

Health and safety offences, corporate
manslaughter and food safety and
hygiene offences guidelines
Consultation

Health and safety offences, corporate manslaughter and food safety and hygiene offences guidelines Consultation

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The consultation will end on 18 February 2015

A consultation produced by the Sentencing Council.
This information is also available on the Sentencing Council's website:

www.sentencingcouncil.org.uk

About this consultation

To:

This consultation is open to everyone including members of the judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice or the offence areas covered by the draft guideline.

Duration:

From 13 November 2014 to 18 February 2015

Enquiries (including requests for this paper in an alternative format) to:

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Additional ways to feed in your views:

This consultation exercise is accompanied by a resource assessment, an equality impact assessment, and an online questionnaire, all of which can be found at:

www.sentencingcouncil.org.uk

A series of consultation meetings is also taking place. For further information please use the 'Enquiries' contact details above.

Response paper:

Following the conclusion of this consultation exercise, a response will be published at:

www.sentencingcouncil.org.uk

Freedom of Information:

We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents' names in any final report we publish.

If you wish to submit a confidential response, you should contact us before sending the response.

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Introduction

What is the Sentencing Council?

The Sentencing Council is the independent body responsible for developing sentencing guidelines for courts to use when passing a sentence.

Why Health and Safety and Food Safety offences?

The extent of existing guidance for these offences varies. The predecessor body to the Sentencing Council, the Sentencing Guidelines Council (SGC), published a definitive guideline for corporate manslaughter and health and safety offences causing death committed by organisations in February 2010. However, there is only piecemeal guidance for sentencing the health and safety offences excluded by the SGC guideline: offences not resulting in death and offences committed by individuals. There is some general guidance in the Magistrates' Court Sentencing Guidelines and Court of Appeal authorities setting out general principles of sentencing for such offences. There is very little specific guidance for sentencing food safety offences and the courts will usually have to extract applicable principles from sentencing in cases involving health and safety and environmental offences.

The number of health and safety and food offences sentenced by the courts is relatively low in comparison to other offences. In 2013, approximately 420 offenders were sentenced for the health and safety offences covered by the draft guidelines, and approximately 280 offenders were sentenced for the food offences covered by the draft guidelines. The Council found in speaking to sentencers around the country that, as a result of the relative infrequency with which magistrates and judges sentence these cases, there was at times a lack of familiarity with them. In addition, in reviewing current sentencing practice the Council identified some inconsistency in how various factors were weighted and applied in reaching sentencing decisions across the country. The Council concluded that further guidance would assist in addressing this inconsistency and would be useful to sentencers dealing with these relatively unfamiliar cases.

In addition, the Council considered that there was a need to review whether sentences imposed on offenders in these cases, in particular fines on larger organisations, were fulfilling the purposes of sentencing in this area. Fines imposed on organisations for health and safety offences have in the past been criticised as too low relative to the harm caused, the culpability of the offender and, on occasions, to the means of the offender.¹ In the food safety and hygiene area, similar concerns have been raised to the Council by the Food Standards Agency. The Elliott Review into the Integrity and Assurance of Food Supply Networks, published in September 2014, also commented on the frustration they encountered amongst their stakeholders regarding the low level of sanctions following formal action by local authority enforcement officers in relation to food law offences.²

¹ R v F Howe and Son (Engineers) Ltd [1999] 2 Cr App R (S) 37

² Elliott review into the Integrity and Assurance of Food Supply Networks, page 55, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/350726/elliott-review-final-report-july2014.pdf

The Council also considered that it had become a particular priority to review sentencing for these offences owing to the following recent developments.

- In January 2014 the Court of Appeal reviewed the principles of sentencing corporate offenders in health and safety and environmental offences, reiterating the importance of identifying a level of fine that achieves the aims of sentencing given the financial circumstances of the offender in question.³ The Council considers that it is appropriate to highlight these principles in guidelines in this area.
- In February 2014 the Council published a definitive guideline for environmental offences, an area related to health and safety and food safety and hygiene offending. The guideline has been in force since July 2014 and introduces starting points and ranges that the Council anticipates will, in some cases, result in higher fines. The Council therefore wishes to put in place guidance for related offences to ensure that sentences in these areas are consistent and proportionate with those for environmental offences.
- Although the relevant provisions are not yet in force, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 gave magistrates the power to impose unlimited fines for certain offences,⁴ including health and safety and food safety and hygiene offences. Once in force, these powers will significantly change the fine levels magistrates can impose in cases covered by the draft guidelines. Consequently, the Council wishes to ensure that guidance is in place to assist magistrates in applying fair and proportionate sentences when their new fining powers come into effect.

Given these developments and the close interplay between sentencing for environmental, health and safety, food safety and corporate manslaughter offences, the Council determined that it was an appropriate time to review and provide guidance on sentencing in these remaining areas.

Why corporate manslaughter?

To date, there have been only a few convictions for corporate manslaughter. There have been only four cases sentenced in England and Wales since the Corporate Manslaughter and Homicide Act 2007 came into force. As noted above, there is a guideline produced by the SGC in force for corporate manslaughter offences. However, as explained in detail in this paper, the Council is proposing a different approach to that used in the SGC guideline to the assessment of fines in the draft guidelines for health and safety offences. The Council considered that this approach should be used consistently across health and safety offences and corporate manslaughter. In addition, as the SGC guideline applies both to health and safety offences causing death and corporate manslaughter the Council was concerned that it would be confusing to leave only the part of the SGC guideline relating to corporate manslaughter in force. Consequently, the Council determined to update relevant aspects of the corporate manslaughter guideline.

What is the Council consulting about?

The Council is consulting on the draft guidelines for sentencing health and safety, corporate manslaughter and food safety offences set out at Annex C of this paper. The Council is not consulting on the legislation that establishes these offences, which is a matter for Parliament. Equally, issues that are the responsibility of the relevant regulatory bodies, such as wider enforcement policy or the decision to bring a prosecution, are outside of the scope of this consultation.

³ R v Sellafield and Network Rail [2014] EWCA Crim 49

⁴ Section 85 Legal Aid, Sentencing and Punishment of Offenders Act 2012

The Council is keen to seek as many views as possible from people and organisations interested in its proposals. In particular the Council is seeking views on:

- the scope of each guideline;
- the overall approach proposed to sentencing organisations and individuals for these offences;
- factors that make these offences more or less serious;
- the principles of sentencing in this area;
- the sentences that should be passed for health and safety, corporate manslaughter and food safety offences; and
- anything else that you think should be considered.

The Council recognises that some respondents may only have an interest in one of the areas covered by the draft guidelines. Such respondents should feel free to address only those matters of interest to them. The structure of the consultation is as follows:

- Section one: Overarching issues: this section contains information and questions relating to issues that cut across all five of the draft guidelines; most respondents will therefore wish to consider this section.
- Section two: Health and Safety offences: guidelines for individuals and organisations.
- Section three: Corporate manslaughter guideline.
- Section four: Food Safety offences: guidelines for individuals and organisations.
- Section five: Questions relating to victims and equality and diversity matters across all guidelines.

What else is happening as part of this consultation process?

During the 14-week public consultation, the Council will organise a number of consultation events to seek the views of groups with an interest in this area, as well as sentencers. Further research is planned for the consultation period to help improve the Council's understanding of the effect of the new guideline. Specifically research will be conducted with sentencers to better understand how they will use the guideline in practice. Once the consultation exercise is over and the guideline revised, a final guideline will be published and used by all adult courts.

Alongside this consultation paper, the Council has produced an online version which allows people to respond to the consultation questions through the Sentencing Council website. The Council has also produced a resource assessment and an equality impact assessment. These documents can be found on the Sentencing Council's website: www.sentencingcouncil.org.uk

Section one: Aims and overarching issues

Background to the offences considered in this consultation

What situations might these offences apply to?

The draft guidelines cover offences that embrace a wide range of circumstances. The type of offenders that may commit these offences varies greatly and, with the exception of corporate manslaughter, there is a broad spectrum of seriousness encompassed within each offence.

Offenders that are organisations in these cases may range, for example, from a small family business to a multinational company, from statutory bodies to charities. An individual may commit a health and safety or food offence in their capacity as a Director of a company or an employee; or they may simply be an individual putting others at risk.

Similarly, there is a wide range of consequences that may result from the offences covered by the draft guidelines.

While the term “health and safety” is sometimes – and often incorrectly – associated with trivial matters, true health and safety breaches can have devastating consequences, up to and including death. The Health and Safety Executive’s (HSE) provisional statistics for the financial year 2013/14 indicate that 133 workers were fatally injured in the workplace and 70 members of the public were fatally injured in accidents connected to work (excluding railway related incidents).⁵ While the UK’s incidence rate of fatal injury to workers is one of the lowest in the EU and has continued to fall across the last 20 years,⁶ each fatality is an individual tragedy. As well as death, health and safety offences cover a wide spectrum of injury⁷ and illness,⁸ from minor injuries that are quickly recovered from to a life-changing disability or health condition. There may also be a health and safety offence where no actual harm occurred but a risk was posed to the health and safety of others.

Equally, there may be a wide range of culpability on the part of the offender, ranging from deliberate decisions that put others at risk through to an incident that occurred because the offender had fallen just short of the reasonable standards required of them.

In contrast, the range of seriousness in corporate manslaughter offences is narrow: all cases involve at least one death and the culpability of the offender has to be high in order to secure a conviction. Since the Corporate Manslaughter and Homicide Act 2007 came into force there have been five

⁵ <http://www.hse.gov.uk/statistics/fatals.htm>

⁶ <http://www.hse.gov.uk/STATISTICS/pdf/fatalinjuries.pdf>

⁷ An estimated 646,000 workers had an accident at work in 2012/13. 19,707 “major injuries” to employees were reported. <http://www.hse.gov.uk/statistics/causinj/index.htm>

⁸ In 2013/14, 1.2 million people were suffering from an illness (long-standing as well as new cases) they believed was caused or made worse by their current or past work. See <http://www.hse.gov.uk/statistics/>

convictions in England and Wales. To date, cases have involved an individual fatality and smaller organisations; however, the offence could also apply to incidents resulting in multiple fatalities or committed by larger undertakings.

Food safety and hygiene offences are wide ranging. They cover situations where people have suffered food poisoning owing to inadequate food hygiene and safety standards but also where there are very poor conditions in food preparation areas but no evidence that people have suffered adverse health effects as a result. Adverse health effects could be wide ranging, up to and including death. Food offences are also concerned with other matters, such as failing to retain documentation to ensure that products being sold can be traced through to suppliers, putting unsafe food on the market or not notifying the authorities of a food business coming into operation.

There has been significant public concern recently regarding the misrepresentation of an item of food as something it is not; for example, the “horsemeat scandal” in 2013 involving horsemeat marketed as beef. It is important to note that serious cases involving conspiracies to profit through deception without posing a safety risk would more likely be prosecuted as fraud offences⁹ than food safety and hygiene offences. The food offences covered by the draft guidelines in this consultation may be engaged for ancillary matters in such cases; for example, for failure to retain documentation required to trace the origin of the product being sold.

As with health and safety offences, there is a broad spectrum of culpability in food safety and hygiene cases; for example, operators may have knowingly and deliberately breached standards or at the other end of the scale there may have been an isolated failure or a misjudgement on the part of an employee.

Which courts sentence these offences?

Health and safety offences and food safety and hygiene offences are either way offences and may be heard by either magistrates’ courts or the Crown Court. Between 2011 and 2013, on average 40 per cent of health and safety offences covered by the draft guidelines committed by organisations and 80 per cent of those committed by individuals were sentenced in magistrates’ courts. In the same time period, nearly all food offences covered by the draft guidelines committed by individuals and organisations were sentenced in magistrates’ courts. Corporate manslaughter offences can only be heard by the Crown Court.

The Council’s aims

In preparing the draft guidelines, the Council has had regard to the purposes of sentencing and to its statutory duties. The Council’s aim throughout has been to ensure that all sentences are proportionate to the offence committed and in relation to other offences.

Overarching aims in sentencing health and safety, corporate manslaughter and food safety and hygiene offences

It is evident from the above review of the offences covered by the guideline that they differ in a number of respects from the criminal offences more commonly seen by the courts. However, the broad aims of sentencing are the same as for any other criminal offence.¹⁰

In these draft guidelines, for any offence committed by an organisation but also in many cases involving individuals, the sentence will be a fine. The Council has considered what a fine should be seeking to achieve in the context of each of the offences covered.

⁹ The Council’s definitive guideline for fraud offences came into force on 1 October 2014: http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf

¹⁰ The aims of sentencing are set out in s.142 of the Criminal Justice Act 2003

The Council's starting point was section 164 of the Criminal Justice Act 2003, which requires that any fine imposed must **reflect the seriousness of the offence** and take into account the **financial circumstances of the offender**. The Council considers that a fine should reflect the extent to which the offender **fell below the required standard** and that it should meet, in a fair and proportionate way, the aims of **punishment** and **deterrence**.

As well as punishment and deterrence the Council reviewed the effect a fine should aim to have on the offender's behaviour and activities in the future. In some cases, offences will have been the result of cutting corners to save money. Therefore, the Council considered that the offence must **remove any economic gain** derived from the offence to ensure that it is not cheaper to offend again than take the necessary precautions. In relation to organisations, the Council has adopted within the guideline the established principle that the fine should be **sufficiently substantial to have a real economic impact** which will bring home to both management and shareholders **the need to comply with legislation and achieve a safe environment** for workers and members of the public.

These principles are included in **step three** of all of the draft guidelines for organisations. There is a minor variation in step three of the corporate manslaughter guideline which does not make reference to falling below the required standard. As explored in Section three, by definition a corporate manslaughter offence will entail an organisation falling much below the required standard and therefore the Council did not consider it necessary to reiterate this principle in step three of this guideline.

Q1

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

Consistency and clarity of guidance

As with all other guidelines, the Council seeks to promote a consistent approach to sentencing for health and safety, corporate manslaughter and food safety and hygiene offences. As observed above there are a wide range of offenders and factual circumstances embraced by these offences; the Council recognises that there is consequently a broad spectrum of appropriate sentencing outcomes in response. The Council's aim has been to devise a guideline that supports sentencers in applying relevant factors in a consistent way in order to achieve a fair and proportionate outcome. The Council has aimed to produce a clear and usable guideline that can be applied with confidence by the courts but retains sufficient flexibility to take account of individual cases.

Fine levels

The Council has reviewed current sentencing practice in each of the areas covered in the draft guidelines against the aims of sentencing identified above (please refer to Section two, Section three and Section four for a full analysis). The Council's aim is to produce a scheme of starting points and ranges that will support magistrates, district judges and judges in identifying sentences that fulfil the aims of sentencing these offences outlined above, whether for individuals or for corporate offenders.

The Council conducted a review of current sentencing practice in order to assess both the consistency in levels of fines given for similar offences committed by similar offenders, and to determine whether the levels of fines imposed were proportionate to the seriousness of the offence, taking into account the means of the offender.

While there were some important data limitations in conducting this exercise,¹¹ the Council concluded that in some cases the levels of fines imposed appeared to be too low to meet the aims of sentencing in this area; the Council also identified some inconsistency in how various factors were weighted and applied in reaching sentencing decisions. However, by no means did the Council conclude that sentencing was too lenient in every case. As a result, in proposing starting points that it considers to be reflective of the seriousness of various offences and proportionate to the varying financial circumstances of offenders, the Council anticipates that the draft proposals would result in an increase in fines in some cases. In particular, the Council anticipates that more serious offences committed by larger organisations would result in higher levels of fines. However, for less serious offences and offences committed by individuals and smaller organisations, the Council anticipates that there would be little change from current sentencing practice.

The Council considers that the starting points and ranges in the draft guidelines are fair, consistent and as proportionate as possible within each offence and across all offences covered by the draft guidelines. Proposed penalties are consulted on in the offence specific chapters below.

How have the draft guidelines been developed?

Data analysis and research

The Council has undertaken a statistical analysis of the current sentencing practice to help inform the development of the guideline. A detailed statistical bulletin on the offences covered by the guideline is available here:

<http://sentencingcouncil.judiciary.gov.uk/facts/research-and-analysis-publications.htm>

To supplement statistical data the Council has undertaken a review of sentencing in recent cases. The Council has analysed transcripts from a range of cases sentenced in the Crown Court and Court of Appeal combined with information from Companies House on the offender's means, where available, to identify relevant sentencing considerations and relationships between the final sentencing outcome and means of the offender. As transcripts are not available for cases sentenced in magistrates' courts the Council used media reports, statistical information supplied by the HSE and Companies House information where available. The Council was conscious that this information may be biased towards cases with certain features; for example, more serious cases or those attracting media interest for other reasons, and therefore applied caution in drawing any definitive conclusions from this data. In cases involving smaller organisations or individuals, for which accounts are not publicly available, the Council relied on information provided in case details to estimate the broad means of the offender.

To develop the overall structure of the guideline, the Council's approach has been informed by research conducted with a small pool of Crown Court judges, district judges and magistrates from across the country undertaken when developing the environmental offences guideline. This research tested how easily sentencers applied three different models of guideline for sentencing corporate offenders.¹² In addition, since the environmental guideline came into force on 1 July 2014, the Council has been working with the Environment Agency to monitor the impact of, and sentencers' confidence with, the definitive environmental guideline in a small sample of cases involving a range of offenders in magistrates' courts and the Crown Court. The Council has considered this information to help inform the appropriate structure and approach of a guideline for health and safety, corporate manslaughter and food safety and hygiene offences.

¹¹ See full discussion in offence specific sections

¹² A report of the two stages of research is available on the Sentencing Council's website: http://sentencingcouncil.judiciary.gov.uk/docs/Final_research_bulletin_environmental_offences.pdf

In addition, the Council has approached a small number of experts and sentencers with expertise in each of the fields covered by the guidelines to seek feedback and challenge on early proposals. The Council is grateful for the advice of these experts, which it has considered in finalising draft guidelines for consultation.

Further work with experts and sentencers is planned during the consultation.

Structure of the guidelines

Health and safety and food safety and hygiene offences may be committed by organisations or by individuals. While a court would be expected to take into account many of the same factors regardless of the capacity in which the offender is charged, in many parts of the sentencing process different considerations apply; for example, in relation to the assessment of means. As such, the Council has concluded that the clearest way to present guidance is to have separate guidelines for organisations and individuals. Corporate manslaughter can only be committed by an organisation and therefore there is a single guideline for this offence.

Approach to guidelines for organisations

The only sentence available for organisations is a fine. In research undertaken during the development of the environmental offences guideline, the Council tested three different models for setting fines for corporate offenders with a small pool of Crown Court judges, district judges and magistrates. Two of the models were “tariff-based” and set out specific starting points and ranges. The third model set out general sentencing principles, but no starting points or ranges. The feedback from sentencers was that a narrative guideline would not be helpful without clear starting points and ranges; but that there should be sufficient flexibility in any guideline to ensure that there was scope to use judicial discretion to tailor the sentence to individual circumstances.

The Council consulted on a model that sought to achieve this balance in sentencing environmental offences in March to June 2013. The Council received a favourable response to the model proposed, and adopted it with some adjustments in the definitive guideline.¹³

On the basis of this work, the Council proposes to adopt the same basic structure for sentencing organisations for health and safety, corporate manslaughter and food safety and hygiene offences as was used in the definitive environmental guideline. The Council will continue to monitor the implementation and use of the environmental guideline over the consultation period to ensure that it is effective. An overview of the model is provided below.

STEP ONE

Determining the offence category

In step one, the court is required to consider **harm** and **culpability** factors to identify the seriousness of the offence committed.

¹³ Further details can be found in the Council’s response to the environmental offences guideline consultation: [http://sentencingcouncil.judiciary.gov.uk/docs/Final_Environmental_Offences_Response_to_Consultation_\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Final_Environmental_Offences_Response_to_Consultation_(web).pdf)

STEP TWO

Starting point and category range

At step two, the court will use guidance on obtaining financial information from the offender to identify whether the size of the organisation is micro, small, medium, large or very large. The categorisations are based on bands of turnover.

Having determined the offence category at step one and the size of the offending organisation at the start of step two, the sentencer will identify a starting point and range in the sentencing tables. The guideline emphasises that the turnover is used to reach a **starting point** and that the court may need to consider wider financial information relating to the offender at the next step.

The court will then consider aggravating and mitigating factors to make adjustments from the starting point.

STEP THREE

Check whether the proposed fine based on turnover is proportionate to the means of the offender

Step three provides important flexibility for the sentencer to adjust the fine to the offender's particular circumstances. The sentencer is required to consider the principles of sentencing an organisation for the offence in question and review the level of fine that will achieve these aims in view of the wider financial circumstances of the offender. If it finds reason for doing so, the sentencing court can move outside the ranges proposed at step two.

STEP FOUR

Consider other factors that may warrant adjustment of the proposed fine

Step four is concerned with any wider impacts the proposed fine may have – for example on innocent third parties such as employees or service users. The court should adjust the fine if necessary to avoid any unjustifiable wider consequences.

Steps five to nine are standard steps in Sentencing Council guidelines, including factors such as reduction for guilty pleas and consideration of totality if sentencing an offender for more than one offence. Step seven of the guidelines for organisations relate to consideration of compensation and ancillary orders, with guidance given on orders available for the specific offences in question.

The Council considers that this structure provides wide discretion to courts to tailor the sentence in individual cases involving organisations but sufficient guidance to promote a consistent approach to sentencing in this area, particularly given that there is a relative lack of familiarity with sentencing these offences.

Q2

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

Assessing the means of organisations

The Council has carefully considered the fairest way to guide sentencers towards fine levels that take account of the offender’s financial circumstances and fulfil the aims of sentencing in this area. As outlined above the Council has chosen to use broad bands of turnover to assist sentencers in identifying a starting point and range combined with flexibility in step three to consider wider financial factors relating to the offender to adjust the fine.

The Council has chosen to use turnover or equivalent to identify starting points at step two as it is a clear financial indicator that can be readily identified by sentencers in accounts or annual reports, and it is less susceptible to manipulation than other accounting measures. In reaching this decision the Council considered potential criticisms of using turnover in this manner, for example, that it is not an accurate indicator of the financial health of an organisation.

To address this risk the Council has ensured that there is adequate flexibility and guidance to allow the court to tailor the sentence to the individual circumstances of the organisation concerned. When using turnover to identify a starting point at step two, the Council has emphasised that turnover is used to find a starting point for a fine. At step three, the court is guided to ‘step back’ and consider whether the fine fulfils the principles of sentencing in this area. The court should **“examine the financial circumstances of the offender in the round to assess the economic realities of the organisation and the most efficacious way of giving effect to the purposes of sentencing”**.

The Council has included the following factors that the court may wish to consider in doing this.

- The profitability of an organisation will be a relevant factor. If an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. If it has a large profit margin, upward adjustment may be needed.
- Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the fine arrived at in step two.¹⁴
- Whether the fine will have the effect of putting the offender out of business will be relevant; in some cases this may be an acceptable consequence.

Finally, the Council has highlighted in step three that “in considering the ability of the offending organisation to pay any financial penalty, **the court can take into account the power to allow time for payment or to order that the amount be paid in instalments**, if necessary over a number of years”.

The Council considers that this approach achieves the right balance between assisting sentencers in pitching fines that properly take account of the financial circumstances of the offender, whilst offering sufficient flexibility to ensure the fine and payment period is fair and proportionate to the offender’s individual financial circumstances.

Q3

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?

Q4

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

¹⁴ The relevance of compensation and confiscation orders to these offences is considered on page 17

There are four broad categories of organisation defined in the guideline:

- Micro organisation: Turnover or equivalent: not more than £2 million.
- Small organisation: Turnover or equivalent: between £2 million and £10 million.
- Medium organisation: Turnover or equivalent: between £10 million and £50 million.
- Large organisation: Turnover or equivalent: £50 million and over.
- In addition, the guideline states that when sentencing “very large” organisations – defined as those whose turnover very greatly exceeds the threshold for large organisations – it may be appropriate to move outside the range to achieve a proportionate sentence.

