OBSERVATIONS OF THE CRIMINAL SUB-COMMITTEE OF THE COUNCIL OF HM CIRCUIT JUDGES ON THE SENTENCING ADVISORY PANEL CONSULTATION PAPER:

SENTENCING FOR CORPORATE MANSLAUGHTER

---

1 The offence created by the Corporate Manslaughter and Corporate Homicide Act 2007 is only triable in the Crown Court with the result that Judges in the Crown Court will be considering the sentencing issues raised. The threshold for conviction is greater than under existing Health and Safety legislation. Under existing legislation offences contrary to sections 2 and 3 of the Health and Safety at Work Act 1974 may be tried in a Magistrates Court but the reality of the situation is that serious cases, including some of those where a death results, are tried in the Crown Court. Although the statistics in Paragraph 4 of the Panel's paper set out the numbers of fatalities that were work related or public incidents the qualification in the footnote, which might easily be overlooked, is important. It appears that more reliable estimates might be 908 work related and 1437 in public incidents over a 10 year period. Of course any fatality is a tragedy in itself both for the victim and all who are affected. We would not wish to be thought to suggest otherwise. The point we make, emphasised by the number of cases that proceed to the Crown Court under the existing lower threshold in Health and Safety legislation, is small and the number of cases proceeding under the Act will, of course, be smaller. Over the past 5 years we understand there to have been 225 prosecutions arising from fatalities under existing Health and Safety legislation. Only a proportion of those were dealt with in the Crown Court. It will be apparent that the numbers are small. It seems to us that there may be no need for a separate Guideline for Corporate Manslaughter where, as the Panel has indicated, the intention is to review sentencing in all Health and Safety cases in the near future.

2 The Paper correctly recognises the overlap between offences of Corporate Manslaughter and offences under existing Health and Safety legislation. Whilst we recognise that the Publicity Order is a new innovation otherwise the Crown Court's powers are the same. There is no evidence to suggest that the Crown Courts were not approaching cases involving fatalities appropriately under existing Health and Safety legislation and thus the approach and guidance remains valid. There is no additional redress, save for the Publicity Order, introduced by the creation of this new offence.

3 The Paper also correctly recognises the difficulty that arises when fixing a financial penalty in relation to a corporate offender. There are often difficult balancing exercises to be undertaken in the light of the identity and circumstances of the individual business concerned. We agree with the Panel's concerns that the imposition of substantial financial penalties may deprive businesses of the funds needed to put right health and safety problems. We point out that the jobs and thus the livelihoods of other employees and their families, unconnected with the breaches, may be put at substantial risk if a financial penalty places the future of the business in jeopardy. There is no public interest in imposing penalties that have to be passed on to the community at large in increased charges or prices. In the case of public bodies the payment of substantial funds results in those funds being transferred from one public body to another with the consequent risk of reduced services by the transferee. It is not a simple

matter of finding a "one size fits all" formula. There is a necessity for considerable discretion and flexibility.

4 We agree that, in principle, no defendant should benefit from unlawful activity. We contributed to the Macrory Review in which this principle was clearly stated.

5 We support the need for proper financial information for the sentencing Court. There is an unarguable case for the provision of Accounts for the three years prior to the offence and an argument for the Accounts covering the period between offence and sentence. We have given careful thought to the other ways in which financial information might be provided. We are concerned on grounds of delay and cost. Seeking an independent "Pre Sentence Accounts Report" would involve commissioning Accountants to prepare that Report. In the case of a small concern the delay might not be great and the cost insubstantial. In other cases the situation might be very different. Those who have experience of the conduct of cases that have a financial element are well aware of the delays that result from the instruction of accountants to review financial matters. Further the costs involved are very substantial indeed. The obtaining of a meaningful financial report on a modest concern might involve a delay of some months and considerable expenditure. In the case of a large concern the preparation of such a report could cause substantial delay and involve expenditure running into many thousands of pounds. We doubt that such steps could be justified. There are currently powers under section 20A of the Criminal Justice Act 1991 to require individuals to provide information and failure to respond is an offence. There may be merit in considering the application of those provisions to corporate defendants. We believe there was some consideration of this within the HM Court Service in late 2005. In practice, of course, the majority of corporate defendants will produce financial information if requested to do so in order to avoid the Court assuming that payment of any financial penalty that might be imposed could be made.

