup>

88. More than one person may have been killed as a result of the offence; others may have been injured. The amount of compensation should be such as the court considers appropriate, having regard to the offender's means. Where both a fine and a compensation order are appropriate but the offender lacks the means to pay both, the compensation order payments will take

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<sup>93</sup> Powers of Criminal Courts (Sentencing) Act (PCCSA) 2000, s.130(1).

<sup>94</sup> s.130(4).

<sup>95</sup> PCCSA 2000, s.130(1)(b).

<sup>96</sup> s.130 (9).

<sup>97</sup> s.1A.

<sup>98</sup> Damages for Bereavement (Variation of Sum) (England and Wales) Order (SI 2002/644).

priority. Compensation paid is deducted from any damages received in civil proceedings, so the existence of a pending civil claim should not in itself prevent the imposition of a compensation order.

89. However, in cases prosecuted for the offences considered in this paper, the level of complexity surrounding the calculation of compensation is likely to be such that it is an issue best resolved outside the criminal proceedings. Whilst a court is always under an obligation to consider whether a compensation order can be made, it is more likely that a court will decide to leave the issue to the civil court, in which case it must give its reasons for doing so.

## **SUMMARY OF PROPOSALS**

90. When sentencing for an offence of corporate manslaughter, the starting point should be:

- the imposition of a publicity order (see paragraphs 75-83); and
- a fine of 5 per cent of the offender's average annual turnover (see paragraph 60);
- within a fine range of 2.5 - 10 per cent of average annual turnover.

91. When sentencing for an offence under the HSWA involving death, the starting point should be:

- a fine of 2.5 per cent of the offender's average annual turnover (see paragraph 61);
- within a fine range of 1 - 7.5 per cent of average annual turnover.

## CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007

### 1 The offence

- (1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—
- (a) causes a person's death, and
  - (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
- (2) The organisations to which this section applies are—
- (a) a corporation;
  - (b) a department or other body listed in Schedule 1;
  - (c) a police force;
  - (d) a partnership, or a trade union or employers' association, that is an employer.
- (3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).
- (4) For the purposes of this Act—
- (a) “relevant duty of care” has the meaning given by section 2, read with sections 3 to 7;
  - (b) a breach of a duty of care by an organisation is a “gross” breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances;
  - (c) “senior management”, in relation to an organisation, means the persons who play significant roles in—
    - (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
    - (ii) the actual managing or organising of the whole or a substantial part of those activities.
- (5) The offence under this section is called—
- (a) corporate manslaughter, in so far as it is an offence under the law of England and Wales or Northern Ireland;
  - (b) corporate homicide, in so far as it is an offence under the law of Scotland.
- (6) An organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.
- (7) The offence of corporate homicide is indictable only in the High Court of Justiciary.

### 2 Meaning of “relevant duty of care”

- (1) A “relevant duty of care”, in relation to an organisation, means any of the following duties owed by it under the law of negligence—
- (a) a duty owed to its employees or to other persons working for the organisation or performing services for it;
  - (b) a duty owed as occupier of premises;
  - (c) a duty owed in connection with—
    - (i) the supply by the organisation of goods or services (whether for consideration or not),
    - (ii) the carrying on by the organisation of any construction or maintenance operations,
    - (iii) the carrying on by the organisation of any other activity on a commercial basis, or

- (iv) the use or keeping by the organisation of any plant, vehicle or other thing;
  - (d) a duty owed to a person who, by reason of being a person within subsection (2), is someone for whose safety the organisation is responsible.
- (2) A person is within this subsection if—
  - (a) he is detained at a custodial institution or in a custody area at a court or police station;
  - (b) he is detained at a removal centre or short-term holding facility;
  - (c) he is being transported in a vehicle, or being held in any premises, in pursuance of prison escort arrangements or immigration escort arrangements;
  - (d) he is living in secure accommodation in which he has been placed;
  - (e) he is a detained patient.
- (3) Subsection (1) is subject to sections 3 to 7.
- (4) A reference in subsection (1) to a duty owed under the law of negligence includes a reference to a duty that would be owed under the law of negligence but for any statutory provision under which liability is imposed in place of liability under that law.
- (5) For the purposes of this Act, whether a particular organisation owes a duty of care to a particular individual is a question of law.  
The judge must make any findings of fact necessary to decide that question.
- (6) For the purposes of this Act there is to be disregarded—
  - (a) any rule of the common law that has the effect of preventing a duty of care from being owed by one person to another by reason of the fact that they are jointly engaged in unlawful conduct;
  - (b) any such rule that has the effect of preventing a duty of care from being owed to a person by reason of his acceptance of a risk of harm.
- (7) In this section—

“construction or maintenance operations” means operations of any of the following descriptions—

  - (a) construction, installation, alteration, extension, improvement, repair, maintenance, decoration, cleaning, demolition or dismantling of—
    - (i) any building or structure,
    - (ii) anything else that forms, or is to form, part of the land, or
    - (iii) any plant, vehicle or other thing;
  - (b) operations that form an integral part of, or are preparatory to, or are for rendering complete, any operations within paragraph (a);

“custodial institution” means a prison, a young offender institution, a secure training centre, a young offenders institution, a young offenders centre, a juvenile justice centre or a remand centre;