The categories for each size of organisation are loosely based on sterling equivalents of EU definitions of small and medium enterprise,¹⁵ to avoid issues with a fluctuating exchange rate. The same approach has been adopted in the Council’s definitive guideline for environmental offences.

The Council has also reiterated the general principle that in reviewing the financial information relating to an offender, “normally, only the information relating to the organisation before the court will be relevant, unless it is demonstrated to the court that the accounts of a linked organisation are available and can properly be taken into account”.

Q5

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?

Wider factors to take into account in assessing fines

Step four of the guidelines for organisations introduces consideration of wider consequences that may warrant adjustment of the proposed figure. The same principles have been included across all three offence areas.

The step contains specific guidance that “where a fine falls on public or charitable bodies, the fine should normally be substantially reduced if the offending organisation is able to demonstrate that the proposed fine would have a significant impact on the provision of their services”. The Council considers specific guidance on this point is appropriate as there is a particular risk that such organisations would have limited options for paying a fine without adversely affecting service provision to third party beneficiaries or taxpayers generally. That such a consequence would be wrong as a matter of principle has been recognised by the Court of Appeal in leading cases in the area.¹⁶

More broadly, the Council has indicated that the court should consider any wider impacts of the fine within the organisation or on innocent third parties and has included the following non-exhaustive list:

- Impact of fine on offender’s ability to improve conditions in the organisation to comply with the law;
- Impact of the fine on the employment of staff, service users, customers and local economy (but not shareholders or directors).

¹⁵ <http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/>

¹⁶ R v Milford Haven [2000] Env LR 632

Q6

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?

Approach to guideline for individuals

Unlike organisations, individuals may receive custodial sentences and community orders as well as fines. However, fines are frequently the disposal used for individuals in health and safety and food safety and hygiene offences. In 2013, in 61 per cent of health and safety cases and 89 per cent of food safety and hygiene cases committed by individuals the sentencing outcome was a fine. The guideline therefore includes specific guidance on fining individuals in these cases. The structure of the two guidelines for individuals is set out below.

STEP ONE

Determining the offence category

In step one, the court is required to consider **harm** and **culpability** factors to identify the seriousness of the offence committed.

STEP TWO

Starting point and category range

Step two contains guidance on the inferences a court may draw if an offender does not provide financial information when setting a fine, and detail on the powers available to compel the disclosure of financial information. There is also guidance as to when a community order or a fine may be the appropriate disposal where the threshold for imposing a community order is passed (this guidance is consulted on in the offence specific chapters below).

The court will identify a starting point and range in the sentencing table, using the harm and culpability categories identified at step one. The court will then consider aggravating and mitigating factors to make adjustments from the starting point.

STEP THREE

Review any financial element of the sentence

Step three provides specific guidance for a sentence which is, or includes, a fine. These factors are the same as in the guideline for organisations but exclude those factors that are not relevant to individuals. In step three of the guideline for individuals the court should review the fine against the aims of sentencing in the area, adding any quantifiable economic benefit derived through the offending to the fine. The court should consider any wider impacts of the fine on the offender's ability to make restitution to victims, comply with the law, or on the employment of staff, service users, customers and the local economy.

Q7

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

Q8

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

Steps four to nine are standard steps in Sentencing Council guidelines, including factors such as reduction for guilty pleas and consideration of totality if sentencing an offender for more than one offence. Step six of the guidelines for individuals relate to consideration of compensation and ancillary orders, with guidance given on orders available for the specific offences in question.

Compensation and confiscation orders

Under section 130 Powers of Criminal Courts (Sentencing) Act 2000, where the means of the offender are limited, priority should be given to the payment of compensation over payment of any other financial penalty. Similarly, confiscation is an order that should take priority over the payment of a fine or any other financial order (other than compensation). To reflect this statutory priority, in other Sentencing Council guidelines for offences frequently or always involving fines – the environmental offences and corporate fraud guidelines – the Council has included compensation and confiscation as specific steps, at step one and two respectively to reflect the order of priority.

However, compensation and confiscation are unusual in health and safety and food safety and hygiene offences. The assessment of compensation in these cases will usually be complex and, where harm has occurred, there will often be a civil claim meaning that compensation will be more appropriately dealt with in a civil court. Indeed, it is a criminal offence for an employer to fail to have in place insurance against liability for injury or disease caused to employees under the Employers' Liability (Compulsory Insurance) Act 1969. Confiscation is similarly very unusual owing to the nature of health and safety and food safety and hygiene offences.

Given the rarity of these orders, the Council considers that it would be potentially confusing for sentencers to include compensation and confiscation at steps one and two. To capture the few cases where a compensation order may be appropriate, the Council has referenced it at step seven of the guidelines for organisations and step six of the guideline for individuals, highlighting that if a compensation order is made then it should take priority over the payment of a fine where the offender's means are limited.

Q9

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

Section two: Guidelines for health and safety offences

Scope

The Council's approach to agreeing the scope of the guidelines has been to identify the most commonly sentenced offences in this area. The Council has decided to take a relatively expansive approach to the scope of the guideline by including all high volume offences it considers can be coherently covered by a single guideline, taking into account the construction of the offences and factors driving seriousness. Despite this the guidelines are not comprehensive across all health and safety offences; this would entail the production of numerous guidelines given the variety of legislation in this area.

Organisations

It is proposed that the guideline for organisations applies to section 33(1)(a) for breaches of section 2 and section 3 of the Health and Safety at Work Act 1974 (HSWA). Section 2 relates to the general duty of an employer to employees to ensure, so far as reasonably practicable, the health, safety and welfare at work of all their employees. Section 3 relates to the general duty on employers to persons other than their employees. This duty is to conduct undertakings in such a way as to ensure, so far as is reasonably practicable, that persons not in their employment who may be affected by their activities are not exposed to risks to their health and safety.

The guideline also applies to the offence under section 33(1)(c) of the HSWA of contravening any health and safety regulations or any requirement or prohibition imposed under such regulations. There is a large number of health and safety regulations, covering a range of matters, meaning that section 33(1)(c) is a very broad offence. Some of the more commonly encountered offences falling under section 33(1)(c) include those committed by breaching the Provision and Use of Work Equipment Regulations 1998, the Gas Safety (Installation and Use) Regulations 1998, the Control of Asbestos Regulations 2006 or the Construction (Design and Management) Regulations 2007. This is to list but a few of the regulations within scope of section 33(1)(c); others are prosecuted in varying numbers.

As such, it can be seen that the Council's proposal to include section 33(1)(c) means that the guideline covers a wide range of offence definitions and scenarios. The Council considers that the guideline it has produced is adequately flexible to cope with this wide scope.

In addition, it should be noted that the general duties in sections 2 and 3 are sufficiently broadly defined to cover a scenario that could also constitute a breach of a regulation; for example, if an employee has fallen from a roof owing to the unsafe conditions permitted by their employer, the employer could either be prosecuted for a breach of section 2 HSWA or under the Work at Height Regulations 2005. In such circumstances, the Council does not wish the applicability of the guideline to depend on which offence is charged by the prosecutor. Both offences have the same statutory

maximum sentence and the Council considers it is right as a matter of principle that the sentence level is driven by considerations of seriousness and the financial circumstances of the offender rather than which of two alternative charges has been brought. Consequently, the Council considers the better approach is to seek to include all these offences within the same guideline.

Individuals

The guideline for individuals also applies to the three offences covered by the guideline for organisations. An individual will be liable for these offences if they are the duty holder as defined by the relevant provision. Therefore, an individual may be an “employer” for the purposes of section 2 or 3 if they are a sole trader or an individual partner in a partnership. Additionally, the duty under section 3 extends to a “self-employed” person. With regards to section 33(1)(c), an example of an offence that individuals are commonly prosecuted for relates to completing illegal gas work, which may constitute breaches of provisions in the Gas Safety (Installation and Use) Regulations 1998.

As well as being the direct duty holder, an individual may be liable for these offences by virtue of section 36 and section 37 HSWA. Section 36 creates secondary liability for a person whose act or default causes another to commit a health and safety offence, meaning that they are charged with the primary offence. Under section 37, where an offence committed by an organisation is proved to have been committed with the consent, connivance of, or neglect of a director, manager or other similar officer of the organisation, then that individual shall be guilty of the offence committed by the organisation.

Finally, in addition, the guideline for individuals includes the offence of breaching the general duty on employees under section 7 of the HSWA. This is the duty to take reasonable care for the health and safety of themselves and others who may be affected by their actions or omissions, and to co-operate with duties and requirements imposed on their employer.

Consequently, as well as a wide range of factual scenarios, the proposed scope of the guideline for individuals means that it would apply to individuals in varying capacities: from Directors of organisations to sole traders to employees.

The offences covered by both guidelines are triable either way. When tried on indictment, the maximum penalty for all offences is an unlimited fine and/or (for individuals) 2 years’ custody. When tried summarily, for all offences other than the breach of section 7 HSWA, the maximum penalty is a £20,000 fine and/or (for individuals) 6 months’ custody. For a breach of section 7 offence, the maximum penalty when tried summarily is a £5,000 fine and/or 6 months’ custody.¹⁷

The Council considers that a relatively expansive approach to the scope of the guidelines will provide certainty and clarity for courts as well as increasing the number of cases in which they will be applicable. The Council believes that the draft guidelines are capable of embracing the broad circumstances covered by these offences. However, the Council is keen to understand if there are any risks posed by this breadth or, on the other hand, whether it has overlooked key offences that could comfortably be brought within scope of the draft guidelines.

Q10 Do you agree with the proposed scope of the health and safety guidelines for organisations and individuals?

¹⁷ When s.85 Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force, the maximum fine for all offences tried summarily will be unlimited meaning that there would be no distinction between the summary maximum for breach of s.7 HSWA and the other offences within scope of the guideline

Step one: Determining the offence category

As explored in the Introduction, there is a wide range of seriousness encompassed by the offences falling within the guideline. The first step in the guideline aims to assist the sentencer in identifying the overall seriousness of the offence within this range by reference to the culpability (or blameworthiness) of the offender in committing the offence and the harm that resulted.

Culpability

Broadly speaking, the health and safety offences within scope of the guideline require certain standards of those to whom the provisions apply. For example:

- Regulation 11 of Control of Asbestos Regulations 2006: every **employer** shall prevent the exposure of his employees to asbestos so far as is **reasonably practicable**;
- Regulation 3 of the Gas Safety (Installation and Use) Regulations 2008: no **person** shall carry out any work in relation to a gas fitting or gas storage vessel unless he is **competent** to do so.

Culpability in this context relates to the extent to which the offender failed to meet the standards required of them. The Council considers that this assessment entails different considerations depending on whether the offender is an individual or an organisation.

Where the offender is an individual, the Council considers that their culpability depends on their attitude – or **state of mind** – towards these standards. An individual offender may have knowingly and intentionally ignored the relevant standards, or they may have been wilfully blind to what was required of them, or they may have been negligent, or have fallen just slightly short of the requirements.

However, this type of analysis is much more difficult where the offender is an organisation. In an environment where there are potentially many individuals involved in an offending scenario – for example from the employee operating equipment on site, through various levels of supervision and even up to management board level – it can be difficult to identify who the relevant individual is in order to apply similar standards. Consequently, for the most part, the Council considers that a better method to assess the culpability of an organisation in this context is to consider, using a series of **objective factors**, how far short of the relevant standards the offender fell. Therefore the court should consider what measures were put in place, the extent to which failures ran through different levels of the organisation and whether there were any warning signs indicating a risk to health and safety.

The Council is therefore consulting on guidelines that have separate culpability schemes for organisations and individuals: these are set out below. The guidelines emphasise that where there are factors present in the case that fall in different categories of culpability, the court should balance these factors to reach a fair assessment of the offender's culpability.

Organisations

Very high

Deliberate breach of or flagrant disregard for the law

High

Offender fell far short of the appropriate standard; for example, by

- failing to put in place measures that are recognised standards in the industry
- ignoring concerns raised by employees or others
- failing to make appropriate changes following prior incident(s) exposing risks to health and safety
- allowing breaches to subsist over a long period of time

Evidence of serious, systemic failings within the organisation to address risks to health and safety

Medium

Offender fell short of the appropriate standard in a manner that falls between descriptions in 'high' and 'low' culpability categories

Level of offender's systemic failure falls between descriptions in 'high' and 'low' culpability categories

Low

Offender did not fall far short of appropriate standard; for example, because

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no prior event or warning indicating a risk to health and safety

Evidence that failings were minor and not systemic

Individuals

Deliberate

Where the offender intentionally breached, or flagrantly disregarded, the law

Reckless

Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken

Negligent

Offence committed through act or omission which a person exercising reasonable care would not commit

Low

Offence committed with little fault, for example, because:

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no prior event or warning indicating a risk to health and safety
- failings were minor and not systemic

As set out above, both schemes of culpability consider an **intentional breach of or a flagrant disregard** for the standards imposed on them to be the **top level of culpability** for both organisations and individuals. In the case of an individual, this level of culpability may be made out where it is clear that the offender knew what was expected of them but deliberately ignored their duty. In the case of an organisation, the Council considered that there could be a narrow set of egregious cases where a deliberate decision to proceed with a course of action in the face of known risks to health and safety was taken by senior management. While potentially a rare occurrence, the Council considered it important to recognise this possibility in a "very high" category of culpability.

Case 2A

The offending company runs a factory. Concerns were raised about the safety of an old pressing machine. An inspection was ordered and a report produced, identifying a high level of risk and recommending the machine was immediately decommissioned. The Management Board considered the report but were concerned about the loss of revenue and agreed to continue using the machine until an affordable replacement could be found. No warnings or updated training measures were issued to employees. The following week, the equipment malfunctioned, causing injuries to workers.

*There is clear evidence that the Board took a deliberate decision not to address risks to health and safety for financial reasons. This would be likely to be considered a “**very high**” culpability offence.*

Case 2B

The offender is an individual who held himself out as an experienced gas fitter. A local household employed him to install a gas fire. On arrival at the premises the offender presented a fake Gas Safe ID card. After completing the work the offender left a false Gas Safe certificate. The customer became suspicious about the work after smelling gas and contacted the Gas Safe Register, which confirmed they had no record of the offender and sent somebody to investigate. The work was found to be dangerous and leaking gas.

*Through forging documentation, the offender demonstrated his knowledge of the standards required of him and the fact he fell short of them. This would be likely to be considered “**deliberate**” culpability.*

At the other end of the scale, the Council is proposing similarly defined categories to assist courts in identifying low culpability offences. These are offences where the offender has only just fallen short of what was required of them; for example, because there was an attempt to address risks to recognised standards, there was no particular warning of the risk or because the failings were minor and not systemic.

There is more variation in the two middle categories of culpability for the reasons set out above. An individual may be assessed as either “reckless” or “negligent”. An organisation will have either “high” or “medium” culpability depending on the extent of their failings. The category of “medium” culpability is defined as falling between “high” and “low” culpability.

Case 2C

The offender is a delivery company. The company has a loading bay outside its warehouse for delivery and collection. A lorry driver reversed his vehicle without seeing that a colleague was standing in front a forklift truck behind the lorry. The employee was crushed to death between the lorry and prongs of the forklift truck. HSE inspectors found that there was a defined traffic route outlined by ground markings in the yard that was regularly reviewed. However, there was no segregated walking route for pedestrians or process for seeking authorisation to move vehicles by requesting keys first. These two measures had been suggested in a recent independent health and safety review, which identified the yard as an area where improvements could be made.

*In this case, some recognised measures had been taken to lower risks and there was no evidence of a systematic disregard for safety measures in the organisation. However, there were failings to put in place relatively simple, recommended, measures that could have prevented the accident. Overall, the culpability of the organisation in this case is likely to be “**medium**”.*

Case 2D

The offender is a large producer of bottled drinks. The drinks were bottled in the offender's factories, using machines with rotating parts. Protective guards were screwed to the machines to prevent employees' hands and arms being pulled into the machinery. All employees were fully trained and had supervised refresher courses every three months. An incident occurred when an employee's right arm was pulled into the machine. The employee, who is right handed, now has no sensory perception in his right arm. He will never be able to return to the type of work he is trained for and suffers PTSD. A subsequent inspection revealed that employees had occasionally used screwdrivers to undo the guards as they were slowing down the pace of their work.

The offender failed to supervise employees adequately to ensure they were not breaching policy. However, with protective guards in place and regular training, the organisation has not fallen far short of the appropriate standard. This is likely to be a "low" culpability case.

Case 2E

The offender is an individual who is a self-employed building contractor. The offender instructed an employee, P, to dismantle a disused barn without instructing him on how to carry out the work or inspecting the site to consider what safety precautions may be required. The offender told P to ring him on his mobile if there were any issues, but did not accompany him to the site. P went out onto a fragile roof without any safety measures in place and the roof gave way underneath him. P fell and suffered serious injuries.

In this case the offender took minimal efforts to secure the safety of his employee. The offender did more than fail to take reasonable care: there were clear risks inherent in the job P was undertaking and the offender was wilfully blind to his duty to assess those risks and mitigate them. It is likely that this case would be considered to be one of "reckless" culpability.

In some cases, there may be similarities between offenders that are charged as individuals or organisations. For example, the difference between a micro organisation and a self-employed person employing staff may not be significant. The Council has sought to achieve parity between the two schemes of culpability, anchored by the nearly identical highest and lowest categories of culpability, to ensure fairness to similar offenders that have been charged in different capacities. However, the Council considers that the differences it has included are necessary in order to assist the court in identifying the range of blameworthiness that may be found in the wide range of potential organisational and individual offenders committing the offences falling within the guidelines.

Q11

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.

Harm

The overall approach

The second part of the assessment of seriousness is consideration of the harm created by the offence. This is a standard step in Sentencing Council guidelines and reflects the importance placed on this factor in legislation¹⁸ relating to sentencing.

The identification of harm caused in health and safety offences poses some challenges. The majority of health and safety offences have risk of harm at their heart: there is no requirement that any actual harm is caused. This is because the offences either explicitly prohibit the creation of a risk of harm, or require action to be taken by the dutyholder to prevent risks. For example:

- Section 3(1) Health and Safety at Work Act 1974: 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**.
- Regulation 4(1) Work at Height Regulations 2005: Every employer shall ensure that work at height is – **(a) properly planned; (b) appropriately supervised; and (c) carried out in a manner which is so far as is reasonably practicable safe** – and that its planning includes the selection of work equipment in accordance with regulation 7.

While health and safety offences can result in a variety of injuries and illness or death, the offence itself is the **creation of the risk** of harm, the **failure to make an activity safe** or whatever other duty is set out in the legislation – rather than *causing* any actual harm. Consequently, establishing a conviction for health and safety offences does not require proof that any actual harm was caused, simply that a breach occurred.

The Council has considered a number of models for the appropriate assessment of harm. The Council has concluded that as a matter of principle and of practicality the fairest way to assess harm is to start by considering only the risk of harm created by the offence.

Seeing as the offence is that of creating a risk of harm, the Council considers that as a matter of principle it would not be right to have significant disparity in the *approach* to sentencing two offences which were identical except that in one case actual harm was avoided. For example, under Regulation 4(1) of the Work at Height Regulations 2005 set out above, there may be a situation where unsafe work was taking place at height with consequent risks to workers. In one scenario, a worker may fall from height and be paralysed or killed. In another scenario, a worker may luckily just escape a fall, or be saved by another worker, and suffer no injury at all. As explored further below, the Council does wish to make some distinction between these two scenarios; however, given that the offence in each case is precisely the same the Council considers that the approach to sentencing should not vary widely.

As matter of practicality, there would be a number of difficulties with disregarding the construction of the offence and only focussing on the end result. This would make it very difficult to sentence a case in certain relatively common health and safety scenarios. For example, where victims have been exposed to dangerous substances (for example, asbestos) or practices but it is not yet known whether they will contract an illness or disability; or, where there are a number of events including the offender's breach that contributed to an accident, and it cannot be said to what extent the offence itself was causative of the accident.

¹⁸ Section 143 Criminal Justice Act 2003 states that "any harm which the offence caused, was intended to cause or might foreseeably have caused" must be considered by the court in considering the seriousness of the offence. Section 121 Coroners and Justice Act 2009 places a requirement on the Council to reflect this in guidelines if reasonably practicable.

For these reasons of principle and practicality, the Council has concluded that the risk posed by the offender’s breach must be considered foremost in assessing harm. However, the Council still considers that the harm actually caused by the offence is central to assessing seriousness for the purposes of sentencing. Not only is this recognised in legislation but the Council believes it is important to recognise any harm suffered by victims as a fundamental aspect of the seriousness of an offence. This is necessary to reflect the impact that has been caused to victims of offending.

The Council is therefore consulting on a two-stage approach to assessing harm. **First**, the court must consider the **risk of harm created by the offence**. There are two dimensions to assessing this risk: 1) the seriousness of the harm risked by the offender’s breach and 2) the likelihood of that harm arising. This first stage will enable the court to identify an initial harm category. The court should then, **second**, consider two factors: whether the offence **exposed a significant number of people** to the risk of harm and whether the offence was a **significant cause of actual harm**. If either of these factors is present, the court must consider moving up within the category range or moving up a harm category.

Q12 Do you agree with the *overall* approach proposed for assessing harm for health and safety offences?

The factors in detail

The Council is also seeking views on the detail of the proposed approach, to ensure that it is clear and can be easily applied by sentencers.

In the first stage, assessing the risk of harm created by the offence, the court is required to consider the seriousness of the harm risked (level A, B or C) and the likelihood of that harm arising (high, medium or remote). Seriousness of harm is ranked into three levels that are defined in the table below. By identifying the severity of the harm risked by the offence (for example, a physical impairment amounting to a disability would be likely to constitute Level B harm) and the likelihood of that harm arising (for example, a medium likelihood), the court will be able to use the table to identify a harm category (for example, Category 3).

		Seriousness of harm risked		
		Level A	Level B	Level C
		<ul style="list-style-type: none"> Death Physical or mental impairment resulting in lifelong dependency on third party care for basic needs Health condition resulting in significantly reduced life expectancy 	<ul style="list-style-type: none"> Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer’s ability to carry out normal day-to-day activities or on their ability to return to work A progressive, permanent or irreversible condition 	<ul style="list-style-type: none"> All other cases not falling within Level A or Level B
Likelihood of harm	High	Harm category 1	Harm category 2	Harm category 3
	Medium	Harm category 2	Harm category 3	Harm category 4
	Remote	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

Case 2B

In case 2B, a gas fitter performed unsafe gas work. Inspectors contacted by the concerned customer categorised the work as dangerous and identified that gas was leaking from the appliance, creating a risk of fire or an explosion. As the problems with the work were so immediately apparent, only a small amount of gas had escaped by the time the appliance was made safe. Had a longer period of time elapsed, the risk of explosion would have been greater.

The court must assess the risk posed by the offender's failure to perform gas work competently. Should there have been an explosion the seriousness of harm could have been at its highest: a death, Level A. However, given the prompt resolution of the problem, the likelihood of this occurring could be said to be remote. Consequently, the court is likely to conclude that this is a category 3 harm case.

Case 2C

Case 2C involved an unsafe system of traffic circulation in the offender's transport yard. This case involved a variety of vehicles moving in a confined space including large lorries with poor rear visibility and forklift trucks, which are known to be hazardous vehicles. A recent independent health and safety review had identified potential improvements to be made in the yard.

The risks posed in this scenario are of serious harm and the sentencer may conclude that the risk was one of death, at Level A. On the facts of the case – large and hazardous vehicles moving in a confined space – the likelihood of harm eventuating in these circumstances could be assessed as medium. This would lead to the conclusion – at this stage – that this was a case of category 2 harm.

Case 2D

Case 2D considered the offender's culpability in relation to an accident where the victim's arm was pulled into factory machinery.

The risk of harm posed by the machinery in this case was one of disability – Level B. As employees had started removing the guards key protection was lost, making the likelihood of harm medium. At this stage this would be a category 3 case.

Q13

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

The second stage of the assessment of harm considers two further possible dimensions of harm.

