

Communication Workers Union

**Sentencing Penalties
For
Corporate Manslaughter**
(Corporate Manslaughter and Corporate Homicide Act 2007)

**CWU Response
to
Sentencing Advisory Panel
Consultation Document**

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Sentencing Penalties for Corporate Manslaughter **CWU response to the SAP Consultation Document**

Introduction

This is the response of the Communication Workers Union to the Sentencing Advisory Panel's Consultation Paper on Sentencing for Corporate Manslaughter. We welcome the opportunity to participate in this Consultative exercise and to make a written submission on the question of Penalties for health and safety offences which in our opinion requires new impetus.

The Communication Workers Union which represents 250,000 Postal and Telecommunications industry workers across the UK.

Our membership includes a range of manual, technical and clerical professions including Postal Mail and Parcel Delivery and Processing staff, Call Centre employees, Clerical, Administration and Financial Services workers, Telecommunications Engineers, Mail Processing Equipment Engineers, Motor Vehicle Maintenance Engineers, FM Engineers (Heating, Ventilation, Gas, Electricians, Plumbing and Lift engineers), LGV professional and light commercial Drivers, Retail network staff, Security Industry workers and Enquiry Officers. We are fortunate in being able to draw on this broad range of occupations and expertise to inform our views.

The CWU gives a high priority to the protection of the health and safety of its members and aims to provide the best advice and representation to our membership.

The CWU and Safety Law Enforcement

The CWU is interested in all aspects of health and safety, particularly how to change the law to encourage legal compliance and the consistent adoption of safe working practices and risk controls in order to reduce totally unnecessary and preventable deaths and injuries we see annually.

The CWU see effective Law enforcement and appropriate Penalties as being a crucial component of achieving that objective and for that reason we see this consultation exercise and the guidance that is produced as crucial in rebalancing the law in favour of the victims and making the punishment fit the crime – something that British law is currently failing to achieve in respect of those responsible for death at work when they are brought before the courts.

Every working day of the week, somebody is likely to die at work because of a breach of safety law. Many more will suffer major injuries. The cost to workers and their families is too high to leave this subject without a powerful deterrent, which can go some way towards dealing with the 'legalised ignorance' recklessness and negligence of some directors and managers when it comes to workers' safety.

CWU members work can often be a hazardous occupation and sadly every year we see a number of them killed at work, others suffer serious injuries, ill health and disability which devastate the lives of ordinary working people and their families.

CWU policy established by our annual conference has consistently reflected the view that there must be pro-active safety law enforcement and prosecutions of offenders with increased court

penalties for employers who fail to discharge their health and safety obligations, leading to fatalities and indeed serious injuries.

Statistics

- Every day of the week 1 person dies in a workplace related accident
- Every day of the week 16 people die from occupational cancers and illnesses
- Every day of the week 390 people suffer non-fatal injuries in workplace related accidents
- Every day of the week 85 people suffer major injuries, amputations etc, in workplace related accidents
- 250 die at work each year - HSC statistics show that the number increased last year.
- 5,000 people die every year because of asbestos exposure at work.
- 1000 workers are killed in work related road accidents annually.
- 2.2 million People are suffering from an illness caused or made worse by their work.
- Thousands are killed by workplace Cancers every year.
- Many suffer heart attacks and strokes as a result of overwork or stress.
- 250,000 reportable workplace injuries are recorded a year.
- 600,000 new cases of ill health caused by work were recorded last year.
- In Britain, a worker aged between 16 and 24 years old suffers a reported workplace injury requiring more than 3 days off work every 12 minutes of every working day. A young worker is seriously injured at work every 40 minutes. Workplace fatalities in the 16-24 age range occur at a rate of more than one a month. There is evidence work is becoming more hazardous for young workers. The combined total for "fatal and major injuries" in 16-24 year old employees has trended upwards in recent years. The figure is higher now than at any time in the last ten years, and has increased year on year for each of the last five years.
- Yet the total number of health and safety convictions was less than 1,400 last year.
- The average health and safety fine is just over £6,000, and much less in Scotland."(excluding a small number of fines against large companies of over £100,000).
- The average fine for a company where health and safety offences resulted in a death is just approx £45,000 per offence
- The chances of a company or organisation getting convicted are tiny and the penalty if they do is in most cases little more than a slap on the wrist.
- Basically fines under the Health and Safety at Work Act are broadly comparable with those under the Environment Act for offences such as "fly tipping".
- The current statistics show that when an employer is successfully prosecuted for breaking health and safety laws - and where there was the potential to kill a worker or a member of the public - they will almost always escape with a small fine.

The Sentence has four purposes.

- First - punishing the offender.
- Second - preventing reoccurrences and protecting vulnerable workers.
- Third - deterring others from negligent behaviour.
- Fourth - giving a sense of justice to the victims or their families and re-balancing the law in favour of the Victims.