“detained patient” means—

  - (a) a person who is detained in any premises under—
    - (i) Part 2 or 3 of the Mental Health Act 1983 (c 20) (“the 1983 Act”), or
    - (ii) Part 2 or 3 of the Mental Health (Northern Ireland) Order 1986 (SI 1986/595 (NI 4)) (“the 1986 Order”);
  - (b) a person who (otherwise than by reason of being detained as mentioned in paragraph (a)) is deemed to be in legal custody by—
    - (i) section 137 of the 1983 Act,
    - (ii) Article 131 of the 1986 Order, or
    - (iii) article 11 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 (SI 2005/2078);
  - (c) a person who is detained in any premises, or is otherwise in custody, under the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) or Part 6 of the Criminal Procedure (Scotland) Act 1995 (c 46) or who is detained in a hospital under section 200 of that Act of 1995;

“immigration escort arrangements” means arrangements made under section 156 of the

Immigration and Asylum Act 1999 (c 33);

“the law of negligence” includes—

- (a) in relation to England and Wales, the Occupiers' Liability Act 1957 (c 31), the Defective Premises Act 1972 (c 35) and the Occupiers' Liability Act 1984 (c 3);
- (b) in relation to Scotland, the Occupiers' Liability (Scotland) Act 1960 (c 30);
- (c) in relation to Northern Ireland, the Occupiers' Liability Act (Northern Ireland) 1957 (c 25), the Defective Premises (Northern Ireland) Order 1975 (SI 1975/1039 (NI 9)), the Occupiers' Liability (Northern Ireland) Order 1987 (SI 1987/1280 (NI 15)) and the Defective Premises (Landlord's Liability) Act (Northern Ireland) 2001 (c 10);

“prison escort arrangements” means arrangements made under section 80 of the Criminal Justice Act 1991 (c 53) or under section 102 or 118 of the Criminal Justice and Public Order Act 1994 (c 33);

“removal centre” and “short-term holding facility” have the meaning given by section 147 of the Immigration and Asylum Act 1999;

“secure accommodation” means accommodation, not consisting of or forming part of a custodial institution, provided for the purpose of restricting the liberty of persons under the age of 18.

### 3 Public policy decisions, exclusively public functions and statutory inspections

(1) Any duty of care owed by a public authority in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests) is not a “relevant duty of care”.

(2) Any duty of care owed in respect of things done in the exercise of an exclusively public function is not a “relevant duty of care” unless it falls within section 2(1)(a), (b) or (d).

(3) Any duty of care owed by a public authority in respect of inspections carried out in the exercise of a statutory function is not a “relevant duty of care” unless it falls within section 2(1)(a) or (b).

(4) In this section—

“exclusively public function” means a function that falls within the prerogative of the Crown or is, by its nature, exercisable only with authority conferred—

- (a) by the exercise of that prerogative, or
- (b) by or under a statutory provision;

“statutory function” means a function conferred by or under a statutory provision.

### 4 Military activities

(1) Any duty of care owed by the Ministry of Defence in respect of—

- (a) operations within subsection (2),
- (b) activities carried on in preparation for, or directly in support of, such operations, or
- (c) training of a hazardous nature, or training carried out in a hazardous way, which it is considered needs to be carried out, or carried out in that way, in order to improve or maintain the effectiveness of the armed forces with respect to such operations,

is not a “relevant duty of care”.

(2) The operations within this subsection are operations, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of the armed forces come under attack or face the threat of attack or violent resistance.

(3) Any duty of care owed by the Ministry of Defence in respect of activities carried on by members of the special forces is not a “relevant duty of care”.

(4) In this section “the special forces” means those units of the armed forces the

maintenance of whose capabilities is the responsibility of the Director of Special Forces or which are for the time being subject to the operational command of that Director.

## **5 Policing and law enforcement**

- (1) Any duty of care owed by a public authority in respect of—
- (a) operations within subsection (2),
  - (b) activities carried on in preparation for, or directly in support of, such operations, or
  - (c) training of a hazardous nature, or training carried out in a hazardous way, which it is considered needs to be carried out, or carried out in that way, in order to improve or maintain the effectiveness of officers or employees of the public authority with respect to such operations,
- is not a “relevant duty of care”.
- (2) Operations are within this subsection if—
- (a) they are operations for dealing with terrorism, civil unrest or serious disorder,
  - (b) they involve the carrying on of policing or law-enforcement activities, and
  - (c) officers or employees of the public authority in question come under attack, or face the threat of attack or violent resistance, in the course of the operations.
- (3) Any duty of care owed by a public authority in respect of other policing or law-enforcement activities is not a “relevant duty of care” unless it falls within section 2(1)(a), (b) or (d).
- (4) In this section “policing or law-enforcement activities” includes—
- (a) activities carried on in the exercise of functions that are—
    - (i) functions of police forces, or
    - (ii) functions of the same or a similar nature exercisable by public authorities other than police forces;
  - (b) activities carried on in the exercise of functions of constables employed by a public authority;
  - (c) activities carried on in the exercise of functions exercisable under Chapter 4 of Part 2 of the Serious Organised Crime and Police Act 2005 (c 15) (protection of witnesses and other persons);
  - (d) activities carried on to enforce any provision contained in or made under the Immigration Acts.