1. Whether the offence exposed a significant number of people to the risk of harm at one time.

If a significant number of workers or members of the public was exposed, at one time, to the risk created by the offender's breach, the court must consider either substantially moving up within the category range or moving up a harm category.

The first factor to consider is the number of people exposed at one time to the risk of harm. In many situations large numbers of members of the public rely on appropriate health and safety systems being in place to secure their safety – for example, when using public transport. Similarly, an event such as an explosion or crash could expose a large number of workers or members of the public to injury at once. The Council considers that cases where significant numbers of members of the public or workers are exposed to risks to health and safety are more serious and that this should be reflected in the harm categorisation.

2. Whether the offence was a significant cause of actual harm.

Where the offender's breach was a **significant cause**¹⁹ of actual harm, the court must consider moving up within the category range or moving up a harm category, depending on the extent to which other factors contributed to the harm caused.

- Actions of victims are highly unlikely to be considered contributory events. Offenders are required to protect workers or others who may be neglectful of their own safety in a way which should be anticipated.
- The court should not move up a harm category if actual harm was caused but to a lesser degree than the harm that was risked, as identified on the scale of seriousness above.

The second factor to consider is whether the offence was a significant cause of actual harm. A significant cause is defined in the guideline as being one which “more than minimally, negligibly or trivially contributed to the outcome. It does not have to be the sole or principal cause”. As such, this factor does not apply where a breach is established but it is not possible to prove a causal link to an accident. The first two bullet points recognise, however, that the test for “significant cause” is a relatively low one and that in some cases there may be a number of additional causes of an accident. The guideline allows discretion for sentencers to adjust the sentence appropriately according to the causative relevance of the offence. However, the Council has also highlighted that the actions of victims are highly unlikely to be considered contributory events. This is because those responsible for health and safety are required to protect those who may be neglectful of their own safety in a way which should be anticipated.

The final bullet point emphasises that if a certain level of harm was risked – for example, there was a risk of a fatality – it would not be appropriate to increase the harm categorisation because some lesser harm was caused – for example, a broken leg. The Council considers that the gravity of the offence is recognised in such a case by the initial analysis that the offence posed a risk of death.

The guideline states that the two factors in the second stage of the harm assessment should be considered in the round in assigning the final harm category. If already in harm category 1 and wishing to move higher, the court should move up within the category range at step two.

¹⁹ A significant cause is one which more than minimally, negligibly or trivially contributed to the outcome. It does not have to be the sole or principal cause.

In **Case 2B**, involving the illegal gas fitter, no actual harm occurred. There is no evidence that the faulty work affected a wider area around the house or that a significant number of people were otherwise exposed to the risk. The second stage of the harm assessment would therefore **not apply to Case 2B**.

Case 2C

In this case involving the death in the transport yard, HSE inspectors concluded that a segregated pedestrian walkway and a process for authorising the movement of vehicles would have prevented the victim's death. There was some suggestion that the lorry driver paid inadequate attention to who was behind the vehicle, but as the lorry was not fitted with a reversing camera it was concluded by the court that any inadvertence on the part of the lorry driver was minimal and could not be considered to be a contributing factor.

*There is no evidence that a significant number of people were at any one time exposed to the risks in the transport yard. However, there is evidence that the offender's failures to make the yard safe were a significant cause of the victim's death. In the absence of any other significant contributory causes, the court would be likely to conclude that it is appropriate to move up a harm category in this case. The original assessment was that this was a **category 2** harm case; following the second stage of the harm assessment this would most likely be considered a **category 1** harm case.*

Case 2D

In this case involving the accident in the bottling factory serious injury did occur. In this case, actions of employees in removing the protective guards contributed to the accident. However, this was done because the guards slowed down the pace of work and, therefore, this possibility could have reasonably been foreseen by the organisation. As such it is unlikely that the court would give significant weight to this as a contributory event. The court may balance these factors by either moving up the range in category 3 harm or up a harm category to category 2.

Q14 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.

Step two: Starting points and ranges for health and safety offences

Step two for individuals and organisations is considered separately below, as different considerations apply for each set of offenders.

Organisations

Developing penalties for organisations

As set out in Section One: Overarching Issues at page 13, step two provides guidance on obtaining financial information from offenders. This guidance assists the sentencer in applying steps two and three of the guideline, which require the court to consider the offender's financial circumstances.

Step two sets out four tables, linked to the turnover of the offending organisation, with starting points and ranges for each offence category.

In order to identify starting points and ranges for consultation the Council reviewed a sample of cases sentenced over the past three years against the aims identified for setting fines in this area, explored on pages 9 to 10. Briefly, the Council considers that fines for these offences should:

- **reflect the seriousness of the offence** (including the extent to which the offender **fell below the required standard**) and take into account the **financial circumstances of the offender**;
- meet, in a fair and proportionate way, the aims of **punishment** and **deterrence** and **removal of gain**; and,
- be **sufficiently substantial to have a real economic impact** which will bring home to both management and shareholders **the need to comply with legislation and achieve a safe environment** for workers and members of the public.

To explore the extent to which existing sentencing practice appeared to be meeting these aims, the Council reviewed cases covering a wide range of culpability, harm and financial circumstances of offenders. The review was conducted using Court of Appeal judgments, Crown Court transcripts, and reports of cases heard in magistrates' courts. Where available, the Council used information provided on the offender's financial situation within case details or from publicly available information from Companies House.

There were some important data limitations to this exercise. First, it was a small scale exercise and owing to the multiplicity of types of offenders and the number of offence categories in the draft guideline it was not possible to build up a high volume of data for all categories of offences committed by varying sizes of organisations. There was a limited level of detail in reports of cases being heard by magistrates' courts and where the offending organisation was small in size there was usually no reliable public information about its financial situation. Given these limitations, the Council used the review only as a guide for their proposals, and is keen to seek views in consultation on the suggested starting points and ranges and the effect these may have on current sentencing practice.

In terms of appropriate fines for organisations in this area, the existing definitive guidance is to be found in the SGC guideline for health and safety offences causing death. This guideline states that "where the offence is shown to have caused death, the appropriate fine will **seldom be less than £100,000** and may be measured in **hundreds of thousands of pounds or more**". There is little definitive guidance on the appropriate levels of fines for offences not causing death.

The Council concluded that there was some variation in the approach to sentencing in the cases it considered, and that the fines in some cases appeared to achieve the aims of sentencing identified better than others.

At the top end of the harm scale, the Council found in the cases they considered that had caused death that fines seldom were below £100,000 – as guided by the SGC guideline – once adjustments had been made for a guilty plea. However, in the Council’s sample of cases, the fines did not vary as significantly as it may have expected given the wide variation in the means of offenders. The cases below all involve offences that caused death and were considered by the Council to be broadly comparable in terms of culpability.

- A very large company, with turnover in the region of £900 million, was fined £300,000 after trial.²⁰
- A large company, turnover in the region of £350 million, was fined £175,000 after an early guilty plea. The fine would have been in the estimated region of £260,000 without a guilty plea.²¹
- A medium company, turnover of around £27 million, was fined £173,332 after a guilty plea. Assuming a reduction of a third, this would have been a fine of around £260,000 after a trial.²²
- A small company, turnover in the region of £6.5 million, was fined £112,500 after a guilty plea. The court made a 25 per cent reduction for the plea, meaning the fine would have been £150,000 without a plea.²³
- A micro company, with a turnover of around £1 million, was fined £50,000 for breach of section 3 alongside £20,000 for a failure to undertake a risk assessment for the same incident and more generally, following an early guilty plea. The fine for the section 3 offence alone, had there not been a plea, would have been £75,000, or £105,000 for both offences.²⁴

While there is a small variation according to the different sizes of organisation, in this selection of the analysis the largest fine is approximately 400 per cent of the smallest fine but the turnover of the largest organisation is around 90,000 per cent of the smallest organisation. While the Council does not believe that a strictly proportional relationship to the size of an organisation is required to fulfil the aims of sentencing, and it recognises the limitations of analysing the financial circumstances of an organisation purely on the basis of turnover, it does consider on the basis of this analysis that further guidance should be given on how to take into account the financial circumstances of offenders in sentencing these offences.

The Council did also consider cases that were atypical of this pattern. The highest fine they considered, on a very large company, was £4 million after an early guilty plea. The lowest fine for a case involving death was of £26,000 on a micro company with very little means available, following an early guilty plea.

For less serious offences, the Council found variation of approach. In cases involving category 3 type harms (for example, injury such as fingers lost in machinery or a real risk of serious harm that was fortunately avoided) and medium culpability, the Council considered cases involving fines ranging between £1,000 and £50,000. The highest fine was imposed on a large company but the lowest fines were imposed on medium organisations – as opposed to small or micro organisations – committing offences of similar seriousness. Consequently, the Council considered that there appeared to be some variation in the approach to considering the means of offenders when sentencing less serious health and safety cases.

²⁰ R v Shawton Engineering Ltd and Amec Group Ltd, 29/06/2012 (Amec Group Ltd was the relevant offender in this analysis)

²¹ R v ISS Mediclean Ltd, 30/03/2012

²² HSE v Mapei UK, 05/12/2013

²³ HSE v Amber Engineering 11/05/2012

²⁴ R v D Roche Ltd [2013] EWCA Crim 993

It must be emphasised that the standards expected of organisations in fulfilling health and safety obligations are the same regardless of the size of the organisation. However, this does not mean that the level of fine should be the same on all sizes of organisations: this would lead to an unfair discrepancy in the impact of the sentence on a small organisation, with little means to pay a fine, and large organisations, which can more easily absorb costs. To achieve the aims of sentencing – in particular, to send a message to management and shareholders – the Council therefore proposes to guide sentencers towards fines that take a better account of the means of the offender. **The Council’s aim at step two is to ensure that sentencers are considering an appropriate level of fine before using the flexibility afforded to them in step three of the guideline to tailor the fine to the offender’s individual circumstances.**

The Council’s proposed starting points and ranges are underpinned by its views on how culpability and harm factors relate to the aims of sentencing in this area, and how they should be weighted in assessing penalties. The Council has applied the following principles.

- In many cases, culpability should be the driver of the penalty. In cases of low culpability, there is less need to send a message home to the organisation or a need to change, because the organisation did not fall far below the relevant standard. Consequently, there is a significant drop in penalties for low culpability cases.
- Offences causing death require particular censure to mark public disquiet at the unnecessary loss of life and to reflect the impact on the victim’s family and friends. In the draft guideline, a case causing death will usually be a Category 1 case unless the likelihood of a fatality was remote. The Council does not believe that it is appropriate to depart from the SGC’s guidance, which appears to be followed in current sentencing practice, that a fine will “seldom be less than £100,000” in such cases.
- There will be unusual cases falling within Category 1 harm that do not involve death but a high likelihood of a fatality, life-shortening illness or catastrophic injury which was fortuitously avoided, or when a significant number of people were put at serious risk at one time. The Council considers that these egregious cases would also be fitting of particular censure.
- While Category 1 offences warrant a high fine, the Council considers that harms falling short of this – which may include significant pain, distress or change to a lifestyle for victims – should not be ignored. Consequently, while Category 1 offences are marked out for the highest fines, there is a regular upward progression in the proposed starting points for Category 4, 3 and 2 harms.

On the basis of the analysis set out above, the Council has determined that fines should not be reduced from the levels currently being imposed on small and micro organisations, but that fines on large organisations should be set at a level that better achieves the aims of sentencing given the substantial means of these offenders.

The Council is proposing on the starting points and ranges set out below. Illustrative case studies are provided.

Micro organisations

Micro Turnover or equivalent: not more than £2 million			
	Starting point	Category range	
Very high culpability			
Harm category 1	£250,000	£150,000 –	£450,000
Harm category 2	£100,000	£50,000 –	£200,000
Harm category 3	£50,000	£25,000 –	£100,000
Harm category 4	£24,000	£12,000 –	£50,000
High culpability			
Harm category 1	£160,000	£100,000 –	£250,000
Harm category 2	£54,000	£30,000 –	£110,000
Harm category 3	£30,000	£12,000 –	£54,000
Harm category 4	£12,000	£5,000 –	£21,000
Medium culpability			
Harm category 1	£100,000	£60,000 –	£160,000
Harm category 2	£30,000	£14,000 –	£70,000
Harm category 3	£14,000	£6,000 –	£25,000
Harm category 4	£6,000	£2,000 –	£12,000
Low culpability			
Harm category 1	£30,000	£18,000 –	£60,000
Harm category 2	£5,000	£1,000 –	£20,000
Harm category 3	£1,200	£200 –	£7,000
Harm category 4	£200	£50 –	£2,000

Case 2F

The offender is a charity providing day care to children aged 4 to 10. One of the charity's sites is a village hall with a playground in an L shape around two sides of the hall. A river runs past the far end of the shorter side of the playground, outside of a wooden fence. The river was identified by the charity to be a potential safety risk, particularly as it could not be seen by somebody on the other side playground. The policy to mitigate the risk was to have two supervisors, one in each part of the playground so the river and fence was always visible. Over time, the team became relaxed about applying this rule and would have only one supervisor on duty. To prevent children from playing in the unsighted part of the playground, cones were placed on the ground and the supervisor would call to any children attempting to run past the cones. One afternoon the supervisor was distracted and did not see a 5 year old child walk past the cones into the unsighted area of the playground. The child fell in the river and drowned. It appeared that he had climbed on the fence and fallen off.

The offender pleaded guilty at the earliest opportunity. The charity has revenue from fundraising grants and a low value contract with the Council. Its total income is around £1.8 million per year.

Step one: *This case is likely to be one of high culpability as simple measures to mitigate known risks were not enforced; the inadequate measures existed over a period of time and the team were aware that children were tempted to breach the inadequate barrier. The likelihood of young children falling in the river and drowning was medium, placing this offence at Category 2. As the event did tragically occur, this is a Category 1 harm case.*

Step two: *This is a micro organisation. A high culpability/category 1 offence has a starting point of £160,000 and range of £100,000 – £250,000.*

*The charity's financial circumstances and reduction for guilty plea will be considered at **steps three and six.***

Q15

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

Small organisations

Small Turnover or equivalent: between £2 million and £10 million		
	Starting point	Category range
Very high culpability		
Harm category 1	£450,000	£300,000 – £1,600,000
Harm category 2	£200,000	£100,000 – £800,000
Harm category 3	£100,000	£50,000 – £400,000
Harm category 4	£50,000	£20,000 – £190,000
High culpability		
Harm category 1	£250,000	£170,000 – £1,000,000
Harm category 2	£100,000	£50,000 – £450,000
Harm category 3	£54,000	£25,000 – £210,000
Harm category 4	£24,000	£12,000 – £100,000
Medium culpability		
Harm category 1	£160,000	£100,000 – £600,000
Harm category 2	£54,000	£25,000 – £230,000
Harm category 3	£24,000	£12,000 – £100,000
Harm category 4	£12,000	£4,000 – £50,000
Low culpability		
Harm category 1	£45,000	£25,000 – £130,000
Harm category 2	£9,000	£3,000 – £40,000
Harm category 3	£3,000	£700 – £14,000
Harm category 4	£700	£100 – £5,000

Case 2G

The offender runs a construction business. The offender had erected two storeys of scaffolding over a busy High Street. Netting had been placed over the scaffolding to shield passers-by from anything falling. However, on a particularly windy day the netting acted as a sail and the scaffolding was pulled over and fell in the street. Two shoppers beneath it had to run out of the way but nobody was injured. Inspectors found that the erection of the scaffolding had some faults which meant that it could not withstand the high wind.

The offender is a small business with a turnover of £3 million. It has been operating at a small loss over the past year.

Step one: The court may conclude that this is a case of **medium culpability**. There appears to have been a high risk of some injury or a medium risk of more debilitating injury: a **Category 3 harm case**. Unless there was compelling evidence to suggest a significant number of people would have risked being hurt by the falling scaffold at any one time, there is no reason to move up a harm category.

Step two: The starting point for a medium/category 3 case for a small organisation is £24,000 and range £12,000 – £100,000.

The fine in light of the offender's wider financial circumstances will be considered at **step three**.

Q16 Do you agree with the proposed starting points and ranges for small organisations in the health and safety guideline?

Medium organisations

Medium Turnover or equivalent: between £10 million and £50 million		
	Starting point	Category range
Very high culpability		
Harm category 1	£1,600,000	£1,000,000 – £4,000,000
Harm category 2	£800,000	£400,000 – £2,000,000
Harm category 3	£400,000	£180,000 – £1,000,000
Harm category 4	£190,000	£90,000 – £500,000
High culpability		
Harm category 1	£950,000	£600,000 – £2,500,000
Harm category 2	£450,000	£220,000 – £1,200,000
Harm category 3	£210,000	£100,000 – £550,000
Harm category 4	£100,000	£50,000 – £250,000
Medium culpability		
Harm category 1	£540,000	£300,000 – £1,300,000
Harm category 2	£240,000	£100,000 – £600,000
Harm category 3	£100,000	£50,000 – £300,000
Harm category 4	£50,000	£20,000 – £130,000
Low culpability		
Harm category 1	£130,000	£75,000 – £300,000
Harm category 2	£40,000	£14,000 – £100,000
Harm category 3	£14,000	£3,000 – £60,000
Harm category 4	£3,000	£1,000 – £10,000

Case 2C

The offender in the case involving the death in the transport yard considered above involves a medium sized business with a turnover of £40 million. The offender entered a guilty plea at the earliest opportunity.

Step two: *The starting point for a medium culpability/category 1 case committed by a medium organisation is £540,000 and the range is £300,000 – £1,300,000.*

The offender's wider circumstances will be considered at step three and reduction for guilty plea at step six.

Q17 Do you agree with the proposed starting points and ranges for medium organisations in the health and safety guideline?

Large and very large organisations

Very large organisation

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.

Large Turnover or equivalent: £50 million and over		
	Starting point	Category range
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
High culpability		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
Medium culpability		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
Low culpability		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

Case 2D

Case 2D related to the bottled drinks producer. The offender is a large organisation with a turnover of £300 million a year and an operating profit of £25 million a year.

Step two: *The conclusion was that this was a low culpability, high category 3 or low category 2 case. Assuming that category 2 is adopted, the starting point is £100,000 with a range of £35,000 to £250,000. Given that this case sat between category 3 and 2, it is likely that the court would wish to identify a starting point lower down in the range.*

Q18

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”.

The Council anticipates that the proposals will result in higher fines on larger organisations committing offences that are outside the category of low culpability. The Council does not anticipate that there will be a change in sentencing practice for smaller organisations in most of the offence categories or for larger organisations committing low culpability offences.

Q19 What impact do you think the proposals will have on current sentencing practice for organisations that have committed health and safety offences?

Developing penalties for individuals

Developing sentences for individuals raised different questions for the Council. The most important distinction in sentencing individuals as opposed to organisations is that courts can impose community orders and custodial sentences as well as fines. The Council has considered how these disposals may be best used as starting points or in ranges in order to achieve the aims of punishment, deterrence, protection of the public and removal of gain, but also reform and rehabilitation of offenders.

As with organisations, the Council conducted a review of current sentencing practice for individuals. In this review, the Council was more reliant on press reports of cases in magistrates' courts, which deal with many cases involving individuals. In addition, in a small scale exercise it was not possible to build up a large amount of data for each offence category. The Council recognised these data limitations in drawing their broad conclusions.

Many of the cases the Council considered involved lesser harms but higher culpability than in cases involving organisations. A common type of case involved illegal gas fitters leaving appliances leaking gas, which were fixed by registered professionals before any actual harm resulted. The Council also considered a range of cases involving many types of individuals; including sole traders, self-employed, employees and Directors prosecuted using the section 37 HSWA (see discussion on page 19).

Overall, bearing in mind the data limitations, the Council concluded that there appeared to be some inconsistency in sentencing in this area. As may be expected, the Council found that custodial sentences were used in more serious cases but there was no consistent indication as to what type of case was above the custody threshold. The Council found some inconsistency in less serious cases, but noted that in many cases, fines were preferred over community orders by sentencers.

The Council is proposing the following starting points and ranges for individuals. In proposing these sentences, the Council aims to improve consistency of sentencing for individuals but it does not intend otherwise to change current sentencing practice. The Council's reasoning and illustrative case studies are set out below the table.

	Starting point	Category range
Deliberate		
Harm category 1	18 months' custody	1 – 2 years' custody
Harm category 2	1 year's custody	26 weeks' – 18 months' custody
Harm category 3	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 4	Band F fine	Band E fine – 26 weeks' custody
Reckless		
Harm category 1	1 year's custody	26 weeks' – 18 months' custody
Harm category 2	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 3	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 4	Band E fine	Band D fine – Band E fine
Negligent		
Harm category 1	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 2	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 3	Band E fine	Band D fine or low level community order – Band E fine
Harm category 4	Band D fine	Band C fine – Band D fine
Low culpability		
Harm category 1	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 2	Band D fine	Band C fine – Band D fine
Harm category 3	Band C fine	Band B fine – Band C fine
Harm category 4	Band A fine	Conditional discharge – Band A fine

The custody threshold

A crucial consideration for the Council was which offence categories cross the custody threshold and should have custodial starting points. As outlined above, there was no clear theme in the cases the Council reviewed and it has taken a principled approach to identifying the appropriate placement of custodial sentences in starting points and ranges.

The Council considers that deliberate actions that put others at risk of harm – the highest category of culpability – should have custodial starting points unless the risks of harm are low. The Council is therefore proposing custodial starting points for all offences that create a risk of death, life-shortening illness or catastrophic and permanent injury where deliberately committed. These offences could also involve a medium or high risk of disability.

Case 2B

Case 2B involved an individual who performed unsafe gas work and forged documentation and identification in order to cover his tracks. The offender put the family at risk of serious harm as the appliances were left leaking gas.

Step two: *The categorisation for this offence was of “deliberate” culpability, Category 3 harm. The starting point for this offence is 26 weeks' custody and range is of Band F fine or high level community order to 1 year's custody.*

The Council also considers that reckless offences – those where the offender is wilfully blind to risks – that create a medium or high likelihood of a fatality, life-shortening illness or catastrophic injury, or a high likelihood of disability, should have starting points over the custody threshold.

Case 2E

Case 2E involved a self-employed contractor who sent an employee to perform unsafe work on the roof of a barn. No safety measures were in place or training or instruction provided. The offender did not inspect the site before sending his employee to perform the work. The employee broke three vertebrae in his back and now has to use a wheelchair. There is some possibility that he may be able to walk again but he will never be able to return to work in construction.

Step one: *In the analysis above, culpability was assessed as reckless. In terms of harm, the risks of working at this height are of serious injury or even fatality. Given that the injury did occur in this case, this is likely to be considered a category 2 harm case.*

Step two: *The starting point for a reckless, category 2 harm case is 26 weeks' custody. The range is of a Band F fine or high level community order to 1 year's custody.*

The most challenging culpability category for the purposes of assessing the custody threshold involved negligence. The Council is consulting on a starting point of 26 weeks' custody for a negligent offence resulting in category 1 harm – this will usually mean that a death was caused by the offender's breach, or in more unusual cases that there was a high likelihood of death, life-shortening illness or catastrophic injury.

However, the Council was divided on this point. On the one hand, Council members acknowledged that carelessness is a lower culpability threshold and there is likely to be less need to reform an offender for the future where the offence was not committed with a culpable state of mind. However, on the other hand, the Council was cognisant of the very high degree of harm involved in a category 1 offence – usually entailing death – that will have occurred because the offender failed to take adequate care. The Council thought an analogy could be drawn in these situations with the offence of death by careless driving: the SGC guideline has custodial starting points for this offence except where the offence was caused with momentary inattention with no aggravating factors.

The Council is keen to seek views on all cases involving a custodial starting point and particularly the proposal to have a custodial starting point for category 1, negligent, offences.

Q20

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

Non-custodial starting points

As observed above, in its review of current sentencing practice, the Council found that in many cases a fine was imposed. The Council agrees that this will normally be the most appropriate disposal as many health and safety cases are committed with an economic gain in mind – this may be by cutting corners to avoid costs or by more blatantly seeking to make money, for example by illegal gas work. As such, the Council has used fines as starting points for offence categories beneath the custodial threshold. The Council has included guidance stating that even where the community order threshold has been passed, a fine will normally be the most appropriate disposal where the offence was committed for economic benefit. Alternatively, the court could consider, if wishing to remove economic benefit derived through the commission of the offence, combining a fine with a community order.