Evidence shows the most effective way to change behaviour is strong enforcement and a penalty that fits the crime.

Victims

The key aim of Health and Safety at Work Act 1974 and now the Corporate Manslaughter and Corporate Homicide Act 2007 is to prevent deaths and injuries, at work and so reduce victims. The view of the CWU is that the balance of power and influence needs to be redressed from 6

April, to rebalance it in favour of the victim and the community". The current Penalties regime often has little preventive impact.

The CWU and the Corporate Manslaughter & Corporate Homicide Act 2007

The CWU welcomes the long-awaited introduction of the Corporate Manslaughter and Corporate Homicide Act 2007, due to come into force on 6 April 2008 and we hope this important legal reform will help ensure better corporate accountability for serious management failings that lead to death at work and will thereby motivate organisations and employers to improve the organisation and management of health and safety generally and so provide a means of promoting and sustaining improved health and safety standards.

The CWU has campaigned for over a decade for a specific offence of corporate manslaughter and welcomes the enactment of this legislation. In considering the issue of sentencing we have given serious consideration to the consultation and feel that prior to answering the specific questions it is important to outline what we see is the purpose of enforcement and to examine the current unacceptable sentencing regime in order to ensure that decisions on sentencing guidance is put in to context and positioned correctly in comparison to sentences placed upon companies and organisations for other offences. There is evidence that strong sentencing is an effective way of changing behaviour. We regret that the only possible sentences available are:-

- a fine,
- a publicity order and/or
- a remedial order.

However the CWU hopes that the sentences handed down by the courts on conviction of the new offence will have a profound impact on those Companies who fail to ensure the health and safety of the workforce and the public, at the same time sending out a clear warning to those employers with poor health and safety cultures.

The Company Directors Disqualification Act 1986 & HSE Prosecution Policy

The CWU considers that the voluntary guidance published by the Institute of Directors and the Health and Safety Commission will not motivate the necessary change in the boardroom that is required to revive the health and safety culture on the shop floor. The research undertaken by Greenstreet Berman Limited for the HSE indicated that one of the major drivers in raising health and safety standards was individual legal responsibilities and in this context, the CWU, amongst others have called on the Government to review Health and Safety legislation with a view to bringing forward measures to introduce as a statutory duty, individual legal health and safety responsibilities on company director at board level.

The CWU accepts that a new statutory duty for directors is a matter for government and not proper to this consultation. However the following important considerations are firmly within the remit of the Sentencing Advisory Panel, within the parameters of this exercise.

The Turnbull Report (*Internal Control: Guidance for Directors on the Combined Code*) identified health and safety as being an important risk area for organisations. Clearly, directors have a key role in relation to the day-to-day running of all organisations. Directors' motivation in respect of health and safety is driven by a number of factors. Leadership and commitment are important in promoting effective health and safety risk control to enable a continuous improvement in health and safety performance. Directors' actions and decisions in this respect must enhance and support the health and safety policy. Differences in attitudes, behaviour or decisions of directors regarding health and safety may have a detrimental effect and could compromise health and safety best

practice. Managers' leadership style and commitment are key aspects of an organisation's safety culture. It is crucial therefore that the new Corporate Manslaughter and Corporate Homicide Act increases board members' awareness of health and safety issues and the impact that they have on their company. This can only be achieved with effective enforcement and penalties for offenders.

Under the Company Directors Disqualification Act 1986 (CDDA), company directors may be disqualified from company directorship for health and safety offences. Only eight directors have been disqualified for health and safety offences in the 20 years since the introduction of this legislation. The latter is an important point showing how little accountability they have in law compared to companies. The court may make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily).

- The CDDA is used by the Courts regularly to disqualify persons from being involved in the management of companies for general misconduct in connection with companies, unfitness, fraudulent or wrongful trading, insolvency, undischarged bankruptcy and failure to pay county court orders. However, for unexplained reasons the existing potential for disqualification of directors under various HSWA sections including failure to comply with an enforcement notice or potentially as an employee under Sections 7, 8, 36 and 37 are rarely used even in cases of "exceptionally grave failings". Potential duties may be placed on directors under Sections 7, 8 and 36 of HSWA, as if they were employees. However, there is no case law on the application of Sections 7, 8 and 36 to directors the HSE appears to have never actually prosecuted a director for breach of Sections 7, 8 or 36.
- Action has been taken by the HSE through Section 37 but convictions have proved difficult to secure. Under Section 37 you need to prove that an offence by the company was the result of "any consent or connivance", or of "neglect", on the part of the director. But you can only prove consent, connivance or neglect if there is a positive legal duty upon the director to ensure that their company is complying with health and safety law. So, if a director has no explicit legal obligation to ensure that their company is complying with health and safety law, then it will virtually be impossible to show that he or she was negligent in their duties, or that they consented to or connived in a breach of the law. Consequently, the absence of positive health and safety directors' duties means that Section 37 actually incentivises directors to know as little as possible about health and safety matters - because, the less directors know about their company in respect of health and safety, the easier it is for them to escape responsibility and justice. Therefore, the lack of clear positive legal duties makes it more difficult to prosecute directors for health and safety offences under Section 37.

