

# Response ID ANON-HUU8-JY9N-M

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## Overarching aims

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

**Please enter your response in the text box:**

The British Safety Council welcomes the opportunity to submit its views to the Sentencing Council on the new sentencing guidelines for health and safety offences, corporate manslaughter and other offences.

The views set out in our response are shaped by the knowledge we have developed in the field of workplace health and safety over the past 58 years and our own and our members' experience of operating under our existing regulatory framework.

We have on this occasion, as with previous consultations concerning developments or changes affecting our health and safety regulatory framework, surveyed our members operating in England and Wales on the questions posed by the review. We received responses from 195.

We have 6,000 corporate members in the UK predominantly operating in sectors with high and medium hazards including construction, manufacturing, oil and gas, major hazards, utilities and transport and distribution - that is tightly regulated and enforced workplaces.

We are not submitting views concerning food safety offences.

The British Safety Council agrees with the overarching principles for setting fines for health and safety offences set out in step three, that is, proportionate fines based on turnover. However as with a number of the questions posed our members were not unanimous in their views. We have sought to reflect these differences, where significant, in our response.

## Structure of the guidelines

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

**Please enter your response in the text box:**

In the December 2014 edition of our members magazine, Safety Management, we included the following quote in an opinion piece concerning the consultative proposals, "The Sentencing Council should be commended for a reasoned and well argued set of proposals."

The new sentencing guidelines will, hopefully, assist the courts with the important and sensitive role of determining the appropriateness of the punishment. Equally importantly duty holders and all of those involved in advising and assisting duty holders in meeting their legal obligations will have a far clearer understanding of the consequences of breaking the law.

The document makes the case for clearer guidelines with the argument for a comprehensible framework for categorising culpability and harm. The proposed new guidelines have not come as a shock. Rather the main thrust of the proposals concerning higher fines for large organisations for serious health and safety and environmental offences was presaged in the judgement delivered by the Lord Chief Justice in the Court of Appeal's decision in January 2014 in R v Sellafield and Network Rail.

As the Sentencing Council guidelines note the purposes of sentencing are clearly stated, these are, to punish offenders; reduce crime including through deterring others; reforming and rehabilitating offenders; protecting the public, and; reparation by offenders to persons affected by their offences. We agree with these goals.

We remain concerned over the the length of time taken for prosecutions to be brought before the courts including more serious offences. We still have to see the delivery of the commitment given by Government in response to the Lofstedt report to reduce time taken to bring prosecutions

## Assessing the means of organisations

### 3 Do you agree with how turnover, profit and reference to other financial factors have been used in the guideline to assist sentencers in identifying fine levels? If not, what alternative to assessing the means of the offender would you suggest?

**Please enter your response in the text box:**

We agree also with how the factors of turnover, profit and other financial circumstances will be used to assist sentencers.

There were differences of view among our members as to whether turnover or profit should be the key determining factor. We believe that the guidelines strike a sensible balance having regard to all of the most important factors.

We do have a concern that for health and safety offences and corporate manslaughter the range of fines being proposed appear disproportionate for micro and small organisations.

For example, the fine range for a micro organisation for an offence with high culpability and category 1 harm - £150,000-£450,000 - could amount to many year's turnover. This would not be the case for medium and large organisations under these proposals. We ask that this concern is taken into account when considering the appropriateness of the range of fines being laid down.

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

**Please enter your response in the text box:**

The British Safety Council agrees that the quantifiable economic benefit derived from the offence, for example, failing to make the necessary investment in safe equipment should be taken into consideration when calculating the fine.

#### **5 Do you agree with the approach used for categorising micro, small, medium and large organisations at step two and the guidance provided for dealing with very large organisations?**

**Please enter your response in the text box:**

The British Safety Council acknowledges and supports the rationale for the four categories used to differentiate organisations, that is, micro, small, medium and large.

We agree that sentencers should have the power to move outside of the prescribed range for very large organisations for offences where there has been a high degree of culpability and serious harm.

#### **6 Do you agree with the wider factors set out in step four of the guidelines for organisations that the court should consider when finalising fines?**

**Please enter your response in the text box:**

The British Safety Council agrees with the proposal set out in step four for sentencers to be able to consider wider factors in determining the fine.

There was a concern felt by some of our members that fines which would effectively put organisations out of business, with a consequent loss of employment, would punish innocent parties. It is right for courts to be able to take such factors into account to assist sentencing decisions. But there will be cases where the fine will, rightly, lead to that organisation going out of business with consequent job losses.