Q21 Do you consider the guidance regarding the use of community orders and fines in the health and safety guideline to be appropriate and sufficient?

For the most part, the Council has adopted the fine bands used in the Magistrates’ Court Sentencing Guidelines since these will be familiar to magistrates. The fine bands relate to an offender’s relevant weekly income.

In addition, to reflect the gravity of the more serious offence categories, the Council has produced an additional, higher, fine band: Band F, which is defined as 600 per cent of relevant weekly income and a range of 500 per cent – 700 per cent of relevant weekly income. This fine band also assures a closer relationship with the bottom of the range of penalties for micro organisations: as noted above, in some cases the difference between a small, micro organisation committing an offence and a self-employed person or sole trader prosecuted as an individual may be a narrow one. The Council is therefore proposing fine bands that have broad equivalents across to the bottom of the range of fines for micro organisations. Fine Band F was originally created for the environmental guideline, meaning that magistrates will gain familiarity with using this sentence for regulatory offences. The fine bands are included in an annex at the back of the guideline.

FINE BANDS

In this guideline, fines are expressed as one of six fine bands (A, B, C, D, E or F).

Fine Band	Starting point (<i>applicable to all offenders</i>)	Category range (<i>applicable to all offenders</i>)
Band A	50% of relevant weekly income	25–75% of relevant weekly income
Band B	100% of relevant weekly income	75–125% of relevant weekly income
Band C	150% of relevant weekly income	125–175% of relevant weekly income
Band D	250% of relevant weekly income	200–300% of relevant weekly income
Band E	400% of relevant weekly income	300–500% of relevant weekly income
Band F	600% of relevant weekly income	500–700% of relevant weekly income

Q22 Do you agree with the remainder of the proposed starting points and ranges for individuals in the health and safety guideline?

Q23 What effect do you think the draft guideline will have on current sentencing practice relating to individuals who commit health and safety offences?

Aggravating and mitigating factors

Having identified a starting point the court is required to consider aggravating and mitigating factors that may warrant movement within the range. These factors relate to the wider circumstances of the offence and also include factors relating to the offender. The lists at this step are not intended to be exhaustive and any other factors present should be taken into account by the court at this step.

The Council's intention is to highlight factors which are likely to be relatively common in such cases in order to ensure that they are considered equally by different courts. The Council proposes the following aggravating and mitigating factors: the top table includes factors common to both organisations and individuals and the lower table factors that are specific to individuals.

Aggravating and mitigating factors for individuals *and* organisations:

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
<p><i>Statutory aggravating factor:</i></p> <p>Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction</p> <p><i>Other aggravating factors include:</i></p> <p>Cost-cutting at the expense of safety</p> <p>Deliberate concealment of illegal nature of activity</p> <p>Breach of any court order</p> <p>Obstruction of justice</p> <p>Poor health and safety record</p> <p>Falsification of documentation or licenses</p> <p>Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities</p>	<p>No previous convictions or no relevant/recent convictions</p> <p>Evidence of steps taken to remedy problem</p> <p>High level of co-operation with the investigation, beyond that which will always be expected</p> <p>Good health and safety record</p> <p>Effective health and safety procedures in place</p> <p>Self-reporting, co-operation and acceptance of responsibility</p>

Additional factors for individuals:

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
<p><i>Statutory aggravating factor:</i></p> <p>Offence committed whilst on bail</p>	<p>Good character and/or exemplary conduct</p> <p>Inappropriate degree of trust or responsibility</p> <p>Mental disorder or learning disability, where linked to the commission of the offence</p> <p>Serious medical conditions requiring urgent, intensive or long-term treatment</p> <p>Age and/or lack of maturity where it affects the responsibility of the offender</p> <p>Sole or primary carer for dependent relatives</p>

Q24

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

Steps three and four

The approach taken in steps three and four of the guidelines for organisations and step three of the guideline for individuals is common to all of the draft guidelines consulted on in this paper and is considered on pages 16 to 17.

The following case studies illustrate how steps three and four may be used by the courts in the context of health and safety cases.

Case 2F

Case 2F involved the charity providing day care to children whose health and safety offence led to a five year old child drowning in a river next to the playground. At step two, a starting point of £160,000 was identified. There were no aggravating factors in this case and credit would be given by the court for the substantial assistance provided by the charity in investigating the incident and their good previous health and safety record. The charity has provided accounts that demonstrate they are unable to pay a significant fine without having to close three of their other centres.

*The court will remind itself of the aims of sentencing at **step three**. The court is likely to note the not-for-profit nature of the offender's work and the power to order payment in instalments. At **step four**, the court will consider substantially reducing the fine as the offender has demonstrated that it would have a significant impact on the provision of their services.*

*Overall, the court is likely to make a reduction to the fine, potentially outside of the lower end of the range (£100,000) and order payment in instalments in order to achieve the aims of sentencing in this case. The court would then consider further steps, including reduction for guilty plea at **step six**.*

Case 2G

Case 2G involved the small company whose scaffolding blew over in the wind. At step two, a starting point of £24,000 was identified. The company had no particular aggravating or mitigating factors of note.

*The court may be minded to reduce the starting point at **step three**, after considering the aims of sentencing. The court is likely to note that, within the definition of "small organisation" in the guideline, the size of the offending organisation with a turnover of £3 million sits towards the bottom end of the category defined as "between £2 million and £10 million". The court will note that the organisation has been operating at a loss. The court may wish to reduce the starting point and order payment in instalments to produce a fair and proportionate sentence.*

Compensation and ancillary orders

The final specific matter to the health and safety guideline relates to ancillary orders. In step seven of the guideline for organisations and step six of the guideline for individuals, guidance is provided for the court on available ancillary orders. As these may be less familiar to sentencers, fuller guidance is provided than in other Sentencing Council guidelines. Both guidelines contain guidance on remediation and forfeiture orders, and the guideline for individuals also includes guidance on ordering the disqualification of a director. Both guidelines provide guidance on compensation orders and emphasise that it will often be unnecessary to make such an order.

Q25

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

Section three: Guidelines for corporate manslaughter

The Council's aims

The offence of corporate manslaughter is a relatively recent offence, enacted in the Corporate Manslaughter and Corporate Homicide Act 2007. Prior to the creation of this offence, it was possible for organisations to be found guilty of a range of criminal offences including gross negligence manslaughter. However, this required proving that a senior figure who could be said to embody the organisation (also known as the “controlling mind”) had the knowledge and fault required for a conviction. This “identification principle” made it very difficult to mount a successful prosecution for manslaughter against a corporate entity, especially against large organisations with many levels of seniority and lines of accountability.²⁵

The offence of corporate manslaughter created by the 2007 Act is focussed on the worst instances of management failures causing death. Although the more serious offence, it is closely related to health and safety cases causing death.

An organisation will be guilty of the offence of corporate manslaughter 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 to the deceased. It is further required that a substantial element of the breach was the way in which the organisation's activities are managed or organised by its **senior management**.

The SGC produced a guideline that came into force in February 2010 to support courts in sentencing for the new offence. In the small number of cases heard to date the guideline appears to have provided much assistance to courts.

As outlined briefly in the introduction, the Council has chosen to review the guideline for corporate manslaughter principally because of the close relationship this offence has with health and safety offences. As explored in sections 2 and 3 of this paper, the Council is proposing to introduce, for health and safety offences, an approach to sentencing that more closely links the means of the offender – alongside the seriousness of the offence – to the final sentence. The Council is proposing starting points and ranges for larger organisations committing more serious offences that it anticipates would be an increase from current sentencing practice. Given the close relationship between these offences and corporate manslaughter, the Council considers that it is necessary to review sentence levels in the corporate manslaughter guideline to ensure they are consistent and proportionate to its proposals for health and safety.

²⁵ A notable example was the trial following the sinking of the *Herald of Free Enterprise* in 1987. 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

In addition, the SGC guideline applies to corporate manslaughter *and* health and safety offences causing death. As the latter area will be covered by the Council’s draft guidelines for health and safety offences, the Council considered it would be confusing to retain a guideline that was only partially in force, relating to corporate manslaughter.

Therefore, the Council’s principal aim in developing the corporate manslaughter guideline has been to ensure consistency and proportionality in the proposed penalties for corporate manslaughter and approach to assessing fine levels when considered in relation to proposals in the draft guideline for health and safety offences. As such, the Council has adopted much of the content of the existing SGC guideline that does not relate to assessing an appropriate starting point for a fine. The Council has also sought to excise content that relates only to health and safety offences causing death, as this is now covered by the draft health and safety offences guideline.

Step one

As with all Sentencing Council guidelines, step one of the draft guideline considers culpability and harm in order to assess the seriousness of the offence. However, unlike other Sentencing Council guidelines, which identify specific factors in order to identify an offence category, the Council has chosen to adopt the approach taken by the SGC of asking questions about the offence in order to gain a broad sense of seriousness.

The primary reason for this decision is that both the culpability and the harm involved in a corporate manslaughter case must, by definition, be very serious. In terms of culpability, the breach must be a gross breach; in other words, the offender must have fallen far below what could reasonably have been expected of the organisation. In terms of harm, there will always be at least one death. While the Council considered potential models that attempted to gradate this narrow ground into different categories, it concluded that the better approach would be to retain the SGC’s approach of guiding the sentencer towards key questions relating to harm and culpability. These questions are set out below.

The court should assess factors affecting the seriousness of the offence within this context by asking:

(a) How foreseeable was serious injury?

The more foreseeable it was the graver usually will be the offence. Failure to heed warnings or advice from the authorities, employees or others or to respond appropriately to “near misses” arising in similar circumstances may be factors indicating greater foreseeability of serious injury.

(b) How far short of the appropriate standard did the offender fall?

Where an offender falls far short of the appropriate standard, the level of culpability is likely to be high. Lack of adherence to recognised standards in the industry or the inadequacy of training, supervision and reporting arrangements may be relevant factors to consider.

(c) How common is this kind of breach in this organisation?

How widespread was the non-compliance? Was it isolated in extent or, for example, indicative of a systematic departure from good practice across the offender’s operations or representative of systemic failings? Widespread non-compliance is likely to indicate a more serious offence.

(d) Was there more than one death, or a high risk of further deaths, or serious personal injury in addition to death?

The greater the number of deaths, very serious personal injuries or people put at high risk of death, the more serious the offence.

The sentencer is then guided that where the answers to these questions indicate a high level of harm or culpability within the context of a corporate manslaughter offence, the court should consider starting point A at step two. For all other offences the court should consider starting point B.

The Council's draft step one has some variations from the SGC's guideline, which are outlined below.

- First, it does not include the question “how far up the organisation does the breach go?”. The Council considered that this question would only be relevant when considering a health and safety offence causing death and not corporate manslaughter. Unlike health and safety offences, the offence of corporate manslaughter requires that a substantial element of the breach is the way in which the organisation's activities are managed or organised by its senior management. Consequently, the Council did not consider that this question would assist the court in determining seriousness.
- Second, additional guidance has been added to assist the court in determining the foreseeability of serious injury and how far short of the appropriate standard the offender fell. The Council considered that failure to heed warnings or advice or respond to near misses, which were aggravating factors in the SGC guideline, would be useful to the court in assessing foreseeability. In addition, having considered factors that were indicative of falling short of the appropriate standard for the draft health and safety offences guideline, the Council concluded that it would both assist sentencers in applying this factor as well as promote consistency to refer to these factors at step one.
- Third, the Council has included within step one the question “was there more than one death, or a high risk of further deaths, or serious personal injury in addition to death?”. A factor relating to the number of deaths caused or whether there was grave personal injury is included as an aggravating factor in the SGC guideline. However, the Council's approach in all guidelines is to consider harm fundamental to the seriousness of the offence and assess it in step one.²⁶ The Council has determined that the same should apply in the offence of corporate manslaughter and therefore proposes that this factor is included in the overall assessment of seriousness.

Q26

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

Q27

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

Step two

As set out in Section One: Overarching Issues at page 13, step two provides guidance on obtaining financial information from offenders. This guidance assists the sentencer in applying steps two and three of the guideline, which require the court to consider the offender's financial circumstances.

Step two of the corporate manslaughter guideline then sets out starting points and ranges for four sizes of organisation, linked to the turnover of the offending organisation.

²⁶ See discussion on page 25

As with health and safety offences, the Council considered the aims of sentencing in this area, set out on pages 9 to 10 above in order to propose starting points and ranges for the draft guideline. Briefly, the Council considers that fines for these offences should:

- **reflect the seriousness of the offence** and take into account the **financial circumstances of the offender**;
- meet, in a fair and proportionate way, the aims of **punishment** and **deterrence** and **removal of gain**; and
- be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to achieve a safe environment** for workers and members of the public affected by their activities.

In addition, as with health and safety offences causing death, the Council considered in setting starting points and ranges that there was a need to reflect the public disquiet at avoidable loss of life.

The existing guidance in the SGC corporate manslaughter guideline is that in cases of corporate manslaughter the **“appropriate fine will seldom be less than £500,000 and may be measured in the millions of pounds”**.

The Council has reviewed the four corporate manslaughter cases sentenced to date in England and Wales. Given the small number of cases, the data is of limited assistance. However, the Council noted the following key points.

- While an important reason for introducing the offence of corporate manslaughter related to the difficulties in obtaining convictions for manslaughter against large organisations, to date only micro or small organisations have been convicted of corporate manslaughter.
- The limited assets of an offender often restrict the level of fine imposed.
- In only one case was the fine near to the minimum limit proposed by the SGC of £500,000. This fine was of £480,000 against one of the larger companies to have been convicted of corporate manslaughter, with a turnover of around £10 million. This company would sit on the upper cusp of the definition of a “small organisation” under the Council’s draft guideline. Costs of £84,000 were also imposed.²⁷

Given the limited data available for this offence, the Council has taken a principled approach to setting starting points and ranges. As well as seeking to achieve the aims outlined above, the Council has considered how corporate manslaughter penalties should relate to starting points for the most serious health and safety offences and concluded as follows.

- Corporate manslaughter is a more serious offence and this should be reflected in starting points and ranges, as it is in the existing SGC guideline.
- However, health and safety offences cover a wide range of culpability, with the most culpable offences involving death potentially capable of overlapping with the lowest level of seriousness in a corporate manslaughter offence.
- Therefore, starting point B (the lower starting point) for a corporate manslaughter offence should represent an incremental increase from the most serious offence category in the draft health and safety guideline (“very high” culpability/category 1 harm) to reflect the fact that corporate manslaughter is the more serious offence. However, this increase should not be significant because the most serious type of health and safety case could overlap with the lower level of culpability and harm involved in a corporate manslaughter case.
- The same principles should apply to setting the ranges for category B in the corporate manslaughter guideline. This approach means that there is some overlap in these ranges with the health and safety guideline, which the Council considers to be appropriate given the potential for overlap between the higher end of health and safety offences and lower end of corporate manslaughter cases.

²⁷ R v Lion Steel Equipment Ltd: <http://www.judiciary.gov.uk/judgments/r-v-steel-equip-ltd-sentencing-remarks/>

- Starting point A, for more serious offences within the context of a corporate manslaughter offence, should represent a further incremental increase in starting points and ranges. Although the range of harm and culpability involved in corporate manslaughter cases is relatively narrow, the Council considers that the increase in seriousness between a case in category B and a case in category A is notable. Consequently, the incremental increase between starting point A and B is greater than the increase proposed from a “very high” culpability/category 1 harm case in the health and safety guideline to starting point B in the corporate manslaughter guideline.

On the basis of these principles, the Council proposes the starting points and ranges set out below.

Very large organisation

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.

Large Turnover more than £50 million

Offence category	Starting point	Category range
A (more serious offences)	£7,500,000	£4,800,000 – £20,000,000
B	£5,000,000	£3,000,000 – £12,500,000

Medium Turnover £10 million to £50 million

Offence category	Starting point	Category range
A (more serious offences)	£3,000,000	£1,800,000 – £7,500,000
B	£2,000,000	£1,200,000 – £5,000,000

Small Turnover £2 million to £10 million

Offence category	Starting point	Category range
A (more serious offences)	£800,000	£540,000 – £2,800,000
B	£540,000	£350,000 – £2,000,000

Micro Turnover up to £2 million

Offence category	Starting point	Category range
A (more serious offences)	£450,000	£270,000 – £800,000
B	£300,000	£180,000 – £540,000

The Council is proposing starting points for micro organisations that are lower than the SGC’s suggested threshold of £500,000. However, the Council considers that these are appropriate and fair starting points that meet the aims of sentencing and the principles outlined above. In addition, the Council has noted that in cases sentenced to date involving micro companies or organisations that had gone out of business, the courts have been restricted in the fines they have been able to impose by the limited means of the offender. Although it is difficult to draw firm conclusions on the basis of such a small number of cases, the Council considers that its approach to starting points and ranges for micro organisations is consistent with what appears to be emerging sentencing practice.

Q28 Do you agree with the proposed starting points and ranges for micro organisations in the corporate manslaughter guideline?

The Council similarly considers that the proposed starting points and ranges for small, medium and large organisations are fair and proportionate and result in starting points that are capable of meeting the aims of sentencing in this area.

Case 3A

The offender is a manufacturer, whose premises comprise a workshop and a three-storey office block. M was employed in the workshop but would from time to time carry out general maintenance tasks around the office. An issue arose when rain started leaking through the roof tiles in to the top floor of the office, ruining computer equipment. A quote was obtained for fixing the roof. The issue was taken to the Management Board who found the quote to be unacceptably expensive and agreed to do the work “in house”. M was asked to do the job. He went out on to the steeply sloping roof, which was wet, without any safety mechanism. He slipped on the roof and fell to his death. He had no formal training or qualifications for the work.

The offender is a medium company with a turnover of £30 million. The offender is narrowly profitable but has had a difficult year and is considering making staff redundancies.

***Step one:** A court is likely to find that death or serious injury in this case was obvious, given that the office was a three-storey building and no safety equipment or training was provided. The offender has fallen far short of the appropriate standard by failing to consider any readily available guidance on working from height or training for M. On the other hand, there is no evidence of a lax attitude generally to health and safety, and there was only one person put at risk of death or serious injury in this case. Overall, the court is likely to conclude that starting point B is appropriate.*

***Step two:** as a medium company, the court will consider starting point B, £2,000,000, and a range of £1,200,000 to £5,000,000.*

Case 3B

The offender is a train operator. A crash between a passenger train operated by the offender and a freight train occurred when the passenger train passed a red signal, resulting in the deaths of 8 people, including the driver, and the injuries of many more passengers. The subsequent investigation found that the Automatic Warning System (AWS) had failed. The driver's attention had apparently been distracted from observing signals visually. In addition, Automatic Train Protection (ATP) equipment, which may have prevented the crash, was switched off. The investigation found that many drivers had not been trained on how to use ATP and therefore kept the equipment switched off. There was evidence that Directors in the organisation were aware of this practice.

The offender's turnover is around £900 million a year, with an operating profit of around £85 million. The offender is the wholly owned subsidiary of its parent company.

Step one: *It is likely that detailed submissions would be made regarding the extent to which the event was foreseeable (question (a)) and the extent to which the offender fell below the relevant standard (question (b)). However, it is likely that the court would consider that the widespread non-compliance with training and failure to ensure that drivers were using ATP makes this a serious case. In addition, there were eight fatalities and many more injuries in this case. The court may consider this to be a starting point A case.*

Step two: *Starting point A for a large company is £7,500,000 and the range is £4,800,000 to £20,000,000. As this offender, with a turnover of £900 million, could be considered a "very large" company it is likely that the court would move to the top of the range or beyond.*

Q29

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

Q30

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

Q31

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".

Aggravating and mitigating factors

Having identified a starting point the court is required to consider aggravating and mitigating factors that may warrant movement within the range. These factors relate to the wider circumstances of the offence and also include factors relating to the offender. The lists at this step are not intended to be exhaustive and any other relevant factors can and should be taken into account by the court.

The Council’s intention is to highlight factors which are likely to be relatively common in order to ensure that they are considered consistently by different courts. The proposed aggravating and mitigating factors are similar to those proposed for health and safety offences. In addition, the Council proposes that an aggravating factor in a corporate manslaughter case would be where the offender exploited vulnerable victims. This factor seeks to capture cases where victims have been less able to defend their rights and the offender has used this to their advantage; for example, where there is language barrier between an employee and employer.

The Council has also included, as a mitigating factor, where other events beyond the responsibility of the offender contributed to the death. The Council included this factor because, to secure a conviction for manslaughter, the prosecution must prove that the breach was a significant but not necessarily the *only* cause of death. As such, the Council considers that there is legitimate mitigation for an offender where there are other events, that the offender had no responsibility for, that contributed to the accident. However, in including this as a mitigating factor, the Council has emphasised that actions of victims are highly unlikely to be considered contributory events, as offenders are required to protect workers or others who are neglectful of their safety in a way which should be anticipated. This factor reflects the reasoning of the Council in relation to assessing harm for health and safety offences.

Factors increasing seriousness

Statutory aggravating factor:

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Other aggravating factors include:

Cost-cutting at the expense of safety

Deliberate concealment of illegal nature of activity

Breach of any court order

Obstruction of justice

Poor health and safety record

Falsification of documentation or licenses

Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities

Offender exploited vulnerable victims

Factors reducing seriousness or reflecting personal mitigation

No previous convictions **or** no relevant/recent convictions

Evidence of steps taken to remedy problem

High level of co-operation with the investigation, beyond that which will always be expected

Good health and safety record

Effective health and safety procedures in place

Self-reporting, co-operation and acceptance of responsibility

Other events beyond the responsibility of the offender contributed to the death (**however**, actions of victims are highly unlikely to be considered contributory events. Offenders are required to protect workers or others who are neglectful of their own safety in a way which should be anticipated).

Q32

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

Steps three and four

The approach taken in steps three and four of the guidelines is common to all of the draft guidelines consulted on in this paper and is considered on pages 12 to 13 above.

The following case studies illustrate how steps three and four may be used by the courts in the context of a corporate manslaughter case.

Case 3A

The offender in this case is a medium sized organisation. The court will revisit the aims of sentencing at **step three** and consider relevant factors. The court is likely to consider the low profit margin of the company but also the fact that there was a quantifiable economic benefit in this case: the cost of fixing the roof using qualified professionals. At **step four**, the court will have regard to the impact of the fine on the employment of staff, in order to finalise an appropriate fine for the organisation. The court may wish to order payment in instalments, having regard to the guidance that, if necessary, payments may take place “over a number of years”.

Case 3B

The offender is a very large organisation. At **step three** the court will consider the offender’s wider financial circumstances to assess the economic realities of the offender. At **step four** the court is likely to consider the fact that the offender provides a service to the public, which is supported through government subsidies, against the fact it is a company that profits for the benefit of a parent company. The court will seek to finalise a fine that is sufficiently substantial to have a real economic impact which will bring home to management and shareholders the need to achieve a safe environment for those affected by their activities, but that can be paid without passing on costs to service users.

Step seven: compensation and ancillary orders

The final matter specific to the corporate manslaughter guideline relates to the guidance on compensation and ancillary orders in step seven. The Council has reviewed the guidance on publicity orders and remediation in the SGC guideline and considered that no amendment is necessary. The Council has therefore fully adopted this content in the step seven of the guideline. The Council has also included guidance on compensation orders, highlighting that these will not usually be required in corporate manslaughter cases as in the great majority of cases it will be dealt with by a civil court.

Q33

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

Section four: Guidelines for food safety and hygiene offences

Scope

In producing a guideline for food offences, the Council elected to focus on the most commonly prosecuted food safety and hygiene offences, and those concerned with risks to health. This was to ensure that the guidelines are of the greatest assistance to the courts and to address the offending areas where concerns had been raised to the Council about the adequacy of penalties.