Additionally around 1,500 Directors are disqualified for periods of 2 - 15 years in the UK every year for various financial irregularities, wrongful trading, taxation offences and insolvency offences and breaching a disqualification order leads to imprisonment for up to 2 years or a fine or both. We think that the same needs to now apply following convictions for serious health and safety offences in connection with major injury and we wish to impress this view on the Sentencing Advisory Panel.

Under the CDDA, the maximum period for disqualification is five years, where a court of summary jurisdiction makes the order, and 15 years otherwise. The Court of Appeal (Re: Sevenoaks Stationers (Retail) Ltd (1990), Dillon LJ) has divided the period of maximum disqualification of 15 years into three separate time periods:

- Over ten years for particularly serious cases (for example, where a director has been disqualified previously).
- Between six and ten years for serious cases not meriting the top bracket.
- Two to five years for 'relatively not very serious' cases.

The HSE have recently made two important changes to its guidance for Inspectors about:

- Prosecuting individuals generally and;
- Making it clear that HSE considers it appropriate for the Courts to consider disqualifying directors where it is legally possible, and that Inspectors should remind the Court that it has this additional power.

The House of Commons Work and Pensions Committee has repeatedly recommended that company directors should have a legal obligation in relation to health and safety.

Therefore the CWU strongly believes that guidance produced by the Sentencing Advisory Panel should not be solely restricted to the Corporate Manslaughter and Corporate Homicide Act 2007 but should include the Company Directors Disqualification Act 1986.

We strongly urge the SAP to include in the guidance to the Courts that alongside the level of fines imposed on offending organisations, consideration should be given to disqualification of culpable directors and senior executives for health and safety offences referral under the Company Directors Disqualification Act 1986 whenever a conviction for Corporate Manslaughter takes place.

The CWU believes this opportunity to hold to account and obtain at least some degree of rightful justice against responsible decision makers should not be passed up.

The CWU would add that we share the view that the offence of corporate manslaughter in itself is insufficient to achieve the level of cultural change within organisations that is required. As the offence only applies to corporate bodies, corporate bodies themselves however do not make the decisions that lead to death. Individual do! It is important to recognise that those companies who eventually kill their workers or members of the public are led by those individuals in charge, Directors and Senior Managers are excluded from liability under the Corporate Manslaughter and Corporate Homicide Act. However they are not beyond the law and hopefully prosecutions under the new act will be accompanied by additional Health and Safety At Work Act charges. It is for that reason that we have argued, and will continue to argue, for a specific legal health and duty on directors to protect the health, safety and welfare of their employees, and the public. However, in any case, the courts have the opportunity to deal with people in charge of companies with poor safety cultures, bad practices and negligence in respect of the safety of the workforce and public alike by the use of the Company Directors Disqualification Act 1986 (CDDA),

At this juncture the least that can be done is for the courts to be guided on the question of directors disqualifications.

Directors and Senior Managers as the key decision makers can not be allowed to legally insulate themselves from what is going on in the company despite those individuals being the people with the most power. This is bad for Safety and bad for accountability. Individual directors who have contributed to a management failure by their connivance, consent or neglect must also be targeted.

Again we would reiterate - We strongly urge the SAP to include in the guidance to the Courts that alongside the level of fines imposed on offending organisations, consideration should be given to disqualification of culpable directors and senior executives for health and safety offences referral under the Company Directors Disqualification Act 1986 whenever a conviction for Corporate Manslaughter takes place.

There has to be more linkage with the prosecution process and the leadership of the organisation and we support the idea that on conviction as part of the remedial order, a requirement should be imposed requiring the Chief Executive Officer, Chairman or other senior Officers, company Directors, board members or senior managers to be present in Court during sentencing for health

and safety offences and a provision to require their attendance at specific health and safety training programmes, sanctioned and accredited by the HSE with participants having to demonstrate satisfactory completion.

Sentencing & Penalties - Ineffectiveness of the current position

The courts presently impose low ineffective fines on companies and organisations convicted of serious health and safety offences where fatalities or serious injuries occur. Unless the Government establishes a tough sentencing regime for Companies, their Directors and Senior Managers who are the decision makers behind the policies of companies will continue to flout the law through negligence and recklessness and in effect the new Corporate Manslaughter offence will have little or no impact at all and will simply be a "Re-Badging" exercise.

