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The Sentencing Council's three-month consultation on new sentencing guidelines for health and safety offences, corporate manslaughter and food safety and hygiene offences closed on 18 February. **Paul Verrico** asked leading legal experts for their views.

In SHP's December issue, Michael Caplan QC outlined the Sentencing Council's proposals for new sentencing guidelines for health and safety offences, corporate manslaughter and food safety and hygiene offences.

Proposals for the new guidelines were published on 13 November 2014 and a three-month consultation to glean the views of health and safety professionals closed last month.

In particular, the Sentencing Council was interested to receive feedback on its approach to sentencing, the factors that would make these offences more or less serious, the principles of sentencing in this area, and sentencing levels.

The general consensus among safety professionals is that the guidelines are likely to come into force in a very similar format to that outlined in the consultation draft. But if that is the case, what are the likely ramifications?

In the lead up to the consultation's closure, Eversheds asked leading lawyers to share their thoughts on the proposals. In particular, should we expect a 'sea change' in sentencing regulatory offences?

Charles Gibson QC

Head of Henderson Chambers

"The courts are being particularly encouraged to ensure that fines are sufficiently substantial to have a 'real economic impact' which will bring home to shareholders and management the need to achieve a safe environment. It follows that fines, particularly on large companies, are bound to rise significantly and scrutiny of accounts, including where a group structure is adopted, is certain to increase.

"Given the importance placed by the draft guidelines on the categorisation of both culpability and harm and the wide range of fines possible within each bracket, companies may well be advised to challenge the prosecution's assessment by way of a Newton hearing. It will also be necessary to seek to ensure that the circumstances surrounding the offence are not distorted in the media because the offence has been placed in a particular sentencing category."

Stephen Hockman QC

Head of 6 Pump Court

"The proposed guideline is explicit with regard to corporate defendants in advising that the sentencing court can take into account its power to allow time for payment, or to order that the amount be paid by instalments, if necessary over a number of years.

"There seems to be nothing explicit with regard to time to pay for individual defendants, and hence it would seem that the pre-existing approach will remain unchanged. The reason for the difference appears to be essentially metaphysical, i.e. a corporate defendant has no soul and therefore will not suffer anxiety if required to pay a large sum albeit over a period of years.

"Needless to say, all decisions whether about quantum or timing are within limits, discretionary and fact-sensitive. The present Lord Chancellor has added his own imprimatur to the jurisprudence on this issue, by making it clear that both a corporate and an individual can be ordered or at least expected to pay forthwith if the means justify this."

Kevin Elliott

Head of health and safety defence, Eversheds LLP

"The proposed reform on sentencing for health and safety offences will have a far greater impact on organisations than the corporate manslaughter reform seven years ago. Indeed, one possible consequence of the sentencing reform is that prosecutors will have even less appetite to pursue large organisations for the offence of corporate manslaughter with the associated challenges of securing a conviction. Instead, fines measured in millions of pounds, with associated publicity, can be achieved by prosecuting a large organisation for much more straightforward HSWA offences.

"Any organisation currently being prosecuted, or about to be prosecuted, should factor into its litigation strategy for dealing with the matter, the fact that the guidelines are likely to come into force in late 2015/early 2016. There could well be an enormous benefit in disposing of the case before the guidelines come into force."

Ian Lawrie QC

Head of 3PB

"The proposed guidelines are designed to enhance consistency of approach – they instead reveal an almost bureaucratic and formulaic approach to sentencing which removes flexibility of judicial discretion. For directors, this is likely to mean greater likelihood of prison.

"For the first time custody thresholds are explicitly set out and steer judges in that direction. Companies will no longer be the lightening rod for individuals' failures. The proposed guidelines also give little recognition to the infinitely variable factors that can and should influence a sentence and are unduly prescriptive. By way of example, as a mitigation feature there is a failure in the guidelines to recognise that sometimes a victim's conduct can be a contributory factor in fatality occurrence in health and safety offences. In any civil claim, contributory negligence is a significant factor. Why should it not be a factor when determining a fine?

"The consequence of such failings means that proportionality, which is the very soul of the sentencing process, is unintentionally sacrificed to promote consistency through a factually straitjacketed approach to sentencing."

Gerard Forlin QC

Cornerstone Barristers

"Only time will tell, but these eye watering changes must raise a real concern that certain large organisations may consider scaling down or ceasing to operate in the UK in the future. The effect of these new fines will be compounded by the adverse publicity that they will almost certainly trigger."