The legislative landscape in this area is relatively complex. This is an area of devolved competence to Wales, meaning that in some areas there are separate legislative provisions for Wales and England. The Council has considered a range of legislation but is consulting on a guideline that covers:

- for England, Regulation 19(1) of the Food Safety and Hygiene (England) Regulations 2013;
- for Wales, Regulation 17(1) of the Food Hygiene (Wales) Regulations 2006 and Regulation 4 of the General Food Regulations 2004.

These offences are expressed in terms of contravening or failing to comply with specified Community provisions; that is, requirements set out in EU legislation. As such, the offences are gateways to a range of different requirements relating to various safety and hygiene matters. Although different domestic legislation applies in England and in Wales, the offences link to the same Community provisions. Therefore, the Council has determined that it would be preferable to cover the same offences in both England and Wales – in other words regulations that refer to the same Community provisions – within one set of guidelines.

The Community provisions cover a relatively wide range of offending. There are some provisions that directly seek to prevent risks to human health – for example, requirements that unsafe food is not placed on the market, or that food products are recalled and customers informed when there has been a breach of food safety requirements. Other provisions are concerned with ensuring that the authorities can fulfil their obligations in monitoring and assuring public safety when buying or consuming food – for example, by requiring food businesses to register with the authorities, or to keep paperwork that would enable regulators to identify the origin or producer of a food product. There is also a provision to ensure that consumers are not misled by the labelling, advertising or presentation of food. This is to summarise just some of the provisions that are covered by these offences.

The Council has also considered whether to bring other similar food offences within scope of the guideline. In particular, the Council considered offences under the Food Safety Act 1990. However, these offences are now prosecuted in very low numbers and have different statutory maxima on summary conviction to the majority of safety and hygiene regulations summarised above. Therefore, the Council concluded that different considerations would apply to identifying starting points and ranges and, given the low number of convictions for these offences, there was no clear need for specific guidance.

The Council is seeking views on whether the proposed scope of the guideline is appropriate, including whether it has overlooked any important offences that may fit within the draft guideline.

Q34

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

Step one Culpability

The food offences within scope of the guideline set out requirements that food business operators must fulfil; for example, a requirement that food business operators adopt certain specific hygiene measures, or a requirement that they retain documents and records for an appropriate period. Failure to comply with these requirements is an offence. A defence of due diligence – where the accused “took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by the accused or by a person in control of the accused” – is available for all these offences.

The range of culpability, therefore, spans from falling just short of having taken all reasonable precautions or all due diligence in relation to each requirement, to having flagrantly or deliberately disregarded them. The Council considered a number of models to gradate these levels of culpability and concluded that the best approach was similar to that proposed in the draft guidelines for health and safety offences.²⁸

Where the offender is an individual, the Council considers that their culpability depends on their attitude – or state of mind – towards these standards. An individual offender may have knowingly and intentionally ignored the relevant standards, or they may have been wilfully blind to what was required of them, or they may have been negligent, or have fallen just slightly short of the standard of due diligence.

However, the Council considered that the same approach would not always assist sentencers in identifying what was culpable about an offence committed by an organisation. Food offences often involve small businesses, where the approach to assessing culpability for individuals may be more easily applied, but they can and do extend up to very large organisations – for example, a large supermarket. In larger organisations it is difficult to identify who the relevant individual is in order to apply the criteria used for individuals. Consequently, for the most part, the Council considers that a better method to assess the culpability of an organisation in this context is to consider, using a series of objective factors, how far short of the requirements the offender fell. The court should consider factors such as what measures were put in place and the extent to which failures ran through different levels of the organisation.

The Council is therefore consulting on guidelines that have a slightly different culpability schemes for organisations and individuals: these are set out below. The guidelines emphasise that where there are factors present in the case that fall in different categories of culpability, the court should balance these factors to reach a fair assessment of the offender’s overall culpability.

²⁸ See discussion on pages 20 to 23

Individuals

Deliberate

Where the offender intentionally breached, or flagrantly disregarded, the law

Reckless

Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken

Negligent

Offence committed through act or omission which a person exercising reasonable care would not commit

Low

Offence committed with little fault, for example, because:

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no prior event or warning indicating a risk to health and safety
- failings were minor and not systemic

Organisations

Very high

Deliberate breach of or flagrant disregard for the law

High

Offender fell far short of the appropriate standard; for example, by

- failing to put in place measures that are recognised standards in the industry
- ignoring concerns raised by employees or others
- allowing breaches to subsist over a long period of time

Evidence of serious, systemic failings within the organisation to address risks to food safety

Medium

Offender fell short of the appropriate standard in a manner that falls between descriptions in “high” and “low” culpability categories

Level of offender’s systemic failure falls between descriptions in “high” and “low” culpability categories

Low

Offender did not fall far short of the appropriate standard; for example, because

- significant efforts were made to secure food safety although they were inadequate on this occasion
- there was no prior event or warning indicating food safety risks

Evidence that failings were minor and not systemic

As set out above, both schemes of culpability consider an **intentional breach of or a flagrant disregard for** the relevant requirements to be the **top level of culpability** for both organisations and individuals. At the other end of the scale, the Council is proposing similarly defined categories to assist courts in identifying **low culpability** offences. These are offences where the offender has not fallen far short of what was required of them. This could happen where, for example, somebody contracted food poisoning in the offender’s restaurant and, while hygiene and safety measures were in place, the offender could not be said to have taken all reasonable precautions and exercised all due diligence.

There is more variation in the two middle categories of culpability for the reasons set out above. An individual may be assessed as either “reckless” or “negligent”. An organisation will have either “high” or “medium” culpability depending on the extent of their failings. The category of “medium” culpability is defined as falling between “high” and “low” culpability.

The Council recognises that in the context of food offences there may relatively frequently be similarities between offenders charged as individuals or organisations. For example, in a case involving a small food outlet, either the organisation itself or the individual running the business could, in theory, be charged. The Council has aimed to define the culpability categories so that in such situations the offender would be considered to be in categories of culpability that were comparable – for example, “reckless” if charged as an individual and “high” if charged as an organisation. The Council considers that the differences between the culpability categories for individuals and organisations are necessary to assist the court in identifying the range of blameworthiness that may be found in the offences falling within the guidelines. However, it is keen to seek views as to whether it has achieved the correct balance between identifying appropriate culpability factors for organisations and individuals whilst not causing unfairness to similar offenders charged in different capacities.

Q35

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

Harm

The harm factors that the Council is proposing to include in the draft guideline aim to cover the range of types of harm the offences within the scope of the guideline seek to prevent. The Council is consulting on the harm scheme set out below, which applies to both individuals and organisations. As with the assessment of culpability, where an offence does not fall squarely into a category, individual factors may require a degree of weighting to make an overall assessment.

Harm	
Category 1	<ul style="list-style-type: none"> • Serious adverse effect(s) on human health i.e. acute and/or chronic condition; and/or widespread impact
Category 2	<ul style="list-style-type: none"> • Adverse effect on human health (not amounting to Category 1) • High risk of an adverse effect on human health – including where supply was to groups that are particularly vulnerable to health issues • Regulator and/or legitimate industry substantially undermined by offender’s activities • Relevant authorities unable to trace products in order to investigate risks to health, or are otherwise inhibited in identifying or addressing risks to health
Category 3	<ul style="list-style-type: none"> • Medium or low risk of an adverse human health effect • Public misled about the specific food consumed, but little or no risk of actual adverse health effect

The Council has reviewed a range of cases in order to define relevant harms to **human health**. While food offences can result in very high levels of harm, including death, in practice this is rare. Food offences more commonly seen by the courts involve risks to human health, occasionally involve proof that consumers did suffer food poisoning, and even more rarely involve consumers suffering a serious condition as a result of the offence. As such, the Council does not propose to include death as a harm factor in the guideline: in an unusual case involving death or harm that is otherwise beyond harm category 1 in the draft guideline, the Council is content that the court should go outside of the parameters of the guideline.²⁹

²⁹ Courts are required to follow guidelines unless satisfied that it would be contrary to the interests of justice to do so (section 125(1) of the Coroners and Justice Act 2009). Where the harm resulting from an offence exceeds the highest harm contemplated by a guideline, a court might consider that it would not be in the interests of justice to sentence within that guideline.

As with environmental offences and health and safety offences, the Council has carefully considered the appropriate treatment of **risk of harm** in the guideline. For the reasons outlined on page 25 above, when considering offence seriousness for the purposes of sentencing, the Council does consider that the causation of actual harm is very important. However, the Council is also conscious that regulators are seeking to *prevent* harm and will not wait for harm to occur before intervening: offences posing a risk of harm can also, therefore, be considered very serious.

The Council's view is that a risk of harm will usually be less serious than the same actual harm, unless the risk of that harm is particularly high. This is consistent with the approach the Council has taken to risk of harm in the definitive environmental guideline and draft health and safety guideline, although this result is achieved in different ways. The Council similarly considers that a slightly different approach is required to assessing risk of harm in the food safety and hygiene guideline.

As set out in the table above, the Council proposes that two levels of actual harm to human health are considered in categorising harm – Category 1: a serious adverse effect on health, or Category 2: any adverse effect on health not amounting to category 1. When assessing a *risk* of human harm in the context of a food case, the Council considered that it was too difficult to assess whether the risk was one of *severe* illness or something falling short of this (in other words a risk of Category 1 harm or Category 2 harm); this assessment depended on too many hypothetical factors such as the bacteria involved or the health and resilience of the person consuming the food. The Council is therefore proposing that the court should simply consider two levels of risk of harm to human health: a high level of risk that human harm would occur, or a medium or low level of this risk.

In addition, as observed above, the majority of cases involving food offences cluster around the lower end of the harm scale, where there was a risk of harm but no proof that sickness resulted from the offender's activities. However, within this group of cases, some offences are more serious than others because the risks posed by the offender's failings are higher. The Council considers that having two explicit levels of risk in the harm scheme will assist sentencers in discriminating between more and less serious cases where no actual harm has occurred.

The offences within scope of the guideline are not all focussed directly on matters of health. The Council has carefully considered the harms that result from offences that are more **procedural** in nature. The Council considers that the fundamental harm in such cases is one of **undermining the regulator** and undercutting **legitimate operators**. The Council has also included factors in the harm scheme that are specifically linked to requirements seeking to ensure the **traceability** of food products and otherwise **protect consumers** from misleading advertising, presentation or labelling of food. Where there is no adverse health effect, the Council has categorised the latter factor as a category 3 harm factor. If other factors in the harm scheme are present in a case where consumers are being misled – for example, that the regulator or legitimate operators were substantially undermined, or that regulators were unable to trace food products, the court will wish to balance these factors in order to determine whether the case is a category 2 harm case or a category 3 harm case.

Case studies below are used to illustrate the entirety of the step one process – the consideration of both culpability and harm.

Q36

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

Case 4A

The offender, A, is an individual running a small restaurant. On arriving at A's restaurant for a routine inspection, environmental health officers witnessed A killing a rat on the premises. Under the sink, very near food being prepared for consumption, there was a drain open to the sewers that had numerous rat droppings on it. The drain had no cover except for a light alloy lid that was wholly insufficient to contain contamination from the sewers. There was a rat's nest found on the premises and rat urine found near work surfaces. The offender, A, stated that he was unaware of the appropriate hygiene procedures that he was meant to apply and agreed to attend a free training course.

Culpability: *The standards in this case are so clearly unacceptable the court may consider this to be a case of "deliberate" culpability; however, on the basis that this was A's first contact with the authorities and that he had not received any specific training or advice, the court may overall consider this to be a case where A was wilfully blind to the risks, in other words a case of "reckless" culpability.*

Harm: *Although there is no proven adverse effect on human health arising from A's actions, this is a case where hygiene standards are particularly poor. Given the presence of open sewers and the rat infestation, the court may conclude there was a "high risk" of an adverse health effect and find this to be a **category 2 harm** case.*

Case 4B

The offender, B, is an individual who ran an illegal meat business from his double garage, which was used as a meat cutting room complete with the relevant machinery, raw meats and meat products. B sold sausages, burgers, lamb, pork and venison by delivering it to private homes. He had not registered his food business and attempted to avoid bringing the nature of his business to light by only advertising by word of mouth. Inspectors visited B's garage after a tip off. They found no sinks or hot water in the garage and evidence of poor hygiene standards such as a mouldy section of lamb hanging and mouldy pork joints in the fridge. There was evidence of rodent activity and the place was generally dirty. There was also no record to show where the meat had come from.

Culpability: *B's efforts to evade the scrutiny of authorities suggest that this was an intentional breach of, or flagrant disregard, for the law. This would be a case of "deliberate" culpability.*

Harm: *in terms of risks to human health, there is little evidence to suggest that the risks to human health posed were "high" despite the poor hygiene standards in the garage. However, B's activities have undermined the regulator's ability to ensure that safe meat products were being sold to the public and undercut nearby legitimate operators by running a cheap, illegal operation. Furthermore, inspectors were unable to trace the origin of the meat, inhibiting their ability to investigate whether there was a bigger issue in play. While the threat to human health in this scenario is relatively low, B's activities have created other harms to the overall regime and consumer protection. Overall, this is likely to be a **category 2 harm** case.*

Case 4C

The offender, C, is an organisation that runs two small pizza restaurants. Environmental health officers visited one of C's restaurants in September last year and found the kitchen to be in an unsatisfactory state with bins uncovered, dirty cleaning materials and surfaces and no grease filters on the ventilation system. Training records revealed that some food handlers had not undertaken the required training. Officers provided advice to C's management on matters that needed to be remedied.

A further visit was made in December last year when inspectors found mouse droppings, damaged equipment and a risk of contamination. There was no proper paperwork or records being kept. An improvement notice was served and further advice to management provided by officers. On two subsequent visits, some improvements were made.

However, on visiting the premises again in May this year, inspectors found deterioration in cleanliness, including mouse droppings, a risk of cross contamination between cooked food and raw food, no hot water for washing hands and no clean aprons available for food handling staff to wear.

Culpability: *The offender has had five visits from environmental health officers and the management has been provided with advice on the required standards. Management, and therefore the organisation, continued to intentionally breach or flagrantly disregard this advice over a period of time. The court is likely to consider this to be a case of “**very high**” culpability.*

Harm: *While the standards are poor, there is no evidence that food has been contaminated or come into contact with harmful substances. Overall a court may not consider this to be a case where there was a “high risk” of an adverse effect on human health, but a “medium or low risk”, meaning that this would be a **category 3 harm** case.*

Case 4D

The offender is a national supermarket chain. A batch of a microwave chicken dish was recalled because it was labelled as fully cooked but was partly raw. However, six weeks after the recall a customer bought a dish from the faulty batch in a local branch of the store. The customer suffered acute food poisoning, which resulted in her admittance to hospital suffering sickness and dehydration. An investigation revealed that the store manager had failed to properly oversee the total withdrawal of the product and had also failed to note the steps taken in a food safety compliance folder. The area manager had failed to check that folder on his visits. Had he done so, he might have discovered that the recall process had not been completed.

Culpability: *There are clear failures at several levels of the offender's organisation to comply with what was required of them; however, measures were in place to ensure adherence to legal requirements and there is no evidence of wider non-compliance or serious systemic failures within the organisation. Overall, the court may consider this to be a case of “**medium**” culpability.*

Harm: *The offence caused an acute adverse effect on the victim's health. This is likely to be a case of **Category 1 harm**.*

Step two

Step two for individuals and organisations is considered separately below, as different considerations apply for each set of offenders.

Individuals

The majority of offenders prosecuted for food offences are prosecuted as individuals. In 2013, approximately 220 individual offenders were sentenced for food safety and hygiene offences in comparison to approximately 60 organisations. For offences under Regulation 19(1) of the Food Safety and Hygiene (England) Regulations 2013 and Regulation 17(1) of the Food Hygiene (Wales) regulations 2006, on summary conviction magistrates only have the power to impose a fine, of up to £5,000,³⁰ on offenders. For offences under Regulation 4 of the General Food Regulations 2004, magistrates may impose a fine of up to £5,000 or a custodial sentence of a term not exceeding six months. In the specific case of regulation 4(b), the limit on the fine magistrates may impose is £20,000. For all offences, when a case is tried on indictment – that is, in the Crown Court – the court has the power to impose a fine of any amount or up to a 2 year custodial sentence.

The Council undertook a review of current sentencing practice to inform its proposals for starting points and ranges for individuals. However, there were data limitations to the review. First, nearly all cases involving food offences are heard in magistrates' courts, where transcripts of sentencing hearings are not available. Therefore, in reviewing cases, the Council was usually reliant on press reports. These reports lacked detail and could be biased towards cases with certain features; for example, more serious cases or those attracting media interest for other reasons. Second, many of the cases involved fines and there was insufficient detail to be able to link the fine to the fine bands defined in the Magistrates' Court Sentencing Guidelines, as these are based on the offender's relevant weekly income. Given these data limitations, the Council was cautious of drawing any firm conclusions.

The Council noted in the review that fines were the most common sentence, which is unsurprising given that for most of the offences this is the only penalty available in magistrates' courts. Custodial sentences were very rare, and were usually suspended. The Council found some inconsistency between the few cases that were committed to the Crown Court because magistrates considered them to be beyond their sentencing powers and cases that were retained.

The Council has taken a principled approach to identifying starting points and ranges, which has been informed and tested against their review of current sentencing practice and statistical information. The proposals are based on the following principles.

- **Venue.** The vast majority of cases are currently sentenced in magistrates' courts (or within their powers). The Council considers this to be appropriate and concluded that the majority of cases should have a starting point within magistrates' powers to reflect this.
- **Appropriateness of fines as sentences as opposed to community orders.** The Council has noted that food safety and hygiene offences are often committed for economic gain as the offender is avoiding the costs of compliance. In view of this, the Council considers that a fine will usually be the more appropriate disposal as opposed to a community order as it removes the economic incentive of non-compliance. This also appears to be a reflection of current sentencing practice. In 2013, 89 per cent of all adult individuals sentenced for food safety and hygiene offences received a fine.

³⁰ When s.85 LASPO Act 2012 is commenced, the monetary limit on the fine that magistrates can impose will be unlimited. See discussion on page 6

- **Custody threshold.** The Council considered that only the most serious case in the food offences guideline – a deliberate, category 1 offence – should cross the custody threshold. The Council proposes a starting point of 9 months’ custody for this offence category. However, the Council considered a very small number of cases where suspended sentence orders were imposed on offenders for offences it had categorised as being in a lower offence category than deliberate/harm category 1. The Council has therefore included custody within the range for deliberate/harm category 2 and 3 offences and reckless/harm category 1 and 2 offences so that courts have a custodial option in a case with many aggravating features.
- **Equivalence.** In proposing starting points and ranges in all guidelines, the Council has regard to sentences across offences to ensure starting points and ranges are fair and proportionate. In this case, the Council had particular regard to its proposals for health and safety offences, which similarly may result in human harm. As explored above, the harm scheme for food safety and hygiene offences stops short of the top levels of harm that may theoretically occur in this context, because they are so unusual. Such levels of harm are more commonly encountered in health and safety offences and the harm scheme extends to these levels. Given the different focuses of the harm scheme, but the similar levels of culpability, the Council is proposing starting points it considers to be fair and proportionate when viewed in light of their proposals for health and safety offences and against other guidelines more widely.

As observed above, Regulation 4 of the General Food Regulations 2004, which is only in force in Wales, has a different maximum sentence on summary conviction to the rest of the offences covered by the guideline: magistrates in Wales may impose a fine of up to £5,000, except for the regulation 4(b) where the fine may be up to £20,000, or a custodial sentence not exceeding six months. The same Community provisions covered by this offence in Wales form part of Regulation 19(1) of the Food Safety and Hygiene (England) Regulations 2014 in England, where the statutory maximum on conviction is a fine of £5,000. All these offences have the same statutory maximum when sentenced in the Crown Court.

Applying the principles above, the Council has concluded that the same starting points should apply to these offences in spite of the different powers magistrates in Wales and England have in relation to these few offences. As such, the main effect of the different legislative provisions will relate to whether magistrates need to commit the case for sentence should they consider that it is appropriate to move up the range and impose a custodial sentence. In England, it will be necessary to send the case to the Crown Court but, in Wales, magistrates’ powers to impose a six month custodial sentence may be adequate and there will be no need to do so. Ultimately, the statutory maximum for all offences is the same should the case be committed to the Crown Court.

The Council is proposing the following starting points and ranges.

	Starting point	Category range
Deliberate		
Harm category 1	9 months' custody	Band F fine – 18 months' custody
Harm category 2	Band F fine	Band E fine – 9 months' custody
Harm category 3	Band E fine	Band D fine – 26 weeks' custody
Reckless		
Harm category 1	Band F fine	Band E fine – 9 months' custody
Harm category 2	Band E fine	Band D fine – 26 weeks' custody
Harm category 3	Band D fine	Band C fine – Band E fine
Negligent		
Harm category 1	Band E fine	Band D fine – Band F fine
Harm category 2	Band D fine	Band C fine – Band E fine
Harm category 3	Band C fine	Band B fine – Band C fine
Low culpability		
Harm category 1	Band C fine	Band B fine – Band C fine
Harm category 2	Band B fine	Band A fine – Band B fine
Harm category 3	Band A fine	Conditional discharge – Band A fine

For the most part, the Council has adopted the fine bands used in the Magistrates' Court Sentencing Guidelines since these will be familiar to magistrates. In addition, to reflect the gravity of the more serious offence categories, the Council has defined a higher fine band: Band F, which has a starting point of 600 per cent of an offender's weekly income and a range of 500 per cent – 700 per cent. This fine band also enables the Council to maintain a read across to its proposed fines for micro organisations: as noted above, offenders running small businesses could be prosecuted either as individuals or organisations although the circumstances in which a prosecution is brought may be similar. The fine bands table is included as an annex at the back of the guideline.³¹

Case 4A

Case 4A above involved very poor standards in A's restaurant, including evidence of a rat infestation and an open sewer under the sink. The offender was charged with six different offences, all relating to this incident, under the relevant regulations. The suggested offence categorisation for 4 offender's behaviour was reckless/harm category 2, which would have a starting point of a Band E fine and a range of a Band D fine to 26 weeks' custody. A Band E fine is defined as 400 per cent of relevant weekly income and a range of 300 per cent – 500 per cent. This starting point would attach to each count the offender was charged with; however, the court would consider guidance on Totality at Step Eight in order to finalise a total fine.

Case 4B

In this case, B ran an illegal meat production business from his garage. This offence was categorised as deliberate/harm category 2, which has a starting point of a Band F fine and a range of a Band E fine to 9 months' custody. A Band F fine is defined as 600 per cent of the offender's relevant weekly income and a range of 500 per cent – 700 per cent.

³¹ See Annex D

Q37

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

Q38

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?

Organisations

Following guidance on obtaining financial information,³² step two sets out four tables, linked to the turnover of the offending organisation, with starting points and ranges for each offence category.

In line with the overarching aims for setting fines in this area, discussed on pages 9 to 10, the Council has sought to propose starting points and ranges for organisations that:

- **reflect the seriousness of the offence** (including the extent to which the offender **fell below the required standard**) and take into account the **financial circumstances** of the offender;
- meet, in a fair and proportionate way, the aims of **punishment** and **deterrence** and **removal of gain**; and,
- are **sufficiently substantial to have a real economic impact** which will bring home to both management and shareholders **the need to operate within the law**.

The Council considered a sample of recent cases to assist it in identifying starting points and ranges. However, data available for considering sentences in this area was particularly sparse as fewer organisations are sentenced for food offences than individuals – approximately 21 per cent of cases sentenced in 2013 involved offenders that were organisations. As such, the Council was unable to build up data for each offence category and size of offender. The Council obtained information from Companies House on the offender's means where possible, but many of the cases involved small organisations that are exempt from the requirement to file accounts at Companies House. The Council used Court of Appeal judgments, Crown Court transcripts and press reports of cases in magistrates' courts. The limitations explored above (page 58) regarding the use of media reports similarly applied to this review.

Given the limited data available, the Council used a principled basis in order to identify fines. The Council used the following principles as a basis for proposing fines.