Although a Corporate Manslaughter conviction under the new law will in itself carry with it the appropriate stigma and public disgrace arising from exceedingly shameful conduct, given that such prosecutions will be targeted at those companies who are guilty of "exceptionally grave failings" and that "the threshold will be high", we strongly believe that sentencing needs to reflect the severity of such an offence and society's level of disapproval. The introduction of the new Corporate Killing offence therefore must be accompanied with a radical review of sentencing and penalties in order to restore confidence and to rebalance the law in favour of the victims. The public do expect the new corporate manslaughter law to be effective in holding those responsible to account and sentencing must be appropriate and effective and in this respect the case for sentencing reform is overwhelming and appropriate. We do need a system in place where workers and the public know that offenders and companies can be charged, convicted and sentenced appropriately.

Current Health and Safety Penalties and Fines for causing death at work by comparison with Fines for other Company trading offences

The Communication Workers Union has continually said over the 10 years that the government has been considering introducing this new law that the immoral and totally unacceptable imbalance in sentencing comparisons between company, regulatory, competition and insolvency penalties and those handed down for health and safety offences resulting in a fatality must be addressed.

CWU believes that the current level of health and safety fines in the UK are inadequate and far too low to deal with the widespread health and safety problems and as such have a limited effect and are too easily shrugged off. These low fines contribute to the idea that a workers death can be "bought off" and that life is only worth a small amount of money. Health and Safety Fines are lower than those imposed on companies for regulatory breaches, competition offences and insolvency etc and this must change.

For example:

- When Royal Mail was convicted in 2003 of three Health and Safety offences following the death of a member of the public in a horrific accident at the Bridgend Delivery Office the Court imposed fines of £200,000 and this compares poorly with the power of the Postal Regular (Postcom) who may impose massive fines. After missing its 2004 targets, Royal Mail paid out £50 million in fines for failing to meet quality of service delivery targets which never physically hurt anyone.
- In 2006 Royal Mail were again convicted of breaching the Health and Safety at Work act when an Engineer and CWU member died in a fall from height accident at the West London Mail Centre. They were fined £150,000 plus costs. No directors were charged. The same

year the Postal Regulator (Postcom) fined Royal Mail nearly £12 Million for service standard failures which again didn't harm anyone.

- The £1.5 Million fine imposed on Great Western Trains following the 1997 Southall Train Crash was only 5.6% of Annual Profit. An Intercity 125 ploughed into a freight train in west London, killing six and injuring more than 150. This fine falls within the bracket proposed by the SAP in this consultation and as we have seen with the further rail disasters that followed, this fine was totally ineffective.
- In 2007 the Water industry regulator (Ofwat) fined Thames Water £12.5m for "inadequate" reporting and poor customer service and also fined Southern Water £20.3m for deliberate misreporting and poor service.
- Argos and Littlewoods were fined £22.65 million last year by the OFT for fixing the price of toys. However when ARGOS were convicted of breaching safety regulations which led to the death of a toddler Matthew Ianson they were only fined £3,000 plus £8,502 costs.
- When Thames Trains were convicted of health and safety offences after the Ladbroke Grove Rail crash in which 31 people died they were fined only £2m when this year the owners recorded a £620 Million turnover on its rail franchises.

- Fines totalling £650,000 imposed on British Sugar plc in February 2005, for multiple Health and Safety Law breaches following the horrific death of a woman employee at their Bury St Edmunds factory in Suffolk two years previously was less than 4% of British Sugar's massive profits of £175m.

- Health and Safety fines compare poorly with fines imposed by regulators as in the case of EU Competition Law breaches (e.g. Sotheby's £14 Million, Nintendo (Europe) £117 Million, Mercedes Benz £50 Million, Genzyme £7 Million, Hasbro £5 Million).