Prashant Popat QC

Henderson Chambers

"The fines to be determined by the sentencing court will be linked, in part, to the turnover of the defendant company and the starting point for a company with a turnover in excess of £50m, convicted of a serious (but not the most serious) health and safety breach leading to a fatality, will be £2.4m, in a range from £1.5m to £6m. A company of that size being sentenced for that type of offence in the current environment might expect a starting point for the offence to be in the region of £750,000, in a range not exceeding £1m.

"Only time will tell, but these eye watering changes must raise a real concern that certain large organisations may consider scaling down or ceasing to operate in the UK in the future"

"In other words, the introduction of the guidelines could result in a three or fourfold increase in expected penalties. It will also be material that the guidelines refer explicitly to the need for the sentencing court, albeit exceptionally, to take account of the turnover of a linked organisation which is not a defendant. This will mean that the means of a parent company may be examined to determine the size category of the organisation being sentenced."

John Cooper QC
Crown Office Chambers

"If the proposals are approved in their current form, they will put corporate safety standards under intense critical review, with huge penalties for any established shortcomings.

"This will lead to more trials, more Newton (fact-finding) hearings and detailed legal debate as to which band a corporate defendant fits into for sentence. The service of a Friskies Schedule will be the starting point for an intense wrangle over culpability. The justification for a reverse burden of proof under section 40 HSWA will appear far less compelling.

"The renewed emphasis on the criminality of companies (and company directors with existing charges) does not fit with the low levels of proof that prosecutors seek to establish. It is doubtful, in this already heavily regulated field, that the changes will, in fact, lead to a substantially safer workplace."

David Travers QC
6 Pump Court

"It appears beyond doubt that very large organisations will be receiving fines, which would have been regarded as unthinkable only a few years ago. The more interesting question is what effect this will have on the safety of the public.

"Generally speaking, large organisations have in place carefully considered systems to prevent harm to their employees, contractors and others and their failings are isolated or result from non-systemic shortcomings. Smaller organisations are sometimes less well-placed to develop sound systems and there is evidence they more frequently fall below the appropriate standard. How far the sentencing guidelines will address this problem remains to be seen."

Oliver Campbell QC
Henderson Chambers

"The aim of the guidelines is to provide consistency and certainty in sentencing of health and safety offences. However, for larger organisations the guidelines will not achieve that aim, and it will become far more difficult to predict the likely fine. At present it is possible to predict the likely fine for a large company within a range of about £250,000 or less. When the guidelines come into force, the range or band of possible fines will increase to £2.5m or even £5m in some cases."

Jason Pitter QC
New Park Court

"The consultation process is a golden opportunity to bring some much needed certainty, clarity and above all guidance to an area of practice which the courts are often not familiar with. If the final guidelines properly absorb the impact of practitioners in health and safety regulation, there could be significant benefits in the efficient management of cases, from the early tactical decisions through to the ultimate question of what sentence will be passed."

Keith Morton QC
Temple Garden Chambers

"The proposed guidelines follow what the Sentencing Council itself describes as a "small scale" research exercise based largely on press reports. Nevertheless, the council has concluded that there is some inconsistency in sentencing of individuals.

"Unsurprisingly, the council suggests that unless the risk of harm is very low, all cases of deliberate breach (the highest category of culpability) should result in an immediate custodial sentence.

"Where, however, there will be a marked change in practice (which is contrary to the council's intention) is in relation to any case which engages the high harm category (which includes cases where there is a risk of death). In such a case, negligent conduct will be sufficient to result in a custodial sentence.

"The difficulty with this is that conduct short of negligence ought not to result in a conviction. It is, therefore, hard if not impossible to envisage a case in practice which could result in a conviction or guilty plea but which nevertheless meets the proposed definition of low culpability."

"If the proposals are approved in their current form, they will put corporate safety standards under intense critical review with huge penalties for any established shortcomings"

Next steps

The final guidelines are anticipated in late 2015/early 2016. Duty holders are well advised to consider increasing the profile of health and safety risk in their corporate risk registers and ensuring that systems are robust.

The parallel guidelines which dealt with environmental offences were retrospective in application – i.e. they applied to cases involving incidents that had occurred before the new guidelines came into effect.

We will revisit this area when the final guidelines are published to seek expert considerations on the definitive guidelines. Watch this space. ■

Paul Verrico is a principal associate at Eversheds – see page 4 for more details