### **Approach to guideline for individuals**

#### **7 Do you agree that the structure of the guidelines for individuals is appropriate?**

**Please enter your response in the text box:**

The consultation document sets out well those circumstances where an individual may be prosecuted for health and safety offences.

The British Safety Council considers it right and proper that, on occasions, individuals are prosecuted for breaches of relevant sections of the Health and Safety at Work Act 1974. The reality is that for the three offences references on page 19 of the consultative document prosecutions are few. Whilst we have seen a significant increase in prosecutions of individuals under section 37 of HSWA in recent years the starting point was low - prosecutions prior to 2008 a rare occurrence.

The British Safety Council believes that the structure of penalties for individuals is appropriate and proportionate. The proposed guidelines are of considerable assistance in setting out thresholds for both custody and fines.

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

**Please enter your response in the text box:**

The four categories of actions by individuals that are proposed - deliberate, reckless, negligent and low culpability - will in our opinion greatly assist courts in achieving far greater consistency.

The British Safety Council agrees with the aims of penalties for individuals - punishment, deterrence, protection of the public, removal of gain and rehabilitation.

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

**Please enter your response in the text box:**

We agree with the proposed approach.

### **Health and safety offences: guidelines**

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

**Please enter your response in the text box:**

The British Safety Council agrees with the proposed scope of the health and safety sentencing guidelines for organisations and individuals.

It is important not to overlook the relatively small number of cases concerning alleged breaches of health and safety law coming before the courts. As the consultation document notes only 420 offenders were sentenced for health and safety offences in England and Wales in 2013.

The sentencing guidelines do not address a real concern that many serious offences, where there is a high degree of culpability and serious harm, are never brought before the courts. Conversely many minor offences, where there is a low degree of culpability and little or no actual harm, could arguably be dealt with more effectively and efficiently through a system of administrative fines as with environmental offences. But these are not matters for this consultation.

### **Health and safety offences: determining the offence category - culpability**

**11 Do you agree with the proposed culpability factors for organisations and individuals at step one of the health and safety guidelines? If not, please specify what you would change and why.**

**Please enter your response in the text box:**

The British Safety Council agrees with the four categories of culpability that are proposed for organisations.

As stated in our response to question 8 the British Safety Council agrees with the four categories of actions (culpability) by individuals that are proposed - deliberate, reckless, negligent and low culpability. These will in our opinion greatly assist courts in achieving consistency.

### **Health and safety offences: determining the offence category - harm**

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

**Please enter your response in the text box:**

Whilst the British Safety Council agrees with the overall objectives underlying the proposed approach concerning the categorisation of degrees of harm - the seriousness of the harm and the likelihood of the harm arising - we do have serious concerns for reasons we explain below.

We also note that other factors will be taken into account specifically whether the offence exposed a significant number of people to the risk of harm at one time and whether the offence was a significant cause of actual harm.

The approach does have shortcomings. We identify two.

Current sentencing policy and practice is largely geared towards offences resulting from safety breaches. The seriousness of harm is tangible and quantifiable. What is apparent is that offences, for example, concerning the exposure of workers to harmful substances which could result in fatal diseases are often rated as less serious. There are countless cases of offences concerning breach of asbestos regulations being disposed of with low level fines. While harm at that point in time may not be quantifiable there is the real threat that exposure to asbestos could eventually result in death. The argument we put forward is that the potential harm needs to be taken into account not just the actual harm.

This argument also applies to safety offences where there has been no actual harm but the potential harm that could have resulted could have led to loss of life or serious injury. Our members are clear in their view that the punishment for offenders should have regard to the potential harm of the offence.

**13 Do you agree that the proposed factors for assessing risk of harm in the health and safety guidelines are clear and appropriately graduated? If not, what changes would you make?**

**Please enter your response in the text box:**

See answer to Qu 12.

**14 Do you agree with the factors included in the second stage of the assessment of harm process? If not, please identify what you would change and why.**

**Please enter your response in the text box:**

See answer to Qu 12.

### **Health and safety offences: starting points and ranges - organisations**

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

**Please enter your response in the text box:**

The British Safety Council wishes to make a point in relation to all four categories of organisation, that is, the fines at the bottom end of the scale for low culpability, low harm are too low.