- In January 2007 Siemens were fined £277 million over its role in a collusion scandal, rigging bids for contracts and fixing prices in the market for gas insulation switch-gear equipment which is used to control the flow of energy in electricity grids.
- British Airways were recently fined £121.5 million pounds for fixing passenger flight prices.
- Supermarkets Asda and Safeways and their suppliers were fined £116 Million pounds for fixing the price of Milk and Cheese.
- Pilkington Glass was fined £98 million last November for price fixing.
- Compare those fines with the recent case of multi-national ICL who were only fined £400,000 for health and safety crimes after killing 9 workers at their Glasgow Stockline factory which exploded in 2004.
- In 2007 Construction Industry supplier Lafarge/Blue Circle concrete and cement were fined £175m for price fixing but their customer, House builder George Wimpey was fined only £320,000 following an accident that left one worker dead and another seriously injured when a trench collapsed. The concrete price fixing fine was 525 times more serious than the fine killing one and maiming another person in a trench that was eventually filled up with the concrete.
- Even the UK record £15 million fine imposed on Transco after it was convicted on a charge of breaching the Health and Safety Act following the Larkhall gas explosion which killed four people, was less than 4% of Transco's £390m operating profit on a turnover of £2.2bn. This fine pales into insignificance against the above OFT Companies Act fines. The judge, Lord Carlway, said Transco had not shown any remorse for the tragedy and a fine is the only thing I can impose.
- The English court record £13.5m fines imposed at the Old Bailey in 2005 on Balfour Beatty £10m and Network Rail £3.5m for breaking safety rules which led to the Hatfield rail disaster in 2000 which killed four people and injured 102, again also compares poorly with fines imposed on companies for trading offences. This was in spite of the Judge Mr Justice Mackay describing Balfour Beatty's breaches of the Health and Safety Act as "one of the worst examples of industrial negligence in a high risk industry he had ever seen. The fine imposed was in reality insignificant because Balfour Beatty were paid £250m for the rail

maintenance contract on the line concerned over five years and Balfour Beatty had earlier that year reported a 15 percent rise in Pretax profits of 150 million pounds for 2004 with expected further profit progress in 2005. And in spite of the crash and their poor safety record, Balfour Beatty were awarded further new rail, road and housing contracts worth more than 360 million pounds in total. Corporate Manslaughter charges against five rail bosses accused in the aftermath of the crash collapsed. The overall cost of the case was estimated to total nearly £20m of which the prosecution costs accounted for around £8.5m but Balfour Beatty only paid costs of £300,000 as did Railtrack.

- No Directors were suspended last year for Health and Safety Offences whereas 30 a week are suspended in insolvency cases.
- Directors and Managers can be imprisoned for Companies Act or Taxation Offences e.g. "Cooking the Books" but not for killing or seriously injuring workers and members of the public.
- Around 50 to 60 people are imprisoned for Animal Cruelty Offences each year but hardly any face prison for serious health and safety offence and for the gravest offence of all involving serious injury and fatalities Directors and Senior Managers are immune.

None of the offences for regulatory breaches, insolvency, competition offences or animal cruelty actually involved any physical harm to any person yet the number of convictions secured and level of sentence and penalty paid are so much greater than an employer who knowingly sends someone into a dangerous work situation putting life and limb at peril.

Loss of life is total! The loss of someone's son, daughter, brother, father, mother and the effect this has on the family left behind is devastating. The current financial penalties for health and safety convictions connected with fatalities are too easily shrugged off. Moreover, fines contribute to the idea that a death can be "bought off" and that life is only worth a certain amount of money. In fact you could draw the conclusion that if you were minded to murder someone in the UK then the best way to do it and get away with it would be to employ them !

Generally, the levels of fines have to be raised significantly if they are to be effective, targeting those responsible for management failures and provide protection for victims. Employees and Good employers alike will welcome higher penalties plus remedial orders, publicity orders and directors suspensions. Good employers will benefit from the fact that competitors are not allowed to operate with lower safety standards as a way of undercutting the competition.

The CWU strongly supports the view that penalties for health and safety offences should be much harsher.

England, Wales, Scotland and Northern Ireland

The CWU was pleased to respond to the Home Office draft Corporate Manslaughter Bill for England and Wales (2005), the Northern Ireland Office's Corporate Manslaughter Northern Ireland proposals (2005) and the Scottish Executive's Corporate Homicide Expert Group Report (2006). CWU also submitted evidence to the Home Affairs and Work and Pensions Sub-Committees' Inquiry. We also now welcome the opportunity to comment on the Sentencing Advisory Panel's Consultation Paper on Sentencing for Corporate Manslaughter.

Although this consultation is only about sentencing in England and Wales, we would advocate a consistent approach across the whole of the UK and would welcome the sharing of this response with the appropriate authorities in Scotland and Northern Ireland.

CWU Answers to consultation document individual questions

Q1. Do you agree with the approach to the assessment of seriousness?

With reference to the comments within the consultation on the levels of seriousness and culpability we are somewhat concerned with regards to the parallel made with 'death by dangerous driving' which is a totally inappropriate and illogical comparison analogy. Death by dangerous driving involves an individual person involved in a single one off incident resulting in a fatality. We participated in the recent SAP consultation on "Causing Death By Driving" and the considerations were totally different. A whole range and combination of penalties are available to the courts in Death By Driving Offences including imprisonment, community service, fines, and bans against the individual making the fatal decisions. In the case of corporate manslaughter, individual liability isn't a consideration and most of the offences will emanate from general management failures, a poor safety culture and general disregard for the law over a long period of time rather than necessarily just one specific event by an individual and as such the level of culpability and seriousness will be greater in our view.