## **6 Emergencies**

- (1) Any duty of care owed by an organisation within subsection (2) in respect of the way in which it responds to emergency circumstances is not a “relevant duty of care” unless it falls within section 2(1)(a) or (b).
- (2) The organisations within this subsection are—
- (a) a fire and rescue authority in England and Wales;
  - (b) a fire and rescue authority or joint fire and rescue board in Scotland;
  - (c) the Northern Ireland Fire and Rescue Service Board;
  - (d) any other organisation providing a service of responding to emergency circumstances either—
    - (i) in pursuance of arrangements made with an organisation within paragraph (a), (b) or (c), or
    - (ii) (if not in pursuance of such arrangements) otherwise than on a commercial basis;
  - (e) a relevant NHS body;
  - (f) an organisation providing ambulance services in pursuance of arrangements—
    - (i) made by, or at the request of, a relevant NHS body, or
    - (ii) made with the Secretary of State or with the Welsh Ministers;

- (g) an organisation providing services for the transport of organs, blood, equipment or personnel in pursuance of arrangements of the kind mentioned in paragraph (f);
- (h) an organisation providing a rescue service;
- (i) the armed forces.

(3) For the purposes of subsection (1), the way in which an organisation responds to emergency circumstances does not include the way in which—

- (a) medical treatment is carried out, or
- (b) decisions within subsection (4) are made.

(4) The decisions within this subsection are decisions as to the carrying out of medical treatment, other than decisions as to the order in which persons are to be given such treatment.

(5) Any duty of care owed in respect of the carrying out, or attempted carrying out, of a rescue operation at sea in emergency circumstances is not a “relevant duty of care” unless it falls within section 2(1)(a) or (b).

(6) Any duty of care owed in respect of action taken—

- (a) in order to comply with a direction under Schedule 3A to the Merchant Shipping Act 1995 (c 21) (safety directions), or
- (b) by virtue of paragraph 4 of that Schedule (action in lieu of direction),

is not a “relevant duty of care” unless it falls within section 2(1)(a) or (b).

(7) In this section—

“emergency circumstances” means circumstances that are present or imminent and—

- (a) are causing, or are likely to cause, serious harm or a worsening of such harm, or
- (b) are likely to cause the death of a person;

“medical treatment” includes any treatment or procedure of a medical or similar nature;

“relevant NHS body” means—

- (a) a Strategic Health Authority, Primary Care Trust, NHS trust, Special Health Authority or NHS foundation trust in England;
- (b) a Local Health Board, NHS trust or Special Health Authority in Wales;
- (c) a Health Board or Special Health Board in Scotland, or the Common Services Agency for the Scottish Health Service;
- (d) a Health and Social Services trust or Health and Social Services Board in Northern Ireland;

“serious harm” means—

- (a) serious injury to or the serious illness (including mental illness) of a person;
- (b) serious harm to the environment (including the life and health of plants and animals);
- (c) serious harm to any building or other property.

(8) A reference in this section to emergency circumstances includes a reference to circumstances that are believed to be emergency circumstances.

## **7 Child-protection and probation functions**

(1) A duty of care to which this section applies is not a “relevant duty of care” unless it falls within section 2(1)(a), (b) or (d).

(2) This section applies to any duty of care that a local authority or other public authority owes in respect of the exercise by it of functions conferred by or under—

- (a) Parts 4 and 5 of the Children Act 1989 (c 41),
- (b) Part 2 of the Children (Scotland) Act 1995 (c 36), or
- (c) Parts 5 and 6 of the Children (Northern Ireland) Order 1995 (SI 1995/755 (NI 2)).

- (3) This section also applies to any duty of care that a local probation board or other public authority owes in respect of the exercise by it of functions conferred by or under—
- (a) Chapter 1 of Part 1 of the Criminal Justice and Court Services Act 2000 (c 43),
  - (b) section 27 of the Social Work (Scotland) Act 1968 (c 49), or
  - (c) Article 4 of the Probation Board (Northern Ireland) Order 1982 (SI 1982/713 (NI 10)).

### 8 Factors for jury

- (1) This section applies where—
- (a) it is established that an organisation owed a relevant duty of care to a person, and
  - (b) it falls to the jury to decide whether there was a gross breach of that duty.
- (2) The jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so—
- (a) how serious that failure was;
  - (b) how much of a risk of death it posed.
- (3) The jury may also—
- (a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it;
  - (b) have regard to any health and safety guidance that relates to the alleged breach.
- (4) This section does not prevent the jury from having regard to any other matters they consider relevant.
- (5) In this section “health and safety guidance” means any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under a statutory provision or otherwise) by an authority responsible for the enforcement of any health and safety legislation.

### 9 Power to order breach etc to be remedied

- (1) A court before which an organisation is convicted of corporate manslaughter or corporate homicide may make an order (a “remedial order”) requiring the organisation to take specified steps to remedy—
- (a) the breach mentioned in section 1(1) (“the relevant breach”);
  - (b) any matter that appears to the court to have resulted from the relevant breach and to have been a cause of the death;
  - (c) any deficiency, as regards health and safety matters, in the organisation's policies, systems or practices of which the relevant breach appears to the court to be an indication.
- (2) A remedial order may be made only on an application by the prosecution specifying the terms of the proposed order.  
Any such order must be on such terms (whether those proposed or others) as the court considers appropriate having regard to any representations made, and any evidence adduced, in relation to that matter by the prosecution or on behalf of the organisation.
- (3) Before making an application for a remedial order the prosecution must consult such enforcement authority or authorities as it considers appropriate having regard to the nature of the relevant breach.
- (4) A remedial order—

- (a) must specify a period within which the steps referred to in subsection (1) are to be taken;
- (b) may require the organisation to supply to an enforcement authority consulted under subsection (3), within a specified period, evidence that those steps have been taken.