Whilst recognising the importance of access to justice the cost of bringing cases where there is low culpability and low harm - and recognising that these factors may be in dispute - fines of £200, £700, £3,000 and £10,000 as starting points for all four categories are far too low. None serve the overriding objectives of sentencing.

Starting point should be at least £2,000. We broadly agree with the range of fines proposed.

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

**Please enter your response in the text box:**

See answer to Qu 15 above.

Starting point should be at least £5,000. We broadly agree with the range of fines proposed.

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

**Please enter your response in the text box:**

See answer to Qu 15 above.

Starting point should be at least £10,000. We broadly agree with the range of fines proposed.

**18 Do you agree with the starting points and ranges for large organisations in the health and safety guideline? Please consider the relevance of the top of the range given the guidance that: “where a defendant organisation’s turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence.”**

**Please enter your response in the text box:**

See answer to Qu 15 above.

Starting point should be at least £25,000. We broadly agree with the range of fines proposed.

The British Safety Council agrees that it may be necessary for the courts, for very large organisations, to move outside of the suggested range to achieve a proportionate sentence.

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

**Please enter your response in the text box:**

We have set our concerns earlier in our response to inconsistencies in sentencing practice both in lower and higher courts in England and Wales. It is clear having regard to the evidence, including that contained in HSE’s online enforcement database, that sentencers needs advice and clear guidelines.

The British Safety Council is confident that once the sentencing guidelines bed down there will be a significant impact on organisations found to have been in breach. Higher fines for organisations found to have had a high degree of culpability who have caused serious harm will, having regard to the views of our members, have a deterrent effect.

**Health and safety offences: starting points and ranges - individuals**

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

**Please enter your response in the text box:**

The British Safety Council agrees that the imposition of custodial sentences where the individual has through their deliberate or reckless actions, and that have caused serious harm, are appropriate.

However we believe that this sanction should only be used in the most serious cases - cases where there is deliberate or reckless action or inaction - and serious harm or potentially serious harm.

We believe that the custodial starting points need to be revisited. As detailed earlier in our response very few prosecutions against individuals are brought where there has been a degree of culpability and serious harm. Whilst we support the use of custodial sentences we believe that the starting point has been set too low; that imprisonment should not be a sanction for negligent acts; and should only be imposed for categories 1 and 2 of harm.

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

**Please enter your response in the text box:**

We have no comment to make on the use of the sanction of community orders.

The British Safety Council does not agree with the rationale applied of carrying across the fine bands currently applied by Magistrates in England and Wales. We believe that there are instances where the prosecution of individuals are so serious, with or without the possibility of the sanction of imprisonment, as to merit being brought before the Crown Court rather than the Magistrates Court.

For offences where the individual has been found to be deliberate or reckless in their actions, and serious harm has resulted, or indeed there has been the potential for serious harm, a Band E or F seems wholly inappropriate. A prosecution of a director, for example, under section 37 of HSWA for such an offence merits the consideration of a fine far in excess of 5-7 times weekly income.

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

**Please enter your response in the text box:**

See answers to Qu 20 and 21 above.

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

**Please enter your response in the text box:**

See our answer to Qu 19 above.

## **Health and safety offences: aggravating and mitigating factors**

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

**Please enter your response in the text box:**

The British Safety Council having considered the aggravating and mitigating factors for both organisations and individuals is in agreement with the proposals.

However the aggravating factors set down in the guidelines for organisations (see above) including cost cutting and concealment should also apply to the sentencing of individuals. There is evidence that some individuals have a track record of persistence breach of health and safety law and this (for example, poor health and safety record) should be taken into account.

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

**Please enter your response in the text box:**

We have no comment to make on ancillary orders and compensation specifically whether the guidelines are appropriate and sufficient.

## **Corporate manslaughter**

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

**Please enter your response in the text box:**

The British Safety Council agrees with the four factors set out in step one in helping the courts to assess the seriousness of the offence.

More generally the British Safety Council is seriously concerned that the policy intention underlying the 2007 Act has not been met. The Act is not working. To date the CPS has gone for low hanging fruit by focusing on micro and small organisations. There is a widely held view that prosecutions of medium and large organisations have not been brought because of difficulties are satisfying the burden of proof. The law needs to be reviewed and reformed.

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

**Please enter your response in the text box:**

We agree with the proposed questions set out in step one.

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

**Please enter your response in the text box:**

For Qu 28-31 - generally for all four categories of organisation more thought needs to be given to how category A and B offences are defined. As drafted the distinction seems rather artificial. The sentencing policy objective can still be achieved with just one category with a wider range of fines.