Q2. Is each of the above aggravating and mitigating factors relevant to sentencing for a) an offence of corporate manslaughter and b) an offence under the HSWA involving death? Are there any other factors which may aggravate or mitigate either or both of these types of offence?

The CWU agrees that the consultation paper quite comprehensively outlines the aggravating and mitigating factors for this offence.

On the question aggravating factors affecting degree of culpability to be taken into account, the CWU agrees that important aggravating factors should include (a) failure to act upon advice, cautions or warnings from regulatory authorities (b) failure to act on the advice of a competent health and safety professional, (c) failure to co-operate appropriately with the authorities. (d) failure to follow best practice guidance, (e) failure to act upon the Inspections, Investigations and complaints of Trade Union Safety Representatives and (f) previous prosecutions for health and safety offences and enforcement notices (Improvement Notices and Prohibition Notices etc).

Regarding mitigating factors, the CWU strongly disagrees with the suggested mitigating factor of "breach due to employee acting outside authority or failing in duties", because if a death resulted in the actions of a maverick employee acting completely outside their own authority, then it is highly unlikely that the corporate body could be convicted because the basic premise of the law would not have been met to warrant charges being brought as the Law states that there needs to be "gross failing, throughout the organisation, in the management of health and safety".

However where an employees act outside their authority or fail in their general duties in respect of their own safety and that of others should only be considered as mitigation where it has been unforeseeable and/or uncontrollable by the employer. However in 99.99% of cases it will nearly always be as a result of such attitudes being generated by a poor management of safety culture, as a result of a failure of the management systems within that organisation or a disregard of proper safety standards and risk controls. Often management choose to turn a blind eye and directly or indirectly encourage such poor working practices. It is clear that the corporate body is responsible for ensuring that their employees act responsibly and safely and if they have not taken practical steps to ensure that, then this should not be seen as mitigation.

Mitigation should also not include 'ready co-operation with the authorities' which of course should be expected by any enforcing authority whether it be the Police, Fire Service, HSE or

Local Authorities etc. Therefore this should not attract any credit and, because the law is in place to deal with 'gross breach' and "exceptionally grave failings" sentencing should not include and dispensation for a 'good safety record' for Corporate Manslaughter & Corporate Homicide Act offences, although this could be taken in to consideration for HSWA. However because many workplaces are not inspected regularly by the enforcing authorities a good safety records does not always reflect good safety standards. Poor safety standards may only be discovered following a tragedy.

Q3. What do you consider should be the main aim of sentencing an organisation for an offence of corporate manslaughter or an offence under the HSWA involving death? Should there be any difference between the two types of offence and, if so, why?

The CWU believes that the aims of Corporate Manslaughter & Corporate Homicide Act are: -

- to rebalance the law in favour of the victims and provide families and the relatives of the victims, proper justice for the offence,
- to reflect the degree of fault, hold culpable organisations to account and enable the Courts to hand down punishment and retribution that fits the crime,
- to help restore public confidence in the justice system and to signal society's disapproval of serious corporate failures that lead to death,
- to act as a powerful deterrent in order to preventing reoccurrences and future offending by the convicted organisation and other organisations,
- and to change behaviour and secure higher safety standard and levels of legal compliance with health sand safety legislation.

The CWU does not believe that there is a difference between an offence of corporate manslaughter and an offence under the Health and Safety at Work Act involving death. An offence under the Corporate Manslaughter Act would involve a level of culpability at senior management level, which is not necessarily shown by an offence under the Health and Safety at Work Act. As the Corporate Manslaughter & Corporate Homicide Act is to be reserved for the gravest of offences, it is appropriate that the penalties reflect this. However the paltry level of fines handed down by the courts for HSAW Act offences in connection with fatalities has caused public outrage therefore both should be sufficiently severe to reflect the gravity of the offence and the culpability of those concerned.

Q4. Do you agree that the aims of the fine should be to ensure future safety and reflect serious concern at the unnecessary loss of life? Should there be any difference in aim when imposing a fine for corporate manslaughter or for an offence under the HSWA involving death?

The CWU agrees that the aims should be to ensure future safety and reflect serious concern at unnecessary loss of life. The CWU would reiterate that, in addition to the preventative effect of any penalty, the sanctions must also ensure that both the families of the victim, and society in general, can have confidence that justice has been done. We would reiterate our belief that a fine under the Corporate Manslaughter Act should not normally be greater than an offence under the Health and Safety at Work Act that involves death. We are of the view that there should be no difference in aim when fining.

Q5. Do you agree that a fine imposed for an offence of corporate manslaughter or an offence under the HSWA involving death should aim to eliminate any financial benefit resulting from the offence? If so, what information would be necessary, and how could this be obtained?