- **In many cases, culpability should be the driver of the penalty.** In cases of low culpability, there is less need to send a message home to the organisation of a need to change practices in order to operate within the law, as the organisation did not fall far below the relevant standard. Consequently, the Council has made a noticeable reduction in starting points for low culpability cases.
- **Fines must be proportionate when compared to analogous offences.** When considering penalties for category 1 harm, which is defined as a serious adverse effect on human health because it is acute and/or chronic and/or widespread, the Council had regard to sentences imposed for other offences causing human harm. In particular, the Council considered its proposed penalties for health and safety offences and the findings of its sentencing review in that context. Whilst harm is very differently defined in each draft guideline, it is clear that the highest level of harm in the food safety and hygiene offences guideline sits at a lower level than the highest levels of harm covered by the health and safety guideline. The Council concluded that its definition of category 1 harm in the food safety and hygiene guideline had a broad equivalence to its definition of category 3 harm in the health and safety guideline and has proposed penalties in accordance with that conclusion.

³² See page 13

- **There must be an appropriate relationship between starting points and ranges for individuals and starting points and ranges for micro organisations.** Given the particularly high potential in this area for very similar offenders to be charged in different capacities – that is, either as a very small organisation or as an individual running a very small organisation – the Council sought to identify penalties for micro organisations that were in proportion with its proposed penalties for individuals. Given that more data was available for offenders prosecuted as individuals running small businesses than for offenders that were charged as organisations, the Council was able to use this information to assist in defining penalties for micro organisations.

The Council has based starting points and ranges on these principles and refined them through applying the proposals to various factual scenarios to ensure that they are fair, proportionate and meet the aims of sentencing in this area.

In relation to fines on smaller organisations, in proposing the following starting points and ranges the Council seeks to improve the consistency in sentencing these cases. The Council anticipates that in some cases this may result in higher sentences, but it does not otherwise intend to alter current sentencing practice. Similarly, the Council does not intend that its proposals should result in an increase in fines on larger organisations committing lower culpability offences, although it does seek to improve consistency in the approach to sentencing such cases. However, whilst these cases are unusual, the Council anticipates that its proposals will result in higher starting points for more serious offences committed by larger organisations than might otherwise have been anticipated.

The Council is consulting on the starting points and ranges set out in the tables below.

Micro Turnover or equivalent: not more than £2 million			
	Starting point	Category range	
Very high culpability			
Harm category 1	£60,000	£25,000 –	£120,000
Harm category 2	£25,000	£10,000 –	£50,000
Harm category 3	£10,000	£5,000 –	£18,000
High culpability			
Harm category 1	£25,000	£10,000 –	£50,000
Harm category 2	£12,000	£4,000 –	£22,000
Harm category 3	£4,000	£2,000 –	£9,000
Medium culpability			
Harm category 1	£10,000	£3,000 –	£18,000
Harm category 2	£4,000	£1,400 –	£8,000
Harm category 3	£1,400	£700 –	£3,000
Low culpability			
Harm category 1	£1,200	£500 –	£3,000
Harm category 2	£500	£200 –	£1,400
Harm category 3	£200	£100 –	£700

Case 4C

The offending organisation in this case, C, operated two small pizza restaurants and consistently failed to meet the required standards and comply with the advice provided by the authorities. C was charged with 8 counts under the relevant regulations. C's turnover is £700,000 a year.

*C's offences were considered to constitute very high culpability/category 3 harm. As a micro organisation, the starting point for this offence would be £10,000 with a range of £5,000 – £18,000. The court would then consider the principles at **step three** relating to C's financial circumstances and any wider impacts of the fine, and guidance on totality at **step eight**, in order to identify a total fine that was fair and proportionate.*

Q39

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

Small

Turnover or equivalent: between £2 million and £10 million

	Starting point	Category range
Very high culpability		
Harm category 1	£120,000	£50,000 – £450,000
Harm category 2	£50,000	£18,000 – £200,000
Harm category 3	£18,000	£9,000 – £80,000
High culpability		
Harm category 1	£50,000	£22,000 – £200,000
Harm category 2	£24,000	£8,000 – £90,000
Harm category 3	£9,000	£4,000 – £35,000
Medium culpability		
Harm category 1	£18,000	£7,000 – £70,000
Harm category 2	£8,000	£3,000 – £35,000
Harm category 3	£3,000	£1,500 – £12,000
Low culpability		
Harm category 1	£3,000	£1,400 – £12,000
Harm category 2	£1,400	£700 – £7,000
Harm category 3	£700	£300 – £3,000

Q40

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

Medium Turnover or equivalent: between £10 million and £50 million		
	Starting point	Category range
Very high culpability		
Harm category 1	£450,000	£200,000 – £1,200,000
Harm category 2	£200,000	£80,000 – £500,000
Harm category 3	£80,000	£40,000 – £200,000
High culpability		
Harm category 1	£200,000	£90,000 – £500,000
Harm category 2	£90,000	£35,000 – £220,000
Harm category 3	£35,000	£18,000 – £90,000
Medium culpability		
Harm category 1	£80,000	£35,000 – £190,000
Harm category 2	£35,000	£14,000 – £90,000
Harm category 3	£14,000	£7,000 – £35,000
Low culpability		
Harm category 1	£12,000	£7,000 – £35,000
Harm category 2	£7,000	£3,500 – £18,000
Harm category 3	£3,500	£2,000 – £10,000

Large Turnover or equivalent: £50 million and over		
	Starting point	Category range
Very high culpability		
Harm category 1	£1,200,000	£500,000 – £3,000,000
Harm category 2	£500,000	£200,000 – £1,400,000
Harm category 3	£200,000	£90,000 – £500,000
High culpability		
Harm category 1	£500,000	£200,000 – £1,400,000
Harm category 2	£230,000	£90,000 – £600,000
Harm category 3	£90,000	£50,000 – £240,000
Medium culpability		
Harm category 1	£200,000	£80,000 – £500,000
Harm category 2	£90,000	£35,000 – £220,000
Harm category 3	£35,000	£20,000 – £100,000
Low culpability		
Harm category 1	£35,000	£18,000 – £90,000
Harm category 2	£18,000	£9,000 – £50,000
Harm category 3	£10,000	£6,000 – £25,000

Case 4D

This case involved the supermarket chain that had failed to fully recall a faulty batch of microwave meals, resulting in serious food poisoning for one customer. The supermarket chain is a large national supermarket with a turnover of £50 billion a year.

*This case was categorised as one of medium culpability/category 1 harm. The starting point for a large organisation in this offence category is £200,000 and the range is £80,000 – £500,000. Given that this organisation is very large, the court is likely to consider starting at the top of the range or beyond in order to achieve a proportionate sentence. The court will use the principles in **step three** to finalise an appropriate fine.*

Variation of case 4D

If the supermarket chain in case D was instead a local chain of shops with a turnover of £20 million, the court would consider the table for medium organisations. A medium/category 1 offence committed by a medium sized organisation carries a starting point of £80,000 and a range of £35,000 – £190,000.

Q41

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

Q43

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

Q42

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.”

Aggravating and mitigating factors

Having identified a starting point the court is required to consider aggravating and mitigating factors that may warrant movement within the range. These factors relate to the wider circumstances of the offence and also include factors relating to the offender. These lists are not intended to be exhaustive and any other factors present in the case should be taken into account by the court at this step.

The Council's intention is to highlight factors which are likely to be relatively common in order to ensure that they are considered equally by different courts. The Council proposes the following aggravating and mitigating factors: the top table includes factors common to both organisations and individuals and the lower table factors that are specific to individuals.

Aggravating and mitigating factors for individuals *and* organisations

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
<p><i>Statutory aggravating factor:</i></p> <p>Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction</p> <p><i>Other aggravating factors include:</i></p> <p>Motivated by financial gain</p> <p>Deliberate concealment of illegal nature of activity</p> <p>Established evidence of wider/community impact</p> <p>Breach of any court order</p> <p>Obstruction of justice</p> <p>Poor food safety or hygiene record</p> <p>Refusal of free advice or training</p>	<p>No previous convictions or no relevant/recent convictions</p> <p>Evidence of steps taken to remedy problem</p> <p>Business closed voluntarily on discovery of problems in order to take remedial steps</p> <p>High level of co-operation with the investigation, beyond that which will always be expected</p> <p>Good food safety/hygiene record</p> <p>Effective food safety/hygiene procedures in place</p> <p>Self-reporting, co-operation and acceptance of responsibility</p>

Additional factors for individuals

The table below contains aggravating and mitigating factors that are specific to individuals, which are included in the guideline for individuals in addition to the factors in the table above. Although it would be very unusual for an offender to commit a food offence whilst on bail, this is a statutory aggravating factor and therefore the Council considers it appropriate to include it in the guideline.

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
<p><i>Statutory aggravating factor:</i></p> <p>Offence committed whilst on bail</p>	<p>Good character and/or exemplary conduct</p> <p>Mental disorder or learning disability, where linked to the commission of the offence</p> <p>Serious medical conditions requiring urgent, intensive or long-term treatment</p> <p>Age and/or lack of maturity where it affects the responsibility of the offender</p> <p>Sole or primary carer for dependent relatives</p>

Q44

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

Steps three and four

The approach taken at steps three and four of the draft guideline for organisations and step three of the guideline for individuals is common to all of the draft guidelines consulted on this paper and is considered on pages 12 to 13 and 16 to 17.

The following case study illustrates how steps three and four may be used by the courts in food safety and hygiene cases.

Case 4C

The offender, C, with a turnover of £700,000 a year, employs five members of permanent staff and a number of part time assistants. C has produced evidence demonstrating that it will have to make two members of staff redundant should significant fines be imposed. Although the costs of compliance were difficult to quantify in this case, the prosecution has adduced evidence that fixing the hand washing facilities in the kitchen would have cost £1,500 and proper pest control over the relevant period would have cost £500.

*At step two, a starting point of £10,000 was identified. The court will consider the aims of sentencing, set out at **step three**. On the basis that the offender – with a turnover of £700,000 – sits at the lower end of the definition for micro organisations, the court may consider a small reduction in the starting point. The court will add the quantifiable economic benefit of £2,000 to this sum. The court may be considering a fine in the region of £11,000 at this stage. At **step four** the court will consider the wider impacts of the fine, including on the employment of staff. The court is likely to consider payment in instalments to minimise the likelihood of staff redundancies.*

Compensation and ancillary orders

In step seven of the guideline for organisations and step six of the guideline for individuals, guidance is provided for the court on available ancillary orders. As these may be less familiar to sentencers, fuller guidance is provided than in other Sentencing Council guidelines.

The specific order that sentencers will wish to consider in food safety and hygiene cases is a Hygiene Prohibition Order. This is an important power that enables the court to prohibit the offender from running a food business, or prohibit certain premises from being used for the purposes of running a food business. The guideline provides an outline of the guidance from the Court of Appeal regarding the making of these orders.³³

In addition, the guideline for individuals includes guidance on ordering the disqualification of a director. Both guidelines also contain brief guidance at this step on compensation orders.

Q45

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

³³ R v Crestdane Limited [2012] EWCA Crim 958

Totality

As alluded to in the illustrative case studies above, totality is a particularly pertinent consideration in food safety and hygiene offences. Offenders are often charged with multiple counts, detailing each specific requirement under the regulations that had been breached, for the same offending incident or set of incidents. In its review of cases, the Council noted that the approach to the number of counts brought by local authorities appeared to vary, but in some cases a single offender was charged with as many as 18 counts.

Given the preponderance of totality issues in these cases, the Council considers it appropriate to highlight specific guidance on fining offenders from its definitive guideline on Totality and Offences Taken into Consideration, to ensure that courts are imposing total penalties that are fair and proportionate to the offending behaviour. The Council proposes to include the following guidance in the step prompting the court to consider the totality principle, which is step eight in the guideline for organisations and step seven in the guideline for individuals.

STEP EIGHT

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

Where the offender is convicted of more than one offence where a fine is appropriate, the court should consider the following guidance from the definitive guideline on Totality.

“The total fine is inevitably cumulative.

The court should determine the fine for each individual offence based on the seriousness of the offence³⁴ and taking into account the circumstances of the case including the financial circumstances of the offender so far as they are known, or appear, to the court.³⁵

The court should add up the fines for each offence and consider if they are just and proportionate.

If the aggregate total is not just and proportionate the court should consider how to reach a just and proportionate fine. There are a number of ways in which this can be achieved.

³⁴ s.164(2) CJA 2003

³⁵ s.164(3) CJA 2003

For example:

- where an offender is to be fined for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose on the most serious offence a fine which reflects the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences.
- where an offender is to be fined for two or more offences that arose out of different incidents, it will often be appropriate to impose a separate fine for each of the offences. The court should add up the fines for each offence and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the court should consider whether all of the fines can be proportionately reduced. Separate fines should then be passed.

Where separate fines are passed, the court must be careful to ensure that there is no double counting.³⁶

Where compensation is being ordered, that will need to be attributed to the relevant offence as will any necessary ancillary orders.”

Case 4C

In this case, the offender was charged with eight offences under the regulations. After step four, the court is likely to be considering a fine of around £11,000. Having made a reduction for an early guilty plea at **step six**, the starting point for each offence will be around £7,400. The court should have regard to the guidance on totality at **step eight** and in particular on the appropriate approach to fining offenders for multiple offences arising out of the same incident. The court is likely to consider that the figure of £7,400 is appropriate for the totality of this offending.

Q46

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

³⁶ R v Pounton [2008] EWCA Crim 513

Section five: Victims and equality and diversity

Victims

When preparing guidelines, the Council must have regard to the impact of sentencing decisions on victims.³⁷ The Council has sought to have full regard to the impact on victims of the health and safety, corporate manslaughter and food offences covered by the draft guidelines. These considerations underlie the Council's proposals at each step of the guidelines, in particular at steps one to three of guidelines for individuals and one to four of guidelines for organisations.

The Council would welcome views on whether it has dealt appropriately with the impact on victims caused by these offences, in particular from victims themselves or their families, and organisations that represent victims.

Q47

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

Equality and Diversity

Alongside this consultation document and the draft guideline the Council has published an equality impact assessment. No equality matters have been identified to date in relation to the development of the guideline, but the Council is keen to hear through the consultation of any matters that should be considered.

Q48

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

Further comments

Q49

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

³⁷ s.120(11)(c) Coroners and Justice Act 2009

Annex A: Summary of consultation questions

Section one: Aims and overarching issues

- Q1 Do you agree with the overarching principles for setting fines for these offences, set out in step three of the draft guidelines?
- Q2 Do you agree that the proposed structure of the guidelines for organisations provides the right balance of guidance and flexibility for sentencers?
- Q3 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?
- Q4 Do you agree that quantifiable economic benefit derived from the offence should be considered in calculating the fine?
- Q5 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?
- Q6 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?
- Q7 Do you agree that the structure of the guidelines for individuals is appropriate?
- Q8 Do you agree that the correct factors relating to finalising a fine on an individual are included in step three?
- Q9 Do you agree with the decision not to include separate and specific steps for compensation and confiscation in the guidelines?

Section two: Guidelines for health and safety offences

- Q10** Do you agree with the proposed scope of the health and safety guidelines for organisations and individuals?
- Q11** 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.
- Q12** Do you agree with the *overall* approach proposed for assessing harm for health and safety offences?
- Q13** Do you agree that the proposed factors for assessing risk of harm in the health and safety guidelines are clear and appropriately gradated? If not, what changes would you make?
- Q14** 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.
- Q15** Do you agree with the proposed starting points and ranges for micro organisations in the health and safety guideline?
- Q16** Do you agree with the proposed starting points and ranges for small organisations in the health and safety guideline?
- Q17** Do you agree with the proposed starting points and ranges for medium organisations in the health and safety guideline?
- Q18** 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”.
- Q19** What impact do you think the proposals will have on current sentencing practice for organisations that have committed health and safety offences?
- Q20** Do you agree with the proposed use of custodial starting points for individuals in the health and safety guideline?
- Q21** Do you consider the guidance regarding the use of community orders and fines in the health and safety guideline to be appropriate and sufficient?

Q22 Do you agree with the remainder of the proposed starting points and ranges for individuals in the health and safety guideline?

Q23 What effect do you think the draft guideline will have on current sentencing practice relating to individuals who commit health and safety offences?

Q24 Do you agree with the proposed aggravating and mitigating factors in the health and safety guideline?

Q25 Is the guidance provided on ancillary orders and compensation in the health and safety guidelines for organisations and individuals appropriate and sufficient?

Section three: Guideline for corporate manslaughter

Q26 Do you agree with the overall approach to assessing offence seriousness at step one of the corporate manslaughter guideline?

Q27 Do you agree with the proposed questions relating to culpability and harm in step one of the corporate manslaughter guideline?

Q28 Do you agree with the proposed starting points and ranges for micro organisations in the corporate manslaughter guideline?

Q29 Do you agree with the proposed starting points and ranges for small organisations in the corporate manslaughter guideline?

Q30 Do you agree with the proposed starting points and ranges for medium organisations in the corporate manslaughter guideline?

Q31 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”.

Q32 Do you agree with the proposed aggravating and mitigating factors for corporate manslaughter?

Q33 Do you agree that the guidance on ancillary orders and compensation in the corporate manslaughter guideline is appropriate and sufficient?

Section four: Guideline for food safety and hygiene offences

- Q34 Do you agree with the proposed scope of the food safety and hygiene offences guideline?
- Q35 Do you agree with the proposed culpability categories for organisations and for individuals in the draft food safety and hygiene offences guideline?
- Q36 Do you agree with the proposed harm factors in the draft guideline for food safety and hygiene offences?
- Q37 Do you agree with the proposed starting points and ranges for individuals in the food safety and hygiene guidelines?
- Q38 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?
- Q39 Do you agree with the proposed starting points and ranges for micro organisations in the food safety and hygiene offences guideline?
- Q40 Do you agree with the proposed starting points and ranges for small organisations in the food safety and hygiene offences guideline?
- Q41 Do you agree with the proposed starting points and ranges for medium organisations in the food safety and hygiene offences guideline?
- Q42 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.”
- Q43 What effect do you think the proposals will have on current sentencing practice for organisations convicted of food safety and hygiene offences?
- Q44 Do you agree with the proposed aggravating and mitigating factors in the food safety and hygiene offences guidelines?
- Q45 Is the guidance provided on ancillary orders and compensation in the guidelines for food safety and hygiene offences appropriate and sufficient?

Q46

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

Section five: Victims and equality and diversity

Q47

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

Q48

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

Q49

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

Annex B:

Background to guidelines

Statutory requirements

In producing these draft guidelines, the Council has had regard to a number of statutory requirements.

The purposes of sentencing are stated in section 142 of the Criminal Justice Act 2003:

- the punishment of offenders;
- the reduction of crime (including its reduction by deterrence);
- the reform and rehabilitation of offenders;
- the protection of the public; and,
- the making of reparation by offenders to persons affected by their offences.

The Sentencing Council has also had regard to the statutory duties in the Coroners and Justice Act 2009 which set out requirements for sentencing guidelines as follows:

- guidelines may be general in nature or limited to a particular offence;
- the Council must publish them as draft guidelines;
- the Council must consult the following persons about draft guidelines: the Lord Chancellor, such persons as the Lord Chancellor may direct, the Justice Select Committee of the House of Commons, such other persons as the Council considers appropriate;
- after making appropriate amendments, the Council must issue definitive guidelines;
- the Council may review the guidelines and may revise them;³⁸
- the Council must publish a resource assessment in respect of the guidelines;³⁹ and,
- the Council must monitor the operation and effect of its sentencing guidelines.⁴⁰

Under the previous bodies (the Sentencing Guidelines Council and the Sentencing Advisory Panel), courts had to *'have regard to any guidelines which are relevant to the offender's case'*⁴¹ and give reasons if a sentence fell outside of the range.⁴² Section 125(a) of the Coroners and Justice Act 2009 states that, *'every court must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender's case'*. Therefore, courts are required to impose a sentence consistent with the guidelines, unless contrary to the interests of justice to do so. Therefore, the Sentencing Council is keen to ensure that the guidelines are as accessible as possible for sentencers.

³⁸ s.120 Coroners and Justice Act 2009

³⁹ s.127(2) *ibid*

⁴⁰ s.128(1) *ibid*

⁴¹ s.172(1) Criminal Justice Act 2003

⁴² s.174(2) *ibid*

When preparing sentencing guidelines, the Council must have regard to the following matters:

- the sentences imposed by courts in England and Wales for offences;
- the need to promote consistency in sentencing;
- the impact of sentencing decisions on victims of offences;
- the need to promote public confidence in the criminal justice system;
- the cost of different sentences and their relative effectiveness in preventing re-offending; and,
- the results of monitoring the operation and effect of its sentencing guidelines.⁴³

When publishing any draft guidelines, the Council must publish a resource assessment of the likely effect of the guidelines on:

- the resources required for the provision of prison places;
- the resources required for probation provision; and
- the resources required for the provision of youth justice services.⁴⁴

In order to achieve these requirements, the Council has considered case law on the offences included within the guidelines, where it is available, evidence on current sentencing practice and drawn on members' own experience of sentencing practice. The intention is for the decision making process in the proposed guideline to provide a clear structure, not only for sentencers, but to provide more clarity on sentencing for the victims and the public, so that they too can have a better understanding of how a sentence has been reached.

The Council has had regard to these duties throughout the preparation of this draft guideline. In developing an understanding of the cost and effectiveness of different sentences, the Council has considered the available information and evidence and these are contained in the resource assessment which accompanies this consultation paper.

⁴³ s.120(11) Coroners and Justice Act 2009

⁴⁴ s.127(3) *ibid*

Annex C: Draft guidelines

List of guidelines

Health and safety – Organisations	79
Health and safety – Individuals	89
Corporate manslaughter	97
Food hygiene and food safety – Organisations	105
Food hygiene and food safety – Individuals	115

Organisations

Breach of duty of employer towards their employees and non-employees

Health and Safety at Work Act 1974 (section 33(1)(a) for breaches of sections 2 and 3)

Breach of Health and Safety regulations

Health and Safety at Work Act 1974 (section 33(1)(c))

Triable either way

Maximum: when tried on indictment: unlimited fine
when tried summarily: £20,000 fine

STEP ONE

Determining the offence category

The court should determine the offence category using the culpability and harm factors in the tables below.

Culpability

Where there are factors present in the case that fall in different categories of culpability, the court should balance these factors to reach a fair assessment of the offender's culpability.

Very high

Deliberate breach of or flagrant disregard for the law

High

Offender fell far short of the appropriate standard; for example, by

- failing to put in place measures that are recognised standards in the industry
- ignoring concerns raised by employees or others
- failing to make appropriate changes following prior incident(s) exposing risks to health and safety
- allowing breaches to subsist over a long period of time

Evidence of serious, systemic failings within the organisation to address risks to health and safety

Medium

Offender fell short of the appropriate standard in a manner that falls between descriptions in 'high' and 'low' culpability categories

Level of offender's systemic failure falls between descriptions in 'high' and 'low' culpability categories

Low

Offender did not fall far short of appropriate standard; for example, because

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no prior event or warning indicating a risk to health and safety

Evidence that failings were minor and not systemic

See page 81.

Harm

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

First, the court should identify an initial harm category by assessing **the risk of harm created by the offence**. There are two dimensions to risk: 1) the seriousness of the harm risked (A, B or C) by the offender's breach and 2) the likelihood of that harm arising (high, medium or remote).

		Seriousness of harm risked		
		Level A	Level B	Level C
Likelihood of harm		Level A <ul style="list-style-type: none"> Death Physical or mental impairment resulting in lifelong dependency on third party care for basic needs Health condition resulting in significantly reduced life expectancy 	Level B <ul style="list-style-type: none"> Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work A progressive, permanent or irreversible condition 	Level C <ul style="list-style-type: none"> All other cases not falling within Level A or Level B
	High	Harm category 1	Harm category 2	Harm category 3
	Medium	Harm category 2	Harm category 3	Harm category 4
	Remote	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

Second, the court should consider the following two factors.