We agree with the proposed starting points and range of fines proposed for micro organisations.

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

**Please enter your response in the text box:**

We agree with the proposed starting points and range of fines proposed for small organisations.

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

**Please enter your response in the text box:**

We agree with the proposed starting points and range of fines proposed for medium organisations.

**31 Do you agree with the proposed starting points and ranges for large organisations in the corporate manslaughter guideline? Please consider the relevance of the top of the range given the guidance that: "where a defendant organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence."**

**Please enter your response in the text box:**

The British Safety Council agrees with the proposed guidelines, specifically, that where the turnover of organisations greatly exceeds the threshold for large

organisations it may be appropriate to move outside of the suggested range in order to achieve a proportionate sentence, that is, to go beyond £20 million.

There will be circumstances where fines in excess of £20 million are justified.

### **32 Do you agree with the proposed aggravating and mitigating factors for corporate manslaughter?**

**Please enter your response in the text box:**

The British Safety Council agrees with the aggravating factors set out in the guidelines that increase the seriousness of the offence.

We would urge that serious consideration is given to the factors which have been identified as mitigating the seriousness of the offence. Specifically remedial action, a good health and safety record and effective procedures should not be taken at face value and carefully probed.

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

**Please enter your response in the text box:**

We have no comment to make about whether the guidance concerning ancillary orders and compensation is appropriate and and sufficient.

## **Food safety and hygiene offences: guidelines**

### **34 Do you agree with the proposed scope of the food safety and hygiene offences guideline?**

**Please enter your response in the text box:**

No comment.

## **Food safety and hygiene offences: culpability and harm**

### **35 Do you agree with the proposed culpability categories for organisations and for individuals in the draft food safety and hygiene offences guideline?**

**Please enter your response in the text box:**

No comment.

### **36 Do you agree with the proposed harm factors in the draft guideline for food safety and hygiene offences?**

**Please enter your response in the text box:**

No comment.

## **Food safety and hygiene offences: starting point and ranges - individuals**

### **37 Do you agree with the proposed starting points and ranges for individuals in the food safety and hygiene guidelines?**

**Please enter your response in the text box:**

No comment.

### **38 What effect do you think the proposed starting points and ranges will have on current sentencing practice for individuals convicted of food safety and hygiene offences?**

**Please enter your response in the text box:**

No comment.

## **Food safety and hygiene offences: starting point and ranges - organisations**

### **39 Do you agree with the proposed starting points and ranges for micro organisations in the food safety and hygiene offences guideline?**

**Please enter your response in the text box:**

No comment.

### **40 Do you agree with the proposed starting points and ranges for small organisations in the food safety and hygiene offences guideline?**

**Please enter your response in the text box:**

No comment.

### **41 Do you agree with the proposed starting points and ranges for medium organisations in the food safety and hygiene offences guideline?**

**Please type your response in the text box:**

No comment.

**42 Do you agree with the proposed starting points and ranges for large organisations in the food safety and hygiene offences guideline? Please consider the relevance of the top of the range given the guidance that: “where the defendant organisation’s turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence”.**

**Please enter your response in the text box:**

No comment.

**43 What effect do you think the proposals will have on current sentencing practice for organisations convicted of food safety and hygiene offences?**

**Please enter your response in the text box:**

no comment.

### **Food safety and hygiene offences: aggravating and mitigating factors**

**44 Do you agree with the proposed aggravating and mitigating factors in the food safety and hygiene offences guidelines?**

**Please enter your response in the text box:**

No comment.

**45 Is the guidance provided on ancillary orders and compensation in the guidelines for food safety and hygiene offences appropriate and sufficient?**

**Please enter your response in the text box:**

No comment.

**46 Do you agree that the proposed guidance on totality in the food safety and hygiene offences guideline is appropriate and sufficient?**

**Please enter your response in the text box:**

No comment.

### **Victims and equality and diversity**

**47 Are there further ways in which you think victims can or should be considered?**

**Please enter your response in the text box:**

No comment.

**48 Are there any equality or diversity matters that the Council should consider? Please provide evidence of any issues where possible.**

**Please enter your response in the text box:**

No comment.

**49 Are there any further comments you wish to make that have not been covered elsewhere in the consultation?**

**Please enter your response in the text box:**

No comment.

### **About you**

**50 What is your name?**

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**52 What is your organisation?**

**Organisation:**

British Safety Council