The CWU fully agrees that under no circumstances should an employer be able to benefit financially from their failure to meet health and safety requirements. This should be the case whether or a not a death has occurred. It is therefore important that penalties, as well as

punishing and acting as a deterrent, must also ensure that any benefits from a criminal act are recovered. Where poor health and safety standards leading to death have arisen from attempts to cut corners on safety, avoid necessary expenditure or investment in health and safety or has used lack of health and safety expenditure to under-cut competitors so winning contracts and profit, all such cumulative savings and profits should all be recovered, over and above the fine.

Q6. Do you agree with the Panel's proposed starting points and ranges for a) offences of corporate manslaughter and b) offences under the HSWA involving death? If not, what alternative approach would you suggest for the fining of organisations for these offences?

The CWU has long made the case in other consultations that both the range of sanctions available under the Health and Safety at Work Act is insufficient and the level of fines handed down for deaths and serious injuries are far too low. Therefore, under no circumstances should it be recommended that Corporate Manslaughter Act offences should have any relationship to the current offences under the Health and Safety at Work Act. The SAP recommendations for Corporate Manslaughter and Corporate Homicide Act Convictions should be for a considerable increase in the fines imposed on organisations after a health and safety at work death.

The CWU does NOT agree with the Panel's proposed starting points and ranges of fines for the reasons set out above. We believe that fines in the range proposed by the Panel would not reflect the seriousness that society gives to this offence. The CWU would propose that the Sentencing Advisory Panel recommend that 10 per cent of turnover should represent an absolute minimum fine, because the breach of duty in such cases has been determined as a 'gross breach' and "exceptionally grave failings". The CWU believes that this would be a reasonable minimum and additionally the court be given the flexibility to stage the fine (e.g. 5 per cent for two years or 2.5 per cent for 4 years). We feel that this would be a far better approach as history shows us that if the recommendation to the court is 2.5 – 10 per cent, then the courts will impose fines towards the lower end and rarely if ever use the maximum of 10%.

The CWU would also support a recommendation for a minimum starting point for offences under the Health and Safety at Work Act of 5 per cent of average turnover. In companies with low turnover but high profitability the Courts should have scope to increase the fines.

Q7. Do you agree that it is for the prosecution and defence to raise issues of profitability and liquidity? What impact should these factors have on the calculation of the fine?

It is certainly appropriate to raise issues of profitability. We agree that it is for the prosecution and defence to raise such issues, within the context of the absolute minimum outlined in the previous answer. In order to gain the focus of stakeholders and investors who can potentially influence future decision-making, exceptionally high profits should be reflected in the calculation of the fine for Corporate Manslaughter and Corporate Homicide Act convictions. Certain companies will have a relatively low turnover but a very high profitability. Where this is the case this should be taken into account. However, low liquidity should not be a reason to lower the minimum fine, only to influence the means and timing of payments.

In addition we would accept that there will, in exceptional circumstances, be cases where a fine could lead to an organisation having to close. While we would not justify any employer being able to continue operating if they are putting the safety of their workforce at risk, we would not wish to see large groups of workers being made redundant as a result of a criminal action by their employer. We believe that in such circumstances it may be appropriate to stage the fine as recommended in our previous answer and disqualify the directors.

Q8. Do you consider that there should be a minimum fine for a) offences of corporate manslaughter and b) offences under the HSWA involving death? If so, what amount do you

think would be appropriate?

The CWU believes there should be a minimum fine for Corporate Manslaughter & Corporate Homicide Act cases, representing a percentage of annual turnover, as outlined in our answer to Q6 above, Likewise for convictions for *offences under the HSWA involving death* as outlined in our answer to Q6 above,

Q9. Do you consider that a report on each offender should be prepared for the court with full details of financial status? If so, how would this be provided?

The CWU welcomes the recommendation and we agree that a financial status report should be prepared on offending organisations and that this should be produced by an independent financial auditor (in the format required by the court) with the cost being met by the offender and be placed before the court.

Q10. Do you agree with the Panel's approach to the impact of the fine on the offender, its employees, customers and shareholders? If not, why not?

The CWU broadly agrees with the Sentencing Advisory panel's approach to the impact of the fine on the offender, its employees, customers and shareholders. However, to avoid a large fine impacting an organisation's ability to invest in health and safety, we believe that staged-payment of the fine should be considered where appropriate, with courts requiring remediation to be prioritised, as suggested in our answer to Q6. Secondly, we suggest mechanisms are put in place to prevent Companies and Organisations from passing the cost of the fines onto customers by way of price or charge increases. The company or organisation must demonstrate that fine payments are from profits, investments, share dividends etc. We agree that the possible affect on shareholders should not be considered, as all investors benefit from profits and so should be prepared to bear a proportion of the losses whether that be by way of a Corporate Manslaughter and Corporate Homicide Act fine or Health and Safety at Work Act fine.