6 We should sound a note of caution so far as assessment of culpability is concerned. The resources available to a corporate defendant will, of necessity, vary considerably. This may have an impact upon culpability. What might be considered to be reasonable in the case of a large multi national with substantial resources might not be achieved by a much smaller concern with more limited resources. The positions of corporate defendants will vary considerably as will culpability.

Question 1
Do you agree with the approach to the assessment of seriousness?

7 Yes.

Question 2
Is each of the aggravating and mitigating factors relevant to sentencing for a) an offence of corporate manslaughter and b) an offence under the Health and Safety at Work Act involving a death? Are there any other factors which may aggravate or mitigate either of both of these offences?

8 The reality of the situation, of course, is that there is considerable overlap between Corporate Manslaughter and fatal cases under Health and Safety legislation. The difference between the two types of offence is that

Corporate Manslaughter requires the breach of duty to be "gross" and by senior management failure. That, in itself, will make it necessary for there to be some distinction between the approaches to penalty although, as set out below, in practical terms, the distinction may not always be substantial.

9 We agree that the aggravating and mitigating factors are appropriate in relation to offences in either category. We might add the occurrence of previous accidents/incidents as a further aspect of the first factor affecting culpability otherwise we do not believe there is need to add any further factor.

Question 3
What do you consider should be the main aim of sentencing an organisation for an offence of corporate manslaughter or an offence under the Health and Safety at Work Act involving a death? Should there be any difference between the two types of offence and if so why?

10 Section 142 of the Criminal Justice Act 2003 sets out the purposes of sentencing in the criminal courts in relation to an offender which must include a corporate offender. As the Panel points out those principles should be reflected in the approach to offences of Corporate Manslaughter or an offence under the Health and Safety at Work Act.

11 Until now offences involving a fatality have been considered under Health and Safety legislation .and approaches that reflect the aims of sentencing and the degree of harm have evolved[1] As a matter of common sense it must follow that a case of Corporate Manslaughter should be treated as more serious than an offence contrary to Health and Safety legislation otherwise the introduction of the new offence would be pointless. The difficult question is how that is to be reflected in practice. The sanctions available are very much the same with the exception of the Publicity Order. That may or may not have an impact beyond that of the usual publicity that follows from a serious case. In other respects the Court is faced with the same question: what should be the nature of the financial penalty? In many instances the difference between the two offences will depend upon the status of the person within the organisation who is considered responsible although the harm done will be the same. Those prosecuted for Corporate Manslaughter will not be possessed of greater assets than they would have had if the prosecution had been under the Health and Safety legislation. Under existing Health and Safety legislation the courts are required to pass sentences that reflect the harm done, the need for deterrence and the financial circumstances of the organisation. In reality the requirements are the same. The likelihood is that in order to distinguish between the offences there will have to be a partial "downgrading" of the financial consequences in cases brought under the Health and Safety legislation if a differential is to be maintained and financial penalties are to be realistic.

12 We do not believe that is possible to treat the two offences as resulting in the same consequences. There can be no doubt that those convicted under Health and Safety legislation. Will seek to argue that their offending is worthy of a lesser consequence than would have been the case if there had been a conviction for corporate manslaughter. Similarly those affected as victims will expect a more serious penalty in the event that Corporate

[1] R v Howe & Son Ltd (1999) 2 Cr App R(S) 37: R v P&O European Ferries (2005) 2 Cr App R(S) 113

Manslaughter is proved. This is recognised by the Panel's approach to the calculation of financial penalties in paragraphs 58 to 63 upon which we comment further below.