A period specified under this subsection may be extended or further extended by order of the court on an application made before the end of that period or extended period.

- (5) An organisation that fails to comply with a remedial order is guilty of an offence, and liable on conviction on indictment to a fine.

### **10 Power to order conviction etc to be publicised**

(1) A court before which an organisation is convicted of corporate manslaughter or corporate homicide may make an order (a “publicity order”) requiring the organisation to publicise in a specified manner—

- (a) the fact that it has been convicted of the offence;
- (b) specified particulars of the offence;
- (c) the amount of any fine imposed;
- (d) the terms of any remedial order made.

(2) In deciding on the terms of a publicity order that it is proposing to make, the court must—

- (a) ascertain the views of such enforcement authority or authorities (if any) as it considers appropriate, and
- (b) have regard to any representations made by the prosecution or on behalf of the organisation.

(3) A publicity order—

- (a) must specify a period within which the requirements referred to in subsection (1) are to be complied with;
- (b) may require the organisation to supply to any enforcement authority whose views have been ascertained under subsection (2), within a specified period, evidence that those requirements have been complied with.

(4) An organisation that fails to comply with a publicity order is guilty of an offence, and liable on conviction on indictment to a fine.

### **11 Application to Crown bodies**

(1) An organisation that is a servant or agent of the Crown is not immune from prosecution under this Act for that reason.

(2) For the purposes of this Act—

- (a) a department or other body listed in Schedule 1, or
  - (b) a corporation that is a servant or agent of the Crown,
- is to be treated as owing whatever duties of care it would owe if it were a corporation that was not a servant or agent of the Crown.

(3) For the purposes of section 2—

- (a) a person who is—
  - (i) employed by or under the Crown for the purposes of a department or other body listed in Schedule 1, or
  - (ii) employed by a person whose staff constitute a body listed in that Schedule,

is to be treated as employed by that department or body;

- (b) any premises occupied for the purposes of—
  - (i) a department or other body listed in Schedule 1, or

(ii) a person whose staff constitute a body listed in that Schedule, are to be treated as occupied by that department or body.

(4) For the purposes of sections 2 to 7 anything done purportedly by a department or other body listed in Schedule 1, although in law by the Crown or by the holder of a particular office, is to be treated as done by the department or other body itself.

(5) Subsections (3)(a)(i), (3)(b)(i) and (4) apply in relation to a Northern Ireland department as they apply in relation to a department or other body listed in Schedule 1.

## **12 Application to armed forces**

(1) In this Act “the armed forces” means any of the naval, military or air forces of the Crown raised under the law of the United Kingdom.

(2) For the purposes of section 2 a person who is a member of the armed forces is to be treated as employed by the Ministry of Defence.

(3) A reference in this Act to members of the armed forces includes a reference to—  
(a) members of the reserve forces (within the meaning given by section 1(2) of the Reserve Forces Act 1996 (c 14)) when in service or undertaking training or duties;  
(b) persons serving on Her Majesty's vessels (within the meaning given by section 132(1) of the Naval Discipline Act 1957 (c 53)).

## **13 Application to police forces**

(1) In this Act “police force” means—  
(a) a police force within the meaning of—  
(i) the Police Act 1996 (c 16), or  
(ii) the Police (Scotland) Act 1967 (c 77);  
(b) the Police Service of Northern Ireland;  
(c) the Police Service of Northern Ireland Reserve;  
(d) the British Transport Police Force;  
(e) the Civil Nuclear Constabulary;  
(f) the Ministry of Defence Police.

(2) For the purposes of this Act a police force is to be treated as owing whatever duties of care it would owe if it were a body corporate.

(3) For the purposes of section 2—  
(a) a member of a police force is to be treated as employed by that force;  
(b) a special constable appointed for a police area in England and Wales is to be treated as employed by the police force maintained by the police authority for that area;  
(c) a special constable appointed for a police force mentioned in paragraph (d) or (f) of subsection (1) is to be treated as employed by that force;  
(d) a police cadet undergoing training with a view to becoming a member of a police force mentioned in paragraph (a) or (d) of subsection (1) is to be treated as employed by that force;  
(e) a police trainee appointed under section 39 of the Police (Northern Ireland) Act 2000 (c 32) or a police cadet appointed under section 42 of that Act is to be treated as employed by the Police Service of Northern Ireland;  
(f) a police reserve trainee appointed under section 40 of that Act is to be treated as employed by the Police Service of Northern Ireland Reserve;  
(g) a member of a police force seconded to the Serious Organised Crime Agency or the National Policing Improvement Agency to serve as a member of its staff is to be treated as employed by that Agency.

(4) A reference in subsection (3) to a member of a police force is to be read, in the case of a force mentioned in paragraph (a)(ii) of subsection (1), as a reference to a constable of that force.

(5) For the purposes of section 2 any premises occupied for the purposes of a police force are to be treated as occupied by that force.

(6) For the purposes of sections 2 to 7 anything that would be regarded as done by a police force if the force were a body corporate is to be so regarded.