Q11. Do you agree that the court should treat offenders consistently, whether or not they are publicly funded or providing a public service? If not, how do you think that considerations specific to public bodies should be reflected?

The CWU does support consistency. However there are clearly some concerns and difficulties here which can not be avoided. A situation must not be allowed to occur whereby public service organisations feel immune from the law and the Government will have an important role to play in ensuring that public body executives to take appropriate action. Recognising that fines imposed on public bodies are paid from the public purse back to the public purse (Treasury), the sanction to a degree may be symbolic of the level of failure, but the shaming to the organisation and exposing the senior executives responsible for the duty of care is important nevertheless with remedial action the key priority over payment of fines and any fine payments can be phased appropriately as suggested in our answer to Q6, in order to protect the delivery of essential public services. For example, were the defendant to be a health trust, and the fine were to be based on its turnover, the reality is that this could have a considerable effect on the ability of the trust to operate and could actually lead to patients not receiving urgent treatment and operations as a result as a lack of resources. Clearly this is inappropriate. Therefore the effect on a public service organisation should be taken into consideration when dealing with crown and publicly funded bodies. It is for this reason that CWU has supported a range of other penalties, such as corporate probation, to be available.

Q12. Do you agree that, when sentencing an organisation for an offence of corporate manslaughter, the court should impose a publicity order?

The CWU believes that the courts should impose a publicity order on every Corporate Manslaughter and Corporate Homicide Act fine or Health and Safety at Work Act offender convicted of death at work offences and there are no grounds for exceptions in our view. We also believe that consideration should be given to naming the major shareholders in such publicity orders. This would help ensure that shareholders exercise an interest and influence the health and safety culture and policies of the company or organisation and in turn this could help ensure that investors demand good health and safety standards and management as a pre-requisite to investment.

Q13. What should the extent of the publicity be and how (if at all) will this differ between offences of corporate manslaughter?

The CWU believes that as a minimum requirement, a convicted organisation be required to record the facts in their annual report, statement and accounts and on any company websites. The organisation should be required to communicate the facts of their conviction and sentence to all their stakeholders including shareholders, investors, trading partners, employees, trade unions, customers and suppliers. Adverts in Trade Journals, Newspapers and on Radio and TV should apply at differing levels depending on the size of the organisation e.g. nationally to national organisations, Regionally to regional organisations and locally to small organisations as determined by the courts. The relatives of the victims should be consulted on this. Most importantly the remedial action plan progress should be reported and on completion, monitored by the HSE.

Q14. Do you agree that the making of a publicity order should not lead to a reduction in the level of fine imposed on an organisation for an offence of corporate manslaughter?

The CWU agrees that the publicity orders should not lead to a reduction in the level of fines. The publicity order is over and above the penalty, and should not be seen as part of it.

Q15. Do you agree that the making of a remedial order should not lead to a reduction in the level of fine imposed on an organisation for an offence of corporate manslaughter or an offence under the HSWA involving death?

The CWU agrees that the remedial orders should not lead to a reduction in the level of fines. Once again the CWU believes that remedial orders should not be seen as part of the penalty and, as such, there should be no reduction in the level of the fine imposed simply because a remedial order has been issued.

The CWU is strongly of the opinion that the use of wide-ranging remedial orders in such cases to be an important option. Although the immediate causes contributing to the breach should have been addressed soon after the incident, and certainly before the court case, we believe that remedial orders have an important part to play in ensuring that all underlying causes are rectified, so that there is sustained compliance and improvement. This is because deep-rooted poor safety culture problems within organisations can lead to unsafe working practices which eventually lead to fatal accidents. Therefore one of the key aims of the sentence must be to achieve sustained legal compliance and improvements in health and safety standards supported by periodic monitoring and review by the HSE.

A Remedial Order is a Court order to ensure that remedial work is undertaken by duty-holders. Section 42 of the Health and Safety at Work etc Act already gives the court the power, following conviction of an offender, to order the cause of the offence to be remedied in addition to the sentence however it is rarely used and it has been suggested that greater use should be made of this power.

There has to be more linkage with the prosecution process and the leadership of the organisation and we support the idea that on conviction as part of the remedial order, a requirement should be imposed requiring the Chief Executive Officer, Chairman or other senior Officers, company Directors, board members or senior managers to be present in Court during sentencing for health and safety offences and a provision to require their attendance at specific health and safety training programmes, sanctioned and accredited by the HSE with participants having to demonstrate satisfactory completion.

Remedial Orders and director disqualifications must be introduced as part of the sentencing regime Corporate Manslaughter and Corporate Homicide Act fine or Health and Safety at Work Act offender convicted of death at work offences

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