Question 4
Do you agree that the aims of the fine should be to ensure future safety and reflect serious concern at the unnecessary loss of life? Should there be any difference in aim when imposing a fine for corporate manslaughter or for an offence under Health and Safety legislation involving death.

13 We agree that the aims are correctly set out. This is the effect of existing authority. Whilst the aims of imposing a fine will be the same whether the offence is corporate manslaughter or under Health and Safety legislation, as indicated above, it seems to us that it is inevitable that a difference n approach will be expected.

Question 5
Do you agree that a fine imposed for an offence of corporate manslaughter or an offence under Health and Safety legislation should aim to eliminate any financial benefit resulting from the offence? If so what information would be necessary and how could this be obtained?

14 We agree that where an offence results in specific financial benefit to the offending organisation the aim should be to eliminate that benefit. In responding to the Macrory consultation we indicated that it is clearly necessary to ensure that those who offend are not left with a benefit as a result of the offending. A profit motive will be an aggravating factor. That is the effect of the Panel's proposals in relation to relevant factors dealt with above.

15 It should be noted that this principle will not apply in all cases. In the many cases benefit will not be the aim of the offending. In those cases the offending will arise from a lack of care or failure in systems that was not intended. In such cases any benefit will be accidental and, perhaps, illusive.

16 We are inclined to the view that the Court should not embark upon detailed enquiry in cases where the benefit is not obvious and is denied. In those cases where the benefit is a clear aggravating factor and is easily determined; for example the cost of taking a step that was not taken or the income achieved by taking a short cut, the Court can determine the extent of that benefit and take account of that in determining where on the scale the fine might fall. There is no easy formula for ascertaining whether there was benefit and, if so, the extent in other cases and the cost of and delay resulting from enquiries would not be economically viable

17 It seems to us that if the fine is linked to ability to pay, as sensibly it ought to be, any general benefit, as opposed to that specifically found as an aggravating factor, will feature in the overall financial position of the organisation and, as such, will be reflected in the fine imposed in any event.

Question 6

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

18 The normal principles in the Criminal Justice Act 2003 apply. The Court must take into account both the seriousness of the offence and the financial circumstances of the corporate defendant as it must in the case of an individual. Section 164 of the Criminal Justice Act 2003 states:, "*a court shall take into account among other things the means of the offender so far as they appear or are known to the court*".

19 The basis for identifying a "starting point" or "range" present particular problems with corporate defendants. The definition is wide and encompasses organisations from the small family business to the major multinational in both the private and public sectors. Whilst we applaud the desire to devise a Guideline that has an equal economic impact of organisations of different sizes that will prove to be very difficult to achieve in practice. We set out below some general considerations although we accept that the adoption of one method of arriving at a starting point will not be appropriate to all organisations across such a broad range.

20 Turnover, in accounting terms, means the total revenue of an organisation derived from its trading less trade discounts, VAT and other tax based on this revenue. Turnover is not profit. As a simple example a business that deals in high value goods with a small mark up will have a very large turnover based on the value of the transactions but a low level of gross profit. Similarly with a fast food restaurant business where mark up on meals sold is low. By contrast a small business, such as a jewellers, dealing in high value goods but with a substantial mark up may have a low turnover but a very high gross profit. There is an argument that turnover may be a measure of the financial position of very large organisations hence the adoption of that approach by bodies such as the Office of Fair Trading who are almost invariably dealing with large organisations where profits are distributed amongst subsidiaries or otherwise dealt with. Turnover may not be an accurate indication of the financial position of smaller organisations and is very difficult to measure in relation to organisations in the public sector.

21 Despite what is set out in the Panel's paper turnover does not compare directly with the income of an individual. The two positions are quite different. A trading organisation has necessary expenditure in order to generate a turnover which is not the situation in the case of an individual. A consultation is annexed to the draft Guideline for Magistrates Courts directed towards the assessment of fines. We will, of course, consider that as another exercise in due course. For these purposes, however, we have noted that the suggestion is that assessment of a fine should be based upon income after deduction of tax and national insurance only: gross income not disposable income. That may be the subject of comment in another context but it, perhaps, illustrates the point we make in relation to turnover. An individual may have no expenditure or very limited expenditure in order to generate his income. That is not the case with a corporate defendant. Thus to suggest that use of turnover equates to use of the gross income of an individual is misconceived.