(7) Where—

(a) by virtue of subsection (3) a person is treated for the purposes of section 2 as employed by a police force, and

(b) by virtue of any other statutory provision (whenever made) he is, or is treated as, employed by another organisation,

the person is to be treated for those purposes as employed by both the force and the other organisation.

### 14 Application to partnerships

(1) For the purposes of this Act a partnership is to be treated as owing whatever duties of care it would owe if it were a body corporate.

(2) Proceedings for an offence under this Act alleged to have been committed by a partnership are to be brought in the name of the partnership (and not in that of any of its members).

(3) A fine imposed on a partnership on its conviction of an offence under this Act is to be paid out of the funds of the partnership.

(4) This section does not apply to a partnership that is a legal person under the law by which it is governed.

### 15 Procedure, evidence and sentencing

(1) Any statutory provision (whenever made) about criminal proceedings applies, subject to any prescribed adaptations or modifications, in relation to proceedings under this Act against—

(a) a department or other body listed in Schedule 1,

(b) a police force,

(c) a partnership,

(d) a trade union, or

(e) an employers' association that is not a corporation,

as it applies in relation to proceedings against a corporation.

(2) In this section—

“prescribed” means prescribed by an order made by the Secretary of State;

“provision about criminal proceedings” includes—

(a) provision about procedure in or in connection with criminal proceedings;

(b) provision about evidence in such proceedings;

(c) provision about sentencing, or otherwise dealing with, persons convicted of offences;

“statutory” means contained in, or in an instrument made under, any Act or any Northern Ireland legislation.

(3) A reference in this section to proceedings is to proceedings in England and Wales or Northern Ireland.

- (4) An order under this section is subject to negative resolution procedure.

## **16 Transfer of functions**

- (1) This section applies where—
- (a) a person's death has occurred, or is alleged to have occurred, in connection with the carrying out of functions by a relevant public organisation, and
  - (b) subsequently there is a transfer of those functions, with the result that they are still carried out but no longer by that organisation.
- (2) In this section “relevant public organisation” means—
- (a) a department or other body listed in Schedule 1;
  - (b) a corporation that is a servant or agent of the Crown;
  - (c) a police force.
- (3) Any proceedings instituted against a relevant public organisation after the transfer for an offence under this Act in respect of the person's death are to be instituted against—
- (a) the relevant public organisation, if any, by which the functions mentioned in subsection (1) are currently carried out;
  - (b) if no such organisation currently carries out the functions, the relevant public organisation by which the functions were last carried out.

This is subject to subsection (4).

- (4) If an order made by the Secretary of State so provides in relation to a particular transfer of functions, the proceedings referred to in subsection (3) may be instituted, or (if they have already been instituted) may be continued, against—

- (a) the organisation mentioned in subsection (1), or
- (b) such relevant public organisation (other than the one mentioned in subsection (1) or the one mentioned in subsection (3)(a) or (b)) as may be specified in the order.

- (5) If the transfer occurs while proceedings for an offence under this Act in respect of the person's death are in progress against a relevant public organisation, the proceedings are to be continued against—

- (a) the relevant public organisation, if any, by which the functions mentioned in subsection (1) are carried out as a result of the transfer;
- (b) if as a result of the transfer no such organisation carries out the functions, the same organisation as before.

This is subject to subsection (6).

- (6) If an order made by the Secretary of State so provides in relation to a particular transfer of functions, the proceedings referred to in subsection (5) may be continued against—

- (a) the organisation mentioned in subsection (1), or
- (b) such relevant public organisation (other than the one mentioned in subsection (1) or the one mentioned in subsection (5)(a) or (b)) as may be specified in the order.

- (7) An order under subsection (4) or (6) is subject to negative resolution procedure.

## **17 DPP's consent required for proceedings**

Proceedings for an offence of corporate manslaughter—

- (a) may not be instituted in England and Wales without the consent of the Director of Public Prosecutions;
- (b) may not be instituted in Northern Ireland without the consent of the Director of Public Prosecutions for Northern Ireland.

### **18 No individual liability**

- (1) An individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter.
- (2) An individual cannot be guilty of aiding, abetting, counselling or procuring, or being art and part in, the commission of an offence of corporate homicide.

### **19 Convictions under this Act and under health and safety legislation**

- (1) Where in the same proceedings there is—
  - (a) a charge of corporate manslaughter or corporate homicide arising out of a particular set of circumstances, and
  - (b) a charge against the same defendant of a health and safety offence arising out of some or all of those circumstances,the jury may, if the interests of justice so require, be invited to return a verdict on each charge.
- (2) An organisation that has been convicted of corporate manslaughter or corporate homicide arising out of a particular set of circumstances may, if the interests of justice so require, be charged with a health and safety offence arising out of some or all of those circumstances.
- (3) In this section “health and safety offence” means an offence under any health and safety legislation.

### **20 Abolition of liability of corporations for manslaughter at common law**

The common law offence of manslaughter by gross negligence is abolished in its application to corporations, and in any application it has to other organisations to which section 1 applies.

### **21 Power to extend section 1 to other organisations**

- (1) The Secretary of State may by order amend section 1 so as to extend the categories of organisation to which that section applies.
- (2) An order under this section may make any amendment to this Act that is incidental or supplemental to, or consequential on, an amendment made by virtue of subsection (1).
- (3) An order under this section is subject to affirmative resolution procedure.

### **22 Power to amend Schedule 1**

- (1) The Secretary of State may amend Schedule 1 by order.
- (2) A statutory instrument containing an order under this section is subject to affirmative resolution procedure, unless the only amendments to Schedule 1 that it makes are amendments within subsection (3).  
In that case the instrument is subject to negative resolution procedure.
- (3) An amendment is within this subsection if—
  - (a) it is consequential on a department or other body listed in Schedule 1 changing its name,
  - (b) in the case of an amendment adding a department or other body to Schedule 1, it is consequential on the transfer to the department or other body of functions all of which were previously exercisable by one or more organisations to which section 1 applies, or

- (c) in the case of an amendment removing a department or other body from Schedule 1, it is consequential on—
- (i) the abolition of the department or other body, or
  - (ii) the transfer of all the functions of the department or other body to one or more organisations to which section 1 applies.

### 23 Power to extend section 2(2)

- (1) The Secretary of State may by order amend section 2(2) to make it include any category of person (not already included) who—
- (a) is required by virtue of a statutory provision to remain or reside on particular premises, or
  - (b) is otherwise subject to a restriction of his liberty.
- (2) An order under this section may make any amendment to this Act that is incidental or supplemental to, or consequential on, an amendment made by virtue of subsection (1).
- (3) An order under this section is subject to affirmative resolution procedure.

### 24 Orders

- (1) A power of the Secretary of State to make an order under this Act is exercisable by statutory instrument.
- (2) Where an order under this Act is subject to “negative resolution procedure” the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament.
- (3) Where an order under this Act is subject to “affirmative resolution procedure” the order may not be made unless a draft has been laid before, and approved by a resolution of, each House of Parliament.
- (4) An order under this Act—
- (a) may make different provision for different purposes;
  - (b) may make transitional or saving provision.

### 25 Interpretation

In this Act—

“armed forces” has the meaning given by section 12(1);

“corporation” does not include a corporation sole but includes any body corporate wherever incorporated;

“employee” means an individual who works under a contract of employment or apprenticeship (whether express or implied and, if express, whether oral or in writing), and related expressions are to be construed accordingly; see also sections 11(3)(a), 12(2) and 13(3) (which apply for the purposes of section 2);

“employers' association” has the meaning given by section 122 of the Trade Union and Labour Relations (Consolidation) Act 1992 (c 52) or Article 4 of the Industrial Relations (Northern Ireland) Order 1992 (SI 1992/807 (NI 5));

“enforcement authority” means an authority responsible for the enforcement of any health and safety legislation;

“health and safety legislation” means any statutory provision dealing with health and safety matters, including in particular provision contained in the Health and Safety at Work etc Act 1974 (c 37) or the Health and Safety at Work (Northern Ireland) Order 1978 (SI 1978/1039 (NI 9));

“member”, in relation to the armed forces, is to be read in accordance with section 12(3);

“partnership” means—

- (a) a partnership within the Partnership Act 1890 (c 39), or
- (b) a limited partnership registered under the Limited Partnerships Act 1907 (c 24), or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom;

“police force” has the meaning given by section 13(1);

“premises” includes land, buildings and moveable structures;

“public authority” has the same meaning as in section 6 of the Human Rights Act 1998 (c 42) (disregarding subsections (3)(a) and (4) of that section);

“publicity order” means an order under section 10(1);

“remedial order” means an order under section 9(1);

“statutory provision”, except in section 15, means provision contained in, or in an instrument made under, any Act, any Act of the Scottish Parliament or any Northern Ireland legislation;

“trade union” has the meaning given by section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992 (c 52) or Article 3 of the Industrial Relations (Northern Ireland) Order 1992 (SI 1992/807 (NI 5)).

### **26 Minor and consequential amendments**

Schedule 2 (minor and consequential amendments) has effect.

### **27 Commencement and savings**

(1) The preceding provisions of this Act come into force in accordance with provision made by order by the Secretary of State.

(2) An order bringing into force paragraph (d) of section 2(1) is subject to affirmative resolution procedure.

(3) Section 1 does not apply in relation to anything done or omitted before the commencement of that section.

(4) Section 20 does not affect any liability, investigation, legal proceeding or penalty for or in respect of an offence committed wholly or partly before the commencement of that section.

(5) For the purposes of subsection (4) an offence is committed wholly or partly before the commencement of section 20 if any of the conduct or events alleged to constitute the offence occurred before that commencement.

### **28 Extent and territorial application**

(1) Subject to subsection (2), this Act extends to England and Wales, Scotland and Northern Ireland.

(2) An amendment made by this Act extends to the same part or parts of the United Kingdom as the provision to which it relates.

- (3) Section 1 applies if the harm resulting in death is sustained in the United Kingdom or—
- (a) within the seaward limits of the territorial sea adjacent to the United Kingdom;
  - (b) on a ship registered under Part 2 of the Merchant Shipping Act 1995 (c 21);
  - (c) on a British-controlled aircraft as defined in section 92 of the Civil Aviation Act 1982 (c 16);
  - (d) on a British-controlled hovercraft within the meaning of that section as applied in relation to hovercraft by virtue of provision made under the Hovercraft Act 1968 (c 59);
  - (e) in any place to which an Order in Council under section 10(1) of the Petroleum Act 1998 (c 17) applies (criminal jurisdiction in relation to offshore activities).

- (4) For the purposes of subsection (3)(b) to (d) harm sustained on a ship, aircraft or hovercraft includes harm sustained by a person who—
- (a) is then no longer on board the ship, aircraft or hovercraft in consequence of the wrecking of it or of some other mishap affecting it or occurring on it, and
  - (b) sustains the harm in consequence of that event.

**29 Short title**

This Act may be cited as the Corporate Manslaughter and Corporate Homicide Act 2007.

**SCHEDULE 1 List of Government Departments etc**  
**Section 1**

Assets Recovery Agency  
Attorney General's Office  
Cabinet Office  
Central Office of Information  
Crown Office and Procurator Fiscal Service  
Crown Prosecution Service  
Department for Communities and Local Government  
Department for Constitutional Affairs (including the Scotland Office and the Wales Office)  
Department for Culture, Media and Sport  
Department for Education and Skills  
Department for Environment, Food and Rural Affairs  
Department for International Development  
Department for Transport  
Department for Work and Pensions  
Department of Health  
Department of Trade and Industry  
Export Credits Guarantee Department  
Foreign and Commonwealth Office  
Forestry Commission  
General Register Office for Scotland  
Government Actuary's Department  
Her Majesty's Land Registry  
Her Majesty's Revenue and Customs  
Her Majesty's Treasury  
Home Office  
Ministry of Defence  
National Archives  
National Archives of Scotland  
National Audit Office  
National Savings and Investments  
National School of Government  
Northern Ireland Audit Office  
Northern Ireland Court Service  
Northern Ireland Office  
Office for National Statistics  
Office of the Deputy Prime Minister  
Office of Her Majesty's Chief Inspector of Education and Training in Wales  
Ordnance Survey  
Privy Council Office  
Public Prosecution Service for Northern Ireland

Registers of Scotland Executive Agency  
Revenue and Customs Prosecutions Office  
Royal Mint  
Scottish Executive  
Serious Fraud Office  
Treasury Solicitor's Department  
UK Trade and Investment  
Welsh Assembly Government

**SCHEDULE 2 Minor and Consequential Amendments**

**Section 26**

**Coroners Act 1988 (c 13)**

**1**

(1) The Coroners Act 1988 is amended as follows.

(2) In the following provisions, after "manslaughter" there is inserted ", corporate manslaughter"—

- (a) section 11(6) (no finding of guilt at coroner's inquest) (twice);
- (b) subsection (1)(a)(i) of section 16 (adjournment of inquest in event of criminal proceedings);
- (c) subsections (1)(a) and (2)(a) of section 17 (coroner to be informed of result of criminal proceedings).

(3) In section 35(1) (interpretation), after the definition of "Greater London" there is inserted—

"“person”, in relation to an offence of corporate manslaughter, includes organisation;”.

**Criminal Justice Act 2003 (c 44)**

**2**

In Schedule 4 to the Criminal Justice Act 2003 (qualifying offences for purposes of section 62), after paragraph 4 there is inserted—

"Corporate manslaughter

4A

An offence under section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007."

**3**

(1) Schedule 5 to that Act (qualifying offences for purposes of Part 10) is amended as follows.

(2) After paragraph 4 there is inserted—

"Corporate manslaughter

4A

An offence under section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007."

(3) After paragraph 33 there is inserted—

"Corporate manslaughter

33A

An offence under section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007."

**Criminal Justice (Northern Ireland) Order 2004 (SI 2004/1500 (NI 9))**

**4**

## **Annex A**

In Schedule 2 to the Criminal Justice (Northern Ireland) Order 2004 (qualifying offences for purposes of Article 21), after paragraph 4 there is inserted—

“Corporate manslaughter

4A

An offence under section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007.”

## MEANING OF “RANGE”, “STARTING POINT” AND “FIRST TIME OFFENDER” WITHIN SENTENCING GUIDELINES COUNCIL GUIDELINES

A Council guideline is generally for a *first time offender* convicted after a trial. It commonly provides a *starting point* based on an assessment of the seriousness of the offence and a *range* within which sentence will normally fall for most cases.

### Assessing the seriousness of the offence

1.
  - a) A typical Council guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. It will apply to a **first time offender** who has been convicted after a trial. Within the guidelines, a **first time offender** is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.
  - b) As an aid to consistency of approach, a guideline will describe a number of types of activity which would fall within the broad definition of the offence. These will be set out in a column generally headed “type/nature of activity”.
  - c) The expected approach is for a court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a **starting point** from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the *offence* (beyond those contained in the description itself) to reach a **provisional sentence**.
  - d) The range is the bracket into which the **provisional sentence** will normally fall after having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the provisional sentence falls outside the range.
2. Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the **provisional sentence** beyond the **range** given particularly where there are significant other aggravating factors present.

### Personal Mitigation

3. Once the **provisional sentence** has been identified by reference to those factors affecting the seriousness of the offence, the court will take into account any relevant factors of personal mitigation. Again, this may take the provisional sentence outside the range.

### Reduction for guilty plea

4. Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. This reduction may take the sentence below the **range** provided.

Sentencing Guidelines Council  
Sentencing Advisory Panel  
May 2007

**AGGRAVATING AND MITIGATING FACTORS IDENTIFIED IN THE  
SENTENCING GUIDELINES COUNCIL GUIDELINE 'OVERARCHING  
PRINCIPLES: SERIOUSNESS'**

**Aggravating factors**

Factors indicating higher culpability:

- Offence committed whilst on bail for other offences
- Failure to respond to previous sentences
- Offence was racially or religiously aggravated
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- 'Professional' offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it
- Deliberate targeting of vulnerable victim(s)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Abuse of power
- Abuse of a position of trust

Factors indicating a more than usually serious degree of harm:

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim
- Victim is particularly vulnerable
- Location of the offence (for example, in an isolated place)
- Offence is committed against those working in the public sector or providing a service to the public
- Presence of others e.g. relatives, especially children or partner of the victim
- Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
- In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

**Mitigating factors**

Factors indicating significantly lower culpability:

- A greater degree of provocation than normally expected
- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence

**Personal mitigation**

- Genuine remorse
- Admissions to police in interview
- Ready co-operation with authorities

## SUMMARY OF QUESTIONS

### Question 1

*Do you agree with the approach to the assessment of seriousness?*

### Question 2

*Is each of the above aggravating and mitigating factors relevant to sentencing for a) an offence of corporate manslaughter and b) an offence under the HSWA involving death? Are there any other factors which may aggravate or mitigate either or both of these types of offence?*

### Question 3

*What do you consider should be the main aim of sentencing an organisation for an offence of corporate manslaughter or an offence under the HSWA involving death? Should there be any difference between the two types of offence and, if so, why?*

### Question 4

*Do you agree that the aims of the fine should be to ensure future safety and reflect serious concern at the unnecessary loss of life? Should there be any difference in aim when imposing a fine for corporate manslaughter or for an offence under the HSWA involving death?*

### Question 5

*Do you agree that a fine imposed for an offence of corporate manslaughter or an offence under the HSWA involving death should aim to eliminate any financial benefit resulting from the offence? If so, what information would be necessary, and how could this be obtained?*

### Question 6

*Do you agree with the Panel's proposed starting points and ranges for a) offences of corporate manslaughter and b) offences under the HSWA involving death? If not, what alternative approach would you suggest for the fining of organisations for these offences?*

### Question 7

*Do you agree that it is for the prosecution and defence to raise issues of profitability and liquidity? What impact should these factors have on the calculation of the fine?*

### Question 8

*Do you consider that there should be a minimum fine for a) offences of corporate manslaughter and b) offences under the HSWA involving death? If so, what amount do you think would be appropriate?*

**Question 9**

*Do you consider that a report on each offender should be prepared for the court with full details of financial status? If so, how would this be provided?*

**Question 10**

*Do you agree with the Panel's approach to the impact of the fine on the offender, its employees, customers and shareholders? If not, why not?*

**Question 11**

*Do you agree that the court should treat offenders consistently, whether or not they are publicly funded or providing a public service? If not, how do you think that considerations specific to public bodies should be reflected?*

**Question 12**

*Do you agree that, when sentencing an organisation for an offence of corporate manslaughter, the court should impose a publicity order?*

**Question 13**

*What should the extent of the publicity be and how (if at all) will this differ between offences of corporate manslaughter?*

**Question 14**

*Do you agree that the making of a publicity order should not lead to a reduction in the level of fine imposed on an organisation for an offence of corporate manslaughter?*

**Question 15**

*Do you agree that the making of a remedial order should not lead to a reduction in the level of fine imposed on an organisation for an offence of corporate manslaughter or an offence under the HSWA involving death?*

## LIST OF CONSULTEES

Copies of the consultation paper have been sent to the organisations listed below. They include the organisations that the Panel is required to consult by the direction of the Sentencing Guidelines Council. In addition, copies have been sent to the Resident Judge at each Crown Court Centre.

### ALARM

Association of Chief Police Officers  
Association of Directors of Social Services  
Better Regulation Executive  
British Safety Council  
Centre for Corporate Accountability  
Centre for Crime and Justice Studies  
Confederation of British Industry  
Construction Confederation  
Construction Safety Campaign  
Council of District Judges (Magistrates' Courts) for England and Wales  
Council of Her Majesty's Circuit Judges  
Criminal Bar Association  
Crown Prosecution Service  
Department for Business, Enterprise and Regulatory Reform  
Department for Work and Pensions  
Disaster Action  
Equality and Human Rights Commission  
Families Against Corporate Killers  
Federation of Small Businesses  
General Council of the Bar  
Health and Safety Commission  
Health and Safety Executive  
Health and Safety Lawyers Association  
HM Prison Service  
Howard League for Penal Reform  
Institute of Chartered Accountants in England and Wales  
Institute of Directors  
Institution of Occupational Safety and Health  
INQUEST  
Justice  
Justices' Clerks' Society  
Law Commission  
Law Society  
Local Government Association  
Liberty  
Magistrates' Association  
National Association for the Care and Resettlement of Offenders  
National Association of Probation Officers  
National Bench Chairmen's Forum

National Housing Federation  
National Offender Management Service  
National Probation Service  
Parole Board  
Penal Affairs Consortium  
Police Federation of England and Wales  
Police Superintendents' Association  
Prison Governors' Association  
Prison Officers' Association  
Prison Reform Trust  
Probation Managers' Association  
Rail Safety and Standards Board  
Royal Society for the Prevention of Accidents  
Trades Union Congress  
Victims Advisory Panel  
Victim Support  
Victims of Crime Trust  
YJB (Youth Justice Board)