1. **Whether the offence exposed a significant number of people to the risk of harm at one time.**

If a significant number of workers or members of the public was exposed at one time to the risk created by the offender's breach, the court must consider either substantially moving up within the category range or moving up a harm category.

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

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

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

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

STEP TWO**Starting point and category range**

Having determined the offence category, the court should identify the relevant table for the offender on pages 83 to 84. There are tables for different sized organisations.

At step two, the court will be required to focus on the organisation's turnover or equivalent to reach a starting point for a fine within the category range. The court should then consider further adjustment within the category range for aggravating and mitigating features, set out on page 85.

Obtaining financial information

The offender is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case, which may include the inference that the offender can pay any fine.

Normally, only information relating to the organisation before the court will be relevant, unless exceptionally it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account.

1. *For companies*: annual accounts. Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to file audited accounts at Companies House. **Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.**
2. *For partnerships*: annual accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. Limited liability partnerships (LLPs) may be required to file audited accounts with Companies House. **If adequate accounts are not produced on request, see paragraph 1.**
3. *For local authorities, fire authorities and similar public bodies*: the Annual Revenue Budget ("ARB") is the equivalent of turnover and the best indication of the size of the defendant organisation. It is unlikely to be necessary to analyse specific expenditure or reserves (where relevant) unless inappropriate expenditure is suggested.
4. *For health trusts*: the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via www.monitor-nhsft.gov.uk. Detailed analysis of expenditure or reserves is unlikely to be called for.
5. *For charities*: it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.

At step two, the court is required to focus on the organisation's annual turnover or equivalent to reach a starting point for a fine. At step three, the court may be required to refer to the other financial factors listed above to ensure that the proposed fine is proportionate.

Very large organisation

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.

Large Turnover or equivalent: £50 million and over		
	Starting point	Category range
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
High culpability		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
Medium culpability		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
Low culpability		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

Medium Turnover or equivalent: between £10 million and £50 million		
	Starting point	Category range
Very high culpability		
Harm category 1	£1,600,000	£1,000,000 – £4,000,000
Harm category 2	£800,000	£400,000 – £2,000,000
Harm category 3	£400,000	£180,000 – £1,000,000
Harm category 4	£190,000	£90,000 – £500,000
High culpability		
Harm category 1	£950,000	£600,000 – £2,500,000
Harm category 2	£450,000	£220,000 – £1,200,000
Harm category 3	£210,000	£100,000 – £550,000
Harm category 4	£100,000	£50,000 – £250,000
Medium culpability		
Harm category 1	£540,000	£300,000 – £1,300,000
Harm category 2	£240,000	£100,000 – £600,000
Harm category 3	£100,000	£50,000 – £300,000
Harm category 4	£50,000	£20,000 – £130,000
Low culpability		
Harm category 1	£130,000	£75,000 – £300,000
Harm category 2	£40,000	£14,000 – £100,000
Harm category 3	£14,000	£3,000 – £60,000
Harm category 4	£3,000	£1,000 – £10,000

Small Turnover or equivalent: between £2 million and £10 million			
	Starting point	Category range	
Very high culpability			
Harm category 1	£450,000	£300,000 –	£1,600,000
Harm category 2	£200,000	£100,000 –	£800,000
Harm category 3	£100,000	£50,000 –	£400,000
Harm category 4	£50,000	£20,000 –	£190,000
High culpability			
Harm category 1	£250,000	£170,000 –	£1,000,000
Harm category 2	£100,000	£50,000 –	£450,000
Harm category 3	£54,000	£25,000 –	£210,000
Harm category 4	£24,000	£12,000 –	£100,000
Medium culpability			
Harm category 1	£160,000	£100,000 –	£600,000
Harm category 2	£54,000	£25,000 –	£230,000
Harm category 3	£24,000	£12,000 –	£100,000
Harm category 4	£12,000	£4,000 –	£50,000
Low culpability			
Harm category 1	£45,000	£25,000 –	£130,000
Harm category 2	£9,000	£3,000 –	£40,000
Harm category 3	£3,000	£700 –	£14,000
Harm category 4	£700	£100 –	£5,000

Micro Turnover or equivalent: not more than £2 million			
	Starting point	Category range	
Very high culpability			
Harm category 1	£250,000	£150,000 –	£450,000
Harm category 2	£100,000	£50,000 –	£200,000
Harm category 3	£50,000	£25,000 –	£100,000
Harm category 4	£24,000	£12,000 –	£50,000
High culpability			
Harm category 1	£160,000	£100,000 –	£250,000
Harm category 2	£54,000	£30,000 –	£110,000
Harm category 3	£30,000	£12,000 –	£54,000
Harm category 4	£12,000	£5,000 –	£21,000
Medium culpability			
Harm category 1	£100,000	£60,000 –	£160,000
Harm category 2	£30,000	£14,000 –	£70,000
Harm category 3	£14,000	£6,000 –	£25,000
Harm category 4	£6,000	£2,000 –	£12,000
Low culpability			
Harm category 1	£30,000	£18,000 –	£60,000
Harm category 2	£5,000	£1,000 –	£20,000
Harm category 3	£1,200	£200 –	£7,000
Harm category 4	£200	£50 –	£2,000

The table below contains a **non-exhaustive** list of factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. **In particular, relevant recent convictions are likely to result in a substantial upward adjustment.** In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
<i>Statutory aggravating factor:</i>	No previous convictions or no relevant/recent convictions
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	Evidence of steps taken to remedy problem
<i>Other aggravating factors include:</i>	High level of co-operation with the investigation, beyond that which will always be expected
Cost-cutting at the expense of safety	Good health and safety record
Deliberate concealment of illegal nature of activity	Effective health and safety procedures in place
Breach of any court order	Self-reporting, co-operation and acceptance of responsibility
Obstruction of justice	
Poor health and safety record	
Falsification of documentation or licenses	
Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities	

See page 86.

STEPS THREE AND FOUR

The court should ‘step back’, review and, if necessary, adjust the initial fine based on turnover to **ensure that it fulfils the objectives of sentencing** for these offences. The court may adjust the fine upwards or downwards, including outside the range.

STEP THREE

Check whether the proposed fine based on turnover is proportionate to the means of the offender

General principles to follow in setting a fine

The court should finalise the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and the court to take into account the financial circumstances of the offender.

The level of fine should reflect the extent to which the offender fell below the required standard. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.

The fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation.**

Review of the fine based on turnover

The court should “step back”, review and, if necessary, adjust the initial fine reached at step two to **ensure that it fulfils the general principles** set out above. The court may adjust the fine upwards or downwards including outside of the range.

The court should examine the financial circumstances of the offender in the round to assess the economic realities of the organisation and the most efficacious way of giving effect to the purposes of sentencing.

In finalising the sentence, the court should have regard to the following factors.

- The profitability of an organisation will be relevant. If an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. If it has a large profit margin, upward adjustment may be needed.
- Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the fine arrived at in step two.
- Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

In considering the ability of the offending organisation to pay any financial penalty, the court can take into account the **power to allow time for payment or to order that the amount be paid in instalments**, if necessary over a number of years.

STEP FOUR**Consider other factors that may warrant adjustment of the proposed fine**

Where the fine will fall on public or charitable bodies, the fine should normally be substantially reduced if the offending organisation is able to demonstrate the proposed fine would have a significant impact on the provision of their services.

The court should consider any wider impacts of the fine within the organisation or on innocent third parties; such as (but not limited to):

- impact of fine on offender's ability to improve conditions in the organisation to comply with the law;
- impact of the fine on employment of staff, service users, customers and local economy (but not shareholders or directors).

STEP FIVE**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP SIX**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP SEVEN**Compensation and ancillary orders**

In all cases, the court must consider whether to make ancillary orders. These may include:

Remediation

Under section 42(1) of the Health and Safety at Work etc. Act 1974, the court may impose a remedial order in addition to or instead of imposing any punishment on the offender.

Forfeiture

Where the offence involves the acquisition or possession of an explosive article or substance, section 42(4) enables the court to order forfeiture of the explosive.

Compensation

Where the offence has resulted in loss or damage, the court must consider whether to make a compensation order. The assessment of compensation in cases involving death or serious injury will usually be complex and will ordinarily be covered by insurance. In the great majority of cases the court should conclude that compensation should be dealt with in the civil courts, and should say that no order is made for that reason.

If compensation is awarded, priority should be given to the payment of compensation over payment of any other financial penalty where the means of the offender are limited.

STEP EIGHT

Totality principle

If sentencing an offender for more than one offence, consider whether the total sentence is just and proportionate to the offending behaviour.

STEP NINE

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

Individuals

Breach of duty of employer towards their employees and non-employees

Breach of duty of self-employed to others

Breach of duty of employees at work

Health and Safety at Work Act 1974 (section 33(1)(a) for breaches of sections 2, 3 and 7)

Breach of Health and Safety regulations

Health and Safety at Work Act 1974 (section 33(1)(c))

Secondary liability

Health and Safety at Work Act 1974 (sections 36 and 37(1) for breaches of sections 2 and 3 and section 33(1)(c))

Triable either way

Maximum: when tried on indictment: unlimited fine and/or 2 years' custody
when tried summarily: £20,000 fine and/or 6 months' custody
(except for breaches of section 7: £5,000 fine and/or 6 months' custody)

Offence range: Conditional discharge – 2 years' custody

STEP ONE**Determining the offence category**

The court should determine the offence category using the culpability and harm factors in the tables below.

Culpability

Where there are factors present in the case that fall in different categories of culpability, the court should balance these factors to reach a fair assessment of the offender's culpability.

Deliberate

Where the offender intentionally breached, or flagrantly disregarded, the law

Reckless

Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken

Negligent

Offence committed through act or omission which a person exercising reasonable care would not commit

Low

Offence committed with little fault, for example, because:

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no prior event or warning indicating a risk to health and safety
- failings were minor and not systemic

Harm

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

First, the court should identify an initial harm category by assessing **the risk of harm created by the offence**. There are two dimensions to risk: 1) the seriousness of the harm risked (A, B or C) by the offender's breach and 2) the likelihood of that harm arising (high, medium or remote).

		Seriousness of harm risked		
		Level A	Level B	Level C
Likelihood of harm		<ul style="list-style-type: none"> • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Health condition resulting in significantly reduced life expectancy 	<ul style="list-style-type: none"> • Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition 	<ul style="list-style-type: none"> • All other cases not falling within Level A or Level B
	High	Harm category 1	Harm category 2	Harm category 3
	Medium	Harm category 2	Harm category 3	Harm category 4
	Remote	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

Second, the court should consider the following two factors.

1. **Whether the offence exposed a significant number of people to the risk of harm.**

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

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

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

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

STEP TWO

Starting point and category range

Having determined the category, the court should refer to the starting points on page 92 to reach a sentence within the category range. The court should then consider further adjustment within the category range for aggravating and mitigating features, set out on page 93.

Obtaining financial information

In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied any financial information to the contrary. It is for the offender to disclose to the court such data relevant to his financial position as will enable it to assess what he can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender's financial circumstances pursuant to section 162 of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.

Starting points and ranges

Where the range includes a potential sentence of custody, the court should consider the custody threshold as follows:

- has the custody threshold been passed?
- if so, is it unavoidable that a custodial sentence be imposed?
- if so, can that sentence be suspended?

Where the range includes a potential sentence of a community order, the court should consider the community order threshold as follows:

- has the community order threshold been passed?

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

Even where the community order threshold has been passed, a fine will normally be the most appropriate disposal where the offence was committed for economic benefit. Or, consider, if wishing to remove economic benefit derived through the commission of the offence, combining a fine with a community order.

	Starting point	Category range
Deliberate		
Harm category 1	18 months' custody	1 – 2 years' custody
Harm category 2	1 year's custody	26 weeks' – 18 months' custody
Harm category 3	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 4	Band F fine	Band E fine – 26 weeks' custody
Reckless		
Harm category 1	1 year's custody	26 weeks' – 18 months' custody
Harm category 2	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 3	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 4	Band E fine	Band D fine – Band E fine
Negligent		
Harm category 1	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 2	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 3	Band E fine	Band D fine or low level community order – Band E fine
Harm category 4	Band D fine	Band C fine – Band D fine
Low culpability		
Harm category 1	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 2	Band D fine	Band C fine – Band D fine
Harm category 3	Band C fine	Band B fine – Band C fine
Harm category 4	Band A fine	Conditional discharge – Band A fine

See page 93.

The table below contains a **non-exhaustive** list of factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. **In particular, relevant recent convictions are likely to result in a substantial upward adjustment.** In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
<i>Statutory aggravating factors:</i>	No previous convictions or no relevant/recent convictions
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	Evidence of steps taken to remedy problem
Offence committed whilst on bail	High level of co-operation with the investigation, beyond that which will always be expected
<i>Other aggravating factors include:</i>	Good health and safety record
Cost-cutting at the expense of safety	Effective health and safety procedures in place
Deliberate concealment of illegal nature of activity	Self-reporting, co-operation and acceptance of responsibility
Breach of any court order	Good character and/or exemplary conduct
Obstruction of justice	Inappropriate degree of trust or responsibility
Poor health and safety record	Mental disorder or learning disability, where linked to the commission of the offence
Falsification of documentation or licenses	Serious medical conditions requiring urgent, intensive or long-term treatment
Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities	Age and/or lack of maturity where it affects the responsibility of the offender
	Sole or primary carer for dependent relatives

See page 94.

STEP THREE**Review any financial element of the sentence**

Where the sentence is or includes a fine, the court should ‘step back’ and, using the factors set out below, review whether the sentence as a whole meets the objectives of sentencing for these offences. The court may increase or reduce the proposed fine reached at step two, if necessary moving outside of the range.

General principles to follow in setting a fine

The court should finalise the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and the court to take into account the financial circumstances of the offender.

The level of fine should reflect the extent to which the offender fell below the required standard. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.

Review of the fine

Where the court proposes to impose a fine it should “step back”, review and, if necessary, adjust the initial fine reached at step two to **ensure that it fulfils the general principles** set out above.

Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the fine arrived at in step two.

In finalising the sentence, the court should have regard to the following factors relating to the wider impacts of the fine on innocent third parties; such as (but not limited to):

- impact of fine on offender’s ability to comply with the law;
- impact of the fine on employment of staff, service users, customers and local economy.

STEP FOUR**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FIVE**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP SIX**Compensation and ancillary orders**

In all cases, the court must consider whether to make ancillary orders. These may include:

Disqualification of director

An offender may be disqualified from being a director of a company in accordance with section 2 of the Company Directors Disqualification Act 1986. The maximum period of disqualification is 15 years (Crown Court) or 5 years (magistrates' court).

Remediation

Under section 42(1) of the Health and Safety at Work etc. Act 1974, the court may impose a remedial order in addition to or instead of imposing any punishment on the offender.

Forfeiture

Where the offence involves the acquisition or possession of an explosive article or substance, section 42(4) enables the court to order forfeiture of the explosive.

Compensation

Where the offence has resulted in loss or damage, the court must consider whether to make a compensation order. The assessment of compensation in cases involving death or serious injury will usually be complex and will ordinarily be covered by insurance. In the great majority of cases the court should conclude that compensation should be dealt with in the civil courts, and should say that no order is made for that reason.

If compensation is awarded, priority should be given to the payment of compensation over payment of any other financial penalty where the means of the offender are limited.

STEP SEVEN**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

STEP EIGHT**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

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Corporate manslaughter

Corporate Manslaughter and Corporate Homicide Act
2007 (section 1)

Triable only on indictment
Maximum: unlimited fine

STEP ONE**Determining the offence category**

By definition, the **harm** and **culpability** involved in corporate manslaughter will be very serious. Every case will involve death and corporate fault at a high level. The court should assess factors affecting the seriousness of the offence within this context by asking:

(a) How foreseeable was serious injury?

The more foreseeable it was the graver usually will be the offence. Failure to heed warnings or advice from the authorities, employees or others or to respond appropriately to “near misses” arising in similar circumstances may be factors indicating greater foreseeability of serious injury.

(b) How far short of the appropriate standard did the offender fall?

Where an offender falls far short of the appropriate standard, the level of culpability is likely to be high. Lack of adherence to recognised standards in the industry or the inadequacy of training, supervision and reporting arrangements may be relevant factors to consider.

(c) How common is this kind of breach in this organisation?

How widespread was the non-compliance? Was it isolated in extent or, for example, indicative of a systematic departure from good practice across the offender’s operations or representative of systemic failings? Widespread non-compliance is likely to indicate a more serious offence.

(d) Was there more than one death, or a high risk of further deaths, or serious personal injury in addition to death?

The greater the number of deaths, very serious personal injuries or people put at high risk of death, the more serious the offence.

Where the answers to these questions indicate a high level of harm or culpability within the context of this offence the court should consider starting point A at step two. For all other offences the court should consider starting point B.

STEP TWO**Starting point and category range**

The court should consider the starting points set out below, before considering additional aggravating and mitigating factors. There are tables for different sized organisations.

Obtaining financial information

The offender is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case, which may include the inference that the offender can pay any fine.

Normally, only information relating to the organisation before the court will be relevant, unless it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account.

1. *For companies:* annual accounts. Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to file audited accounts at Companies House. **Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.**
2. *For partnerships:* annual accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. Limited liability partnerships (LLPs) may be required to file audited accounts with Companies House. **If adequate accounts are not produced on request, see paragraph 1.**
3. *For local authorities, fire authorities and similar public bodies:* the Annual Revenue Budget ("ARB") is the equivalent of turnover and the best indication of the size of the defendant organisation. It is unlikely to be necessary to analyse specific expenditure or reserves (where relevant) unless inappropriate expenditure is suggested.
4. *For health trusts:* the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via www.monitor-nhsft.gov.uk. Detailed analysis of expenditure or reserves is unlikely to be called for.
5. *For charities:* it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.

At step two, the court is required to focus on the organisation's annual turnover or equivalent to reach a starting point. At step three, the court may be required to refer to the other financial factors listed above to ensure that the proposed fine is proportionate.

Very large organisation

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.

Large

Turnover more than £50 million

Offence category	Starting point	Category range
A (more serious offences)	£7,500,000	£4,800,000 – £20,000,000
B	£5,000,000	£3,000,000 – £12,500,000

Medium

Turnover £10 million to £50 million

Offence category	Starting point	Category range
A (more serious offences)	£3,000,000	£1,800,000 – £7,500,000
B	£2,000,000	£1,200,000 – £5,000,000

Small

Turnover £2 million to £10 million

Offence category	Starting point	Category range
A (more serious offences)	£800,000	£540,000 – £2,800,000
B	£540,000	£350,000 – £2,000,000

Micro

Turnover up to £2 million

Offence category	Starting point	Category range
A (more serious offences)	£450,000	£270,000 – £800,000
B	£300,000	£180,000 – £540,000

The table below contains a **non-exhaustive** list of factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
<i>Statutory aggravating factor:</i>	No previous convictions or no relevant/recent convictions
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	Evidence of steps taken to remedy problem
<i>Other aggravating factors include:</i>	High level of co-operation with the investigation, beyond that which will always be expected
Cost-cutting at the expense of safety	Good health and safety record
Deliberate concealment of illegal nature of activity	Effective health and safety procedures in place
Breach of any court order	Self-reporting, co-operation and acceptance of responsibility
Obstruction of justice	Other events beyond the responsibility of the offender contributed to the death (however , actions of victims are highly unlikely to be considered contributory events. Offenders are required to protect workers or others who are neglectful of their own safety in a way which should be anticipated).
Poor health and safety record	
Falsification of documentation or licenses	
Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities	
Offender exploited vulnerable victims	

STEPS THREE AND FOUR

The court should ‘step back’, review and, if necessary, adjust the initial fine based on turnover to **ensure that it fulfils the objectives of sentencing** for these offences. The court may adjust the fine upwards or downwards, including outside the range.

STEP THREE

Check whether the proposed fine based on turnover is proportionate to the means of the offender

General principles to follow in setting a fine

The court should finalise the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and requires the court to take into account the financial circumstances of the offender.

Fines cannot and do not attempt to value a human life in money. The fine should meet the objectives of punishment, the reduction of offending through deterrence and removal of gain derived through the commission of the offence. The fine **must be sufficiently substantial to have a real economic impact which will bring home to management and shareholders the need to achieve a safe environment for workers and members of the public affected by their activities.**

Review of the fine based on turnover

The court should “step back”, review and, if necessary, adjust the initial fine reached at step two to **ensure that it fulfils the general principles** set out above. The court may adjust the fine upwards or downwards including outside of the range.

The court should examine the financial circumstances of the offender in the round to assess the economic realities of the organisation and the most efficacious way of giving effect to the purposes of sentencing.

In finalising the sentence, the court should have regard to the following factors.

- The profitability of an organisation will be a relevant factor. If an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. If it has a large profit margin, upward adjustment may be needed.
- Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the fine arrived at in step two.
- Whether the fine will have the effect of putting the offender out of business will be relevant; in some cases this may be an acceptable consequence.

In considering the ability of the offending organisation to pay any financial penalty, the court can take into account the **power to allow time for payment or to order that the amount be paid in instalments**, if necessary over a number of years.

STEP FOUR

Consider other factors that may warrant adjustment of the proposed fine

Where the fine will fall on public or charitable bodies, the fine should normally be substantially reduced if the offending organisation is able to demonstrate the proposed fine would have a significant impact on the provision of their services.

The court should consider any wider impacts of the fine within the organisation or on innocent third parties; such as (but not limited to):

- impact of fine on offender’s ability to improve conditions in the organisation to comply with the law;
- impact of the fine on employment of staff, service users, customers and local economy (but not shareholders or directors).

STEP FIVE**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP SIX**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP SEVEN**Compensation and ancillary orders**

In all cases, the court must consider whether to make ancillary orders. These may include:

Publicity Orders

(Section 10 Corporate Manslaughter and Corporate Homicide Act 2007)

Publicity Orders should ordinarily be imposed in a case of corporate manslaughter. They may require publication in a specified manner of:

- a) the fact of conviction;
- b) specified particulars of the offence;
- c) the amount of any fine;
- d) the terms of any remedial order.

The object of the publicity order is deterrence and punishment.

- (i) The order should specify with particularity the matters to be published in accordance with section 10(1). Special care should be taken with the terms of the particulars of the offence committed.
- (ii) The order should normally specify the place where public announcement is to be made, and consideration should be given to indicating the size of any notice or advertisement required. It should ordinarily contain a provision designed to ensure that the conviction becomes known to shareholders in the case of companies and local people in the case of public bodies. Consideration should be given to requiring a statement on the offender's website. A newspaper announcement may be unnecessary if the proceedings are certain to receive news coverage in any event, but if an order requires publication in a newspaper it should specify the paper, the form of announcement to be made and the number of insertions required.
- (iii) The prosecution should provide the court in advance of the sentencing hearing, and should serve on the offender, a draft of the form of order suggested and the Judge should personally endorse the final form of the order.
- (iv) Consideration should be given to stipulating in the order that any comment placed by the offender alongside the required announcement should be separated from it and clearly identified as such.

A publicity order is part of the penalty. Any exceptional cost of compliance should be considered in fixing the fine. It is not, however, necessary to fix the fine first and then deduct the cost of compliance.

Remediation

(Section 9 Corporate Manslaughter and Corporate Homicide Act 2007)

A defendant ought by the time of sentencing to have remedied any specific failings involved in the offence and if it has not will be deprived of significant mitigation.

If, however, it has not, a remedial order should be considered if it can be made sufficiently specific to be enforceable. The prosecution is required by section 9(2) Corporate Manslaughter and Corporate Homicide Act 2007 to give notice of the form of any such order sought, which can only be made on its application. The Judge should personally endorse the final form of such an order.

The cost of compliance with such an order should not ordinarily be taken into account in fixing the fine; the order requires only what should already have been done.

Compensation

Where the offence has resulted in loss or damage, the court must consider whether to make a compensation order. The assessment of compensation in cases involving death or serious injury will usually be complex and will ordinarily be covered by insurance. In the great majority of cases the court should conclude that compensation should be dealt with in the civil courts, and should say that no order is made for that reason.