22 Liquidity is a different concept again. Liquidity means the extent to which the assets of an organisation are available to pay its debts when they fall due. It is a measure of an organisation's easily realisable assets. We agree that is not a basis upon which to found the assessment of a fine save for in those cases where the organisation has ceased to trade or is in the course of doing so when this would have obvious relevance and other approaches might not. It may, of course, have relevance to the ability to discharge a fine assessed on another basis.

23 We believe that a fine for a criminal offence is generally better linked to the profitability of the offending organisation. That more nearly equates to the gross income of an individual. It also impacts directly upon the profits and more accurately reflects the ability of an organisation to pay One of the principal aims has been articulated as a desire to influence shareholders with a view to their securing improvements in an organisation's safety performance. Any impact upon profits affects dividends and share values .and thus shareholders. As with the case of turnover, to which we have referred above, there may be some need to take account of the fact that profitability alone may not reflect a proper assessment of financial status in relation to very large organisations. It would, however, more accurately reflect the financial situation of the smaller concerns.

24 Although Corporate Manslaughter is a new offence it would be a mistake to approach the question of sentencing on the basis that Courts have no experience of dealing with fatal accident cases. The Panel recognises this in paragraphs 40 to 43 of the Paper. There is the rather sweeping statement that fines have been regarded as too low although no independent source for this statement is identified other than a reference to a comment of the Court of Appeal in a case decided in 1999. There has been considerable movement since then as is recognised in paragraph 43 We have considered the Court's approach to corporate offending under Health and Safety legislation since 1999. We have both looked at the decisions of the Court of Appeal and drawn on the experience of Crown Court Judges who deal with these cases. Whilst it is not often stated in terms the clear indication is that the starting point in determining the amount of a fine has been gross profit.

25 The real difficulty arises from the fact that with organisations, as opposed to individuals, no one means of assessing the organisation's finances will be appropriate in every case. There may be need for the Court to consider an overall picture or compare the results of looking at different aspects. A gross profit approach would be the right starting point in very many instances but if the Court were to form the view that the gross profit shown was not, in reality, representative, as might be the case with publicly owned organisations or where figures are the cause of concern, a comparison with turnover might produce a more accurate overview. As indicated above liquidity or asset value could well be appropriate with organisations that have ceased to trade or are in the process of doing so.

26 There may be a strong case for a Guideline that identifies the factors that the Court should take into account when ascertaining seriousness. Such would ensure a consistency of approach to these cases. That could be coupled with guidance as to the way in which a Court might approach a "starting point" by reference to the different means of assessing the financial position of on organisation depending upon the criteria that might apply to that organisation. Such a "guidance" approach is

postulated in the consultation in relation to fining individuals coupled with the draft Magistrates Guideline. It seems to us that the recognition that situations will vary considerably when considering the imposition of fines on individuals is sensible and that such recognition should also extend to corporate defendants. As is set out in that consultation and, we trust, clear from our comments above the assessment of financial circumstances is not a precise science.

27 There is no evidence to support any particular percentage as representing an appropriate "starting point" or "range" nor is there evidence that such a model would, in fact, produce comparable economic impact. This is, of course, a substantial weakness in any argument for a mathematical model for the fixing of corporate fines.

28 It will be the expectation that Corporate Manslaughter will result in a more severe penalty than an offence under Health and Safety legislation that results in death. As we have indicated above that will not necessarily result in fines for corporate manslaughter increasing from the levels of fines currently imposed for offences that arise from fatalities under Health and Safety legislation. The authorities suggest that in recent years the financial penalties in relation to fatal cases have reached a level appropriate to offences of Corporate Manslaughter. We agree that it will be necessary for the Court to approach the "starting points" for the two offences with the culpability of each in mind. If it is considered that some mathematical model should be suggested in guidance then we would be inclined to accept the views expressed some time ago by the Criminal Bar Association as a sensible way forward. We would propose that in cases of Corporate Manslaughter guidance might suggest that the Court might consider a starting point of 50% of the gross profit or, if the Court determines that the gross profit is not in the circumstances an appropriate indicator of the organisation's finances, 5%`of the turnover. In cases where there was a fatality but which are dealt with under Health and Safety legislation the figures might be 25% gross profit or 2.5% of turnover. We would emphasise, however, that this is better dealt with in general guidance rather than in a Guideline for which there may be little evidential justification

Question 7
Do you agree that it is for the prosecution and defence to raise issues of profitability and liquidity? What impact should these factors have on the calculation of the fine.

29 As indicated above the common sense approach in the Criminal Justice Act 1991 applies:, "a court shall take into account among other things the means of the offender so far as they appear or are known to the court". Thus profitability must be a matter that the Court should take into account. Where it is argued that a fine should be at a lower level as a result of low profitability liquidity may arise if the organisation has assets that might be realised to meet a financial penalty.

30 It should be for the defence to raise matters relevant to an organisation's ability to discharge a financial penalty where ability to pay is advanced as mitigation.

Question 8
Do you consider that there should be minimum fines for a) offences of corporate manslaughter and b) offences under Health and Safety legislation involving death? If so what amount do you think would be appropriate.

31 No. Further we do not believe that the Sentencing Guidelines Council has the power to "legislate" in this fashion.

Question 9
Do you consider that a report on each offender should be prepared for the Court with full details of financial status? If so how would this be provided.

32 No for the reasons set out in paragraph 5 above. There has been a tendency to suggest that expert evidence of one sort or another ought routinely to be admitted by Courts dealing with criminal cases In view of the many well publicised cases of expert error since Ward in 1993 we are concerned at this trend. The Court ought to be able to reach conclusions on the financial information available and has the power to seek information if necessary. Any expert would have to base his or her evidence upon the same information that is presented to the Court and any further information that would emanate from the defendant. The delay and expense involved are multiplied as soon as the defence seek to produce their own expert which is the almost inevitable consequence in many cases. The additional cost and delay would not be proportionate in the vast majority of cases. There would be a very real risk that the facts of the case would appear to be of less importance than financial argument between experts much to the distress of victims. The final decision must always rest with the Court and must be seen to do so.

33 Many Judges will have the ability to interpret accounts and act accordingly. If there are concerns about that there may be a case for providing Judges with some further instruction and guidance in the interpretation of accounts. Such was provided by the Judicial Studies Board for Specialist Recorders and we would support the inclusion of training in the regular courses that are provided by the Judicial Studies Board.

Question 10
Do you agree with the Panel's approach to the impact of the fine on the offender, its employees, customers and shareholders? If not why not?

34 Yes. It is a question of balance. There is the need to impose a penalty that has a sufficient impact but if the effect of that is job losses or cut backs there would be a disproportionate effect upon those to whom no blame may attach. Similarly if the impact of the penalty is to increase prices the consumer at large would suffer. The Court will be conscious of both the position of the victim but also the wider picture and others who might be adversely affected. This is the sort of balancing exercise that requires considerable discretion.

Question 11
Do you agree that the Court should treat offenders consistently whether or not they are publicly funded or providing a public service? If not, how do you think that considerations specific to public bodies should be reflected.

35 This is again a question of balance. Simply because an organisation is publicly funded or providing a public service should not exempt that organisation from the financial consequences of offending. Indeed there are those who might argue that organisations providing a public service, such as transport, have a greater responsibility. There is, however, the same need to take account of employees and "customers" as set out in paragraph 33 above In addition there are two other obvious factors for a Court to consider. First the fact that in the case of a publicly funded organisation the financial penalty may result in little more than an accounting exercise with the funds moving from one area of public funding to another. Second a financial penalty can impact upon the service provided with consequences for the wider community. If the funding necessary to complete works of improvement or maintain a service is reduced all those who might use the service will be affected. The Court will again be alert to position of the victim but also the wider picture and others who might be adversely affected.

36 It would be quite inappropriate to approach commercial or private organisations differently from organisations that are publicly funded or providing a public service. Thus the aggravating an mitigating factors would be approached in the same way. The financial assessment would have to take account of the different positions of such organisations. Assessing the financial viability of an organisation that is publicly funded or providing a public service may be more difficult than the same exercise with a commercial or private organisation We would not expect the accounts to show the same levels of profit if indeed a profit is shown. In many instances there will be public subsidies the reclamation of which by a financial penalty is certain to have an effect. We cannot imagine that subsidies are paid unless financially necessary. Further in the case of publicly funded organisations the public in general are the "shareholders". It would be a failure to recognise the reality if a large public concern were to be approached on the same basis as a successful commercial operation of a similar size.

37 It seems to us that this difficult area requires care in approach and a degree of flexibility to enable a Court to strike the correct balance in an individual case. Of course if our view that financial assessment should be the subject of guidance and not Guidelines were to be adopted the difficulty might be largely overcome.

Question 12
Do you agree that when sentencing an organisation for an offence of corporate manslaughter the Court should impose a publicity order?

38 We do not believe that such an Order should automatically follow in every case. It is likely, of course, that in very many cases there will be publicity in any event. It seems to us that the three situations set out in paragraph 79 of the Panel's Paper should be the relevant considerations for a Court to take into account.

Question 13
What should the extent of the publicity be and how, if at all, will this differ between cases of corporate manslaughter?

39 We agree that it would not be sensible to provide a detailed formula for a Publicity Order applicable to every case. Circumstances will vary with the scale of operation of the organisation and the activities it pursues. There may be a case for some minimum requirements which might be extended to deal with the particular circumstances of the case. In our view minimum requirements would be an insertion in the Annual Report and a Notice in a newspaper to be specified by the Court. Minimum requirements should be just that. If the minimum requirements stray beyond simply indicating the minimum that might be expected there is less flexibility and a greater risk of inappropriate Orders.

Question 14
Do you agree that the making of a publicity order should not lead to a reduction in the level of fine imposed on an organisation for an offence of corporate manslaughter?

40 We agree.

Question 15
Do you agree that the making of a remedial order should not lead to a reduction in the level of fine imposed on an organisation for an offence of corporate manslaughter or an offence under the Health and Safety legislation?

41 We believe that the Panel's approach is inappropriate. Whilst we accept that the purpose of a Remedial Order is rehabilitative and intended to set out steps that must be taken to address failure it cannot be regarded in isolation. If the financial penalty is approached on the basis that it should have a real impact upon the organisation it will, as a consequence, affect the financial position of that organisation. Corporate bodies and other organisations do not have infinite means. Thus if there is no account taken of the financial impact of the fine there will be difficulty in funding the steps needed to implement a Remedial Order. That might mean that the steps required by the Remedial Order are not fulfilled. Alternatively, or indeed in addition, it may also result in consequences for employees, customers or others whose position is dependent upon the viability of the organisation. It has already been accepted that such considerations should apply when a fine is imposed. As a matter of logic and common sense they must also apply when a Remedial Order is considered.

42 We accept, of course, that the purpose of a Remedial Order is different from the purpose of a fine. The latter is intended as punishment and deterrence whilst the former is intended to significantly reduce the risks of repetition and force improvements. Thus there is an argument for suggesting that the financial position is of less relevance than when a fine is fixed. If remedial; steps are considered necessary and there is no funding then the organisation may not continue to function. The outcome of that, of course, could be far reaching perhaps affecting a local economy.

43 There has to be a balance struck between the imposition of a fine and the costs incidental to a Remedial Order. It is unrealistic to approach this by disregarding the financial implications of the fine. Where the outcome of the sentencing process is to result in financial consequences it seems to us

that both logic and common sense make it necessary for the Court to take into