If compensation is awarded, priority should be given to the payment of compensation over payment of any other financial penalty where the means of the offender are limited.

STEP EIGHT**Totality principle**

If sentencing an offender for more than one offence, consider whether the total sentence is just and proportionate to the offending behaviour.

STEP NINE**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

Organisations

Breach of food hygiene and food safety regulations

England

Food Safety and Hygiene (England) Regulations 2013
(regulation 19(1))

Triable either way

Maximum: when tried on indictment: unlimited fine
when tried summarily: £5,000 fine

Wales

Food Hygiene (Wales) Regulations 2006 (regulation 17(1))
The General Food Regulations 2004 (regulation 4)

Triable either way

Maximum: when tried on indictment: unlimited fine
when tried summarily: £5,000 fine
except for regulation 4(b) of the General Food Regulations 2004:
£20,000 fine

STEP ONE**Determining the offence category**

The court should determine the offence category using only the culpability and harm factors in the tables below. Where an offence does not fall squarely into a category, individual factors may require a **degree of weighting** to make an overall assessment.

Culpability**Very high**

Deliberate breach of or flagrant disregard for the law

High

Offender fell far short of the appropriate standard; for example, by

- failing to put in place measures that are recognised standards in the industry
- ignoring concerns raised by employees or others
- allowing breaches to subsist over a long period of time

Evidence of serious, systemic failings within the organisation to address risks to food safety

Medium

Offender fell short of the appropriate standard in a manner that falls between descriptions in “high” and “low” culpability categories

Level of offender’s systemic failure falls between descriptions in “high” and “low” culpability categories

Low

Offender did not fall far short of the appropriate standard; for example, because

- significant efforts were made to secure food safety although they were inadequate on this occasion
- there was no prior event or warning indicating food safety risks

Evidence that failings were minor and not systemic

Harm

The table below contains factors relating to both actual harm and risk of harm. Dealing with a **risk of harm** involves consideration of both the likelihood of harm occurring and the extent of it if it does.

Harm	
Category 1	<ul style="list-style-type: none"> • Serious adverse effect(s) on human health i.e. acute and/or chronic condition; and/or widespread impact
Category 2	<ul style="list-style-type: none"> • Adverse effect on human health (not amounting to Category 1) • High risk of an adverse effect on human health – including where supply was to groups that are particularly vulnerable to health issues • Regulator and/or legitimate industry substantially undermined by offender’s activities • Relevant authorities unable to trace products in order to investigate risks to health, or are otherwise inhibited in identifying or addressing risks to health
Category 3	<ul style="list-style-type: none"> • Medium or low risk of an adverse human health effect • Public misled about the specific food consumed, but little or no risk of actual adverse health effect

STEP TWO**Starting point and category range**

Having determined the category, the court should identify the relevant table for the offender on pages 108 to 109. There are tables for different sized organisations.

At step two, the court will be required to focus on the organisation's turnover or equivalent to reach a starting point for a fine within the category range. The court should then consider further adjustment within the category range for aggravating and mitigating features, set out on page 110.

Obtaining financial information

Offenders which are companies, partnerships or bodies delivering a public or charitable service are expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case, **which may include the inference that the offender can pay any fine.**

Normally, only information relating to the organisation before the court will be relevant, unless it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account.

1. *For companies:* annual accounts. Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to file audited accounts at Companies House. Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.
2. *For partnerships:* annual accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. Limited liability partnerships (LLPs) may be required to file audited accounts with Companies House. If adequate accounts are not produced on request, see paragraph 1.
3. *For local authorities, police and fire authorities and similar public bodies:* the Annual Revenue Budget ("ARB") is the equivalent of turnover and the best indication of the size of the defendant organisation. It is unlikely to be necessary to analyse specific expenditure or reserves unless inappropriate expenditure is suggested.
4. *For health trusts:* the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via www.monitor-nhsft.gov.uk. Detailed analysis of expenditure or reserves is unlikely to be called for.
5. *For charities:* it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.

At step two, the court is required to focus on the organisation's annual turnover or equivalent to reach a starting point for a fine. At step three, the court may be required to refer to the other financial factors listed above to ensure that the proposed fine is proportionate.

Very large organisation

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.

Large Turnover or equivalent: £50 million and over		
	Starting point	Category range
Very high culpability		
Harm category 1	£1,200,000	£500,000 – £3,000,000
Harm category 2	£500,000	£200,000 – £1,400,000
Harm category 3	£200,000	£90,000 – £500,000
High culpability		
Harm category 1	£500,000	£200,000 – £1,400,000
Harm category 2	£230,000	£90,000 – £600,000
Harm category 3	£90,000	£50,000 – £240,000
Medium culpability		
Harm category 1	£200,000	£80,000 – £500,000
Harm category 2	£90,000	£35,000 – £220,000
Harm category 3	£35,000	£20,000 – £100,000
Low culpability		
Harm category 1	£35,000	£18,000 – £90,000
Harm category 2	£18,000	£9,000 – £50,000
Harm category 3	£10,000	£6,000 – £25,000

Medium Turnover or equivalent: between £10 million and £50 million		
	Starting point	Category range
Very high culpability		
Harm category 1	£450,000	£200,000 – £1,200,000
Harm category 2	£200,000	£80,000 – £500,000
Harm category 3	£80,000	£40,000 – £200,000
High culpability		
Harm category 1	£200,000	£90,000 – £500,000
Harm category 2	£90,000	£35,000 – £220,000
Harm category 3	£35,000	£18,000 – £90,000
Medium culpability		
Harm category 1	£80,000	£35,000 – £190,000
Harm category 2	£35,000	£14,000 – £90,000
Harm category 3	£14,000	£7,000 – £35,000
Low culpability		
Harm category 1	£12,000	£7,000 – £35,000
Harm category 2	£7,000	£3,500 – £18,000
Harm category 3	£3,500	£2,000 – £10,000

Small Turnover or equivalent: between £2 million and £10 million			
	Starting point	Category range	
Very high culpability			
Harm category 1	£120,000	£50,000 –	£450,000
Harm category 2	£50,000	£18,000 –	£200,000
Harm category 3	£18,000	£9,000 –	£80,000
High culpability			
Harm category 1	£50,000	£22,000 –	£200,000
Harm category 2	£24,000	£8,000 –	£90,000
Harm category 3	£9,000	£4,000 –	£35,000
Medium culpability			
Harm category 1	£18,000	£7,000 –	£70,000
Harm category 2	£8,000	£3,000 –	£35,000
Harm category 3	£3,000	£1,500 –	£12,000
Low culpability			
Harm category 1	£3,000	£1,400 –	£12,000
Harm category 2	£1,400	£700 –	£7,000
Harm category 3	£700	£300 –	£3,000

Micro Turnover or equivalent: not more than £2 million			
	Starting point	Category range	
Very high culpability			
Harm category 1	£60,000	£25,000 –	£120,000
Harm category 2	£25,000	£10,000 –	£50,000
Harm category 3	£10,000	£5,000 –	£18,000
High culpability			
Harm category 1	£25,000	£10,000 –	£50,000
Harm category 2	£12,000	£4,000 –	£22,000
Harm category 3	£4,000	£2,000 –	£9,000
Medium culpability			
Harm category 1	£10,000	£3,000 –	£18,000
Harm category 2	£4,000	£1,400 –	£8,000
Harm category 3	£1,400	£700 –	£3,000
Low culpability			
Harm category 1	£1,200	£500 –	£3,000
Harm category 2	£500	£200 –	£1,400
Harm category 3	£200	£100 –	£700

Note on statutory maxima on summary conviction. For offences under *regulation 19(1) Food Safety and Hygiene (England) Regulations 2013* and *regulation 17(1) Food Hygiene (Wales) Regulations 2006* the maximum sentence magistrates may pass on summary conviction is a £5,000 fine. The *General Food Regulations 2004* are only in force in Wales. The maximum sentence on summary conviction for offences under *regulations 4(a) and 4(c)–(e)* is a £5,000 fine, and under *regulation 4(b)*, a £20,000 fine.

The table below contains a **non-exhaustive** list of factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. **In particular, relevant recent convictions are likely to result in a substantial upward adjustment.** In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
<i>Statutory aggravating factor:</i>	No previous convictions or no relevant/recent convictions
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	Evidence of steps taken to remedy problem
<i>Other aggravating factors include:</i>	Business closed voluntarily on discovery of problems in order to take remedial steps
Motivated by financial gain	High level of co-operation with the investigation, beyond that which will always be expected
Deliberate concealment of illegal nature of activity	Good food safety/hygiene record
Established evidence of wider/community impact	Effective food safety/hygiene procedures in place
Breach of any court order	Self-reporting, co-operation and acceptance of responsibility
Obstruction of justice	
Poor food safety or hygiene record	
Refusal of free advice or training	

STEPS THREE AND FOUR

The court should 'step back', review and, if necessary, adjust the initial fine based on turnover to **ensure that it fulfils the objectives of sentencing** for these offences. The court may adjust the fine upwards or downwards, including outside the range.

STEP THREE

Check whether the proposed fine based on turnover is proportionate to the means of the offender

General principles to follow in setting a fine

The court should finalise the fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and the court to take into account the financial circumstances of the offender.

The level of fine should reflect the extent to which the offender fell below the required standard. **The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence;** it should not be cheaper to offend than to take the appropriate precautions.

The fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to operate within the law.**

Review of the fine based on turnover

The court should 'step back', review and, if necessary, adjust the initial fine reached at step two to **ensure that it fulfils the general principles** set out above. The court may adjust the fine upwards or downwards including outside of the range.

The court should examine the financial circumstances of the offender in the round to enable the court to assess the economic realities of the company and the most efficacious way of giving effect to the purposes of sentencing.

In finalising the sentence, the court should have regard to the following factors.

- The profitability of an organisation will be relevant. If an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. If it has a large profit margin, upward adjustment may be needed.
- Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the total fine arrived at in step two.
- Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

In considering the ability of the offending organisation to pay any financial penalty, the court can take into account the **power to allow time for payment or to order that the amount be paid in instalments**, if necessary over a number of years.

STEP FOUR**Consider other factors that may warrant adjustment of the proposed fine**

Where the fine will fall on public or charitable bodies, the fine should normally be substantially reduced if the offending organisation is able to demonstrate the proposed fine would have a significant impact on the provision of their services.

The court should consider any wider impacts of the fine within the organisation or on innocent third parties; such as (but not limited to):

- impact of fine on offender's ability to improve conditions in the organisation to comply with the law;
- impact of the fine on employment of staff, service users, customers and local economy (but not shareholders or directors).

STEP FIVE**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP SIX**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP SEVEN**Compensation and ancillary orders*****Compensation***

Where the offence results in loss or damage the court must consider whether to make a compensation order. If compensation is awarded, priority should be given to the payment of compensation over payment of any other financial penalty where the means of the offender are limited.

Hygiene Prohibition Order

If the court is satisfied that the health risk condition in Regulation 7(2) is fulfilled it **shall** impose the appropriate prohibition order in Regulation 7(3).

Where a food business operator is convicted of an offence under the Regulations and the court thinks it proper to do so in all the circumstances of the case, the court **may** impose a prohibition on the operator pursuant to Regulation 7(4). An order under Regulation 7(4) is not limited to cases where there is an immediate risk to public health; the court might conclude that there is such a risk of some future breach of the regulations or the facts of any particular offence or combination of offences may alone justify the imposition of a Hygiene Prohibition Order. In deciding whether to impose an order the court will want to consider the history of convictions or a failure to heed warnings or advice in deciding whether an order is proportionate to the facts of the case. Deterrence may also be an important consideration.

(These orders are available under both the Food Safety and Hygiene (England) Regulations 2013 and the Food Hygiene (Wales) Regulations 2006.)

STEP EIGHT**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

Where the offender is convicted of more than one offence where a fine is appropriate, the court should consider the following guidance from the definitive guideline on Totality.

“The total fine is inevitably cumulative.

The court should determine the fine for each individual offence based on the seriousness of the offence* and taking into account the circumstances of the case including the financial circumstances of the offender so far as they are known, or appear, to the court.†

The court should add up the fines for each offence and consider if they are just and proportionate.

If the aggregate total is not just and proportionate the court should consider how to reach a just and proportionate fine. There are a number of ways in which this can be achieved.

For example:

- *where an offender is to be fined for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose on the most serious offence a fine which reflects the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences.*
- *where an offender is to be fined for two or more offences that arose out of different incidents, it will often be appropriate to impose a separate fine for each of the offences. The court should add up the fines for each offence and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the court should consider whether all of the fines can be proportionately reduced. Separate fines should then be passed.*

Where separate fines are passed, the court must be careful to ensure that there is no double counting.‡

Where compensation is being ordered, that will need to be attributed to the relevant offence as will any necessary ancillary orders.”

STEP NINE**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

* s.164(2) CJA 2003

† s.164(3) CJA 2003

‡ R v Pointon [2008] EWCA Crim 513

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Individuals

Breach of food hygiene and food safety regulations

England

Food Safety and Hygiene (England) Regulations 2013 (regulation 19(1))

Triable either way

Maximum: when tried on indictment: unlimited fine and/or 2 years' custody
when tried summarily: £5,000 fine

Wales

Food Hygiene (Wales) Regulations 2006 (regulation 17(1))

Triable either way

Maximum: when tried on indictment: unlimited fine and/or 2 years' custody
when tried summarily: £5,000 fine

The General Food Regulations 2004 (regulation 4)

Triable either way

Maximum: when tried on indictment: unlimited fine and/or 2 years' custody
when tried summarily: £5,000 fine and/or 6 months' custody
except for regulations 4(b): £20,000 fine and/or 6 months' custody

Offence range: Conditional discharge – 18 months' custody

STEP ONE**Determining the offence category**

The court should determine the offence category using only the culpability and harm factors in the tables below. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting to make an overall assessment.

Culpability**Deliberate**

Where the offender intentionally breached, or flagrantly disregarded, the law

Reckless

Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken

Negligent

Offence committed through act or omission which a person exercising reasonable care would not commit

Low

Offence committed with little fault, for example, because:

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no prior event or warning indicating a risk to health and safety
- failings were minor and not systemic

Harm

The table below contains factors relating to both actual harm and risk of harm. Dealing with a **risk of harm** involves consideration of both the likelihood of harm occurring and the extent of it if it does.

Harm	
Category 1	<ul style="list-style-type: none"> • Serious adverse effect(s) on human health i.e. acute and/or chronic condition; and/or widespread impact
Category 2	<ul style="list-style-type: none"> • Adverse effect on human health (not amounting to Category 1) • High risk of an adverse effect on human health – including where supply was to groups that are particularly vulnerable to health issues • Regulator and/or legitimate industry substantially undermined by offender's activities • Relevant authorities unable to trace products in order to investigate risks to health, or are otherwise inhibited in identifying or addressing risks to health
Category 3	<ul style="list-style-type: none"> • Medium or low risk of an adverse human health effect • Public misled about the specific food consumed, but little or no risk of actual adverse health effect

STEP TWO**Starting point and category range**

Having determined the category, the court should refer to the starting points on the next page to reach a sentence within the category range. The court should then consider further adjustment within the category range for aggravating and mitigating features, set out on page 118.

Obtaining financial information

In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied any financial information to the contrary. It is for the offender to disclose to the court such data relevant to his financial position as will enable it to assess what he can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender's financial circumstances pursuant to section 162 of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.

Starting points and ranges

Where the range includes a potential sentence of custody, the court should consider the custody threshold as follows:

- has the custody threshold been passed?
- if so, is it unavoidable that a custodial sentence be imposed?
- if so, can that sentence be suspended?

Where the range includes a potential sentence of a community order, the court should consider the community order threshold as follows:

- has the community order threshold been passed?

Even where the community order threshold has been passed, a fine will normally be the most appropriate disposal. Or, consider, if wishing to remove economic benefit derived through the commission of the offence, combining a fine with a community order.

	Starting point	Category range
Deliberate		
Harm category 1	9 months' custody	Band F fine – 18 months' custody
Harm category 2	Band F fine	Band E fine – 9 months' custody
Harm category 3	Band E fine	Band D fine – 26 weeks' custody
Reckless		
Harm category 1	Band F fine	Band E fine – 9 months' custody
Harm category 2	Band E fine	Band D fine – 26 weeks' custody
Harm category 3	Band D fine	Band C fine – Band E fine
Negligent		
Harm category 1	Band E fine	Band D fine – Band F fine
Harm category 2	Band D fine	Band C fine – Band E fine
Harm category 3	Band C fine	Band B fine – Band C fine
Low culpability		
Harm category 1	Band C fine	Band B fine – Band C fine
Harm category 2	Band B fine	Band A fine – Band B fine
Harm category 3	Band A fine	Conditional discharge – Band A fine

Note on statutory maxima on summary conviction. For offences under *regulation 19(1) Food Safety and Hygiene (England) Regulations 2013* and *regulation 17(1) Food Hygiene (Wales) Regulations 2006*, the maximum sentence magistrates may pass on summary conviction is a £5,000 fine; therefore for these offences, magistrates may not pass a community order. *Regulation 4 of The General Food Regulations 2004* is in force in Wales but not in England. For offences under *regulation 4(a)* and *4(c)–(e)*, the maximum sentence on summary conviction is 6 months' custody and/or a £5,000 fine. For an offence under *regulation 4(b)*, the maximum sentence on summary conviction is 6 months' custody and/or a £20,000 fine.

The table below contains a **non-exhaustive** list of factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. **In particular, relevant recent convictions are likely to result in a substantial upward adjustment.** In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
<i>Statutory aggravating factor:</i>	No previous convictions or no relevant/recent convictions
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	Evidence of steps taken to remedy problem
Offence committed whilst on bail	Business closed voluntarily on discovery of problems in order to take remedial steps
<i>Other aggravating factors include:</i>	High level of co-operation with the investigation, beyond that which will always be expected
Motivated by financial gain	Good food safety/hygiene record
Deliberate concealment of illegal nature of activity	Effective food safety/hygiene procedures in place
Established evidence of wider/community impact	Self-reporting, co-operation and acceptance of responsibility
Breach of any court order	Good character and/or exemplary conduct
Obstruction of justice	Mental disorder or learning disability, where linked to the commission of the offence
Poor food safety or hygiene record	Serious medical conditions requiring urgent, intensive or long-term treatment
Refusal of free advice or training	Age and/or lack of maturity where it affects the responsibility of the offender
	Sole or primary carer for dependent relatives

STEP THREE**Review any financial element of the sentence**

Where the sentence is or includes a fine, the court should ‘step back’ and, using the factors set out in step three, review whether the sentence as a whole meets the objectives of sentencing for these offences. The court may increase or reduce the proposed fine reached at step two, if necessary moving outside of the range.

General principles to follow in setting a fine

The court should finalise the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and the court to take into account the financial circumstances of the offender.

The level of fine should reflect the extent to which the offender fell below the required standard.

The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.

Review of the fine

Where the court proposes to impose a fine it should ‘step back’, review and, if necessary, adjust the initial fine reached at step two to **ensure that it fulfils the general principles** set out above.

Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the total fine arrived at in step two.

In finalising the sentence, the court should have regard to the following factors relating to the wider impacts of the fine on innocent third parties; such as (but not limited to):

- impact of fine on offender’s ability to comply with the law;
- impact of the fine on employment of staff, service users, customers and local economy.

STEP FOUR**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FIVE**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP SIX**Compensation and ancillary orders****Compensation**

Where the offence results in loss or damage the court must consider whether to make a compensation order. If compensation is awarded, priority should be given to the payment of compensation over payment of any other financial penalty where the means of the offender are limited.

Ancillary orders

In all cases the court must consider whether to make ancillary orders. These may include:

Hygiene Prohibition Order

If the court is satisfied that the health risk condition in Regulation 7(2) is fulfilled it **shall** impose the appropriate prohibition order in Regulation 7(3).

Where a food business operator is convicted of an offence under the Regulations and the court thinks it proper to do so in all the circumstances of the case, the court **may** impose a prohibition on the operator pursuant to Regulation 7(4). An order under Regulation 7(4) is not limited to cases where there is an immediate risk to public health; the court might conclude that there is such a risk of some future breach of the regulations or the facts of any particular offence or combination of offences may alone justify the imposition of a Hygiene Prohibition Order. In deciding whether to impose an order the court will want to consider the history of convictions or a failure to heed warnings or advice in deciding whether an order is proportionate to the facts of the case. Deterrence may also be an important consideration.

(These orders are available under both the Food Safety and Hygiene (England) Regulations 2013 and the Food Hygiene (Wales) Regulations 2006.)

Disqualification of director

An offender may be disqualified from being a director of a company in accordance with section 2 of the Company Directors Disqualification Act 1986. The maximum period of disqualification is 15 years (Crown Court) or 5 years (magistrates' court).

STEP SEVEN**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

Where the offender is convicted of more than one offence where a fine is appropriate, the court should consider the following guidance from the definitive guideline on Totality.

“The total fine is inevitably cumulative.

The court should determine the fine for each individual offence based on the seriousness of the offence* and taking into account the circumstances of the case including the financial circumstances of the offender so far as they are known, or appear, to the court.†

The court should add up the fines for each offence and consider if they are just and proportionate.

If the aggregate total is not just and proportionate the court should consider how to reach a just and proportionate fine. There are a number of ways in which this can be achieved.

For example:

- *where an offender is to be fined for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose on the most serious offence a fine which reflects the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences.*
- *where an offender is to be fined for two or more offences that arose out of different incidents, it will often be appropriate to impose a separate fine for each of the offences. The court should add up the fines for each offence and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the court should consider whether all of the fines can be proportionately reduced. Separate fines should then be passed.*

Where separate fines are passed, the court must be careful to ensure that there is no double counting.‡

Where compensation is being ordered, that will need to be attributed to the relevant offence as will any necessary ancillary orders.”

STEP EIGHT**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

* s.164(2) CJA 2003

† s.164(3) CJA 2003

‡ R v Pointon [2008] EWCA Crim 513

Annex D: Fine bands and community orders

FINE BANDS

In this guideline, fines are expressed as one of six fine bands (A, B, C, D, E or F).

Fine Band	Starting point (<i>applicable to all offenders</i>)	Category range (<i>applicable to all offenders</i>)
Band A	50% of relevant weekly income	25–75% of relevant weekly income
Band B	100% of relevant weekly income	75–125% of relevant weekly income
Band C	150% of relevant weekly income	125–175% of relevant weekly income
Band D	250% of relevant weekly income	200–300% of relevant weekly income
Band E	400% of relevant weekly income	300–500% of relevant weekly income
Band F	600% of relevant weekly income	500–700% of relevant weekly income

Band F is provided as an alternative to a community order or custody in the context of this guideline.

COMMUNITY ORDERS

In this guideline, community sentences are expressed as one of three levels (low, medium or high). An illustrative description of examples of requirements that might be appropriate for each level is provided below.

Where two or more requirements are ordered, they must be compatible with each other. Save in exceptional circumstances, the court must impose at least one requirement for the purpose of punishment, or combine the community order with a fine, or both (see section 177 Criminal Justice Act 2003).

LOW	MEDIUM	HIGH
In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary		More intensive sentences which combine two or more requirements may be appropriate
Suitable requirements might include one or more of: <ul style="list-style-type: none"> • 40–80 hours unpaid work; • prohibited activity requirement; • curfew requirement within the lowest range (for example, up to 12 hours per day for a few weeks). 	Suitable requirements might include one or more of: <ul style="list-style-type: none"> • greater number of hours of unpaid work (for example, 80–150 hours); • prohibited activity requirement. • an activity requirement in the middle range (20–30 days); • curfew requirement within the middle range (for example, up to 12 hours for 2–3 months). 	Suitable requirements might include one or more of: <ul style="list-style-type: none"> • 150–300 hours unpaid work; • activity requirement up to the maximum of 60 days; • curfew requirement up to 12 hours per day for 4–6 months; • exclusion order lasting in the region of 12 months.

The *Magistrates' Court Sentencing Guidelines* includes further guidance on fines and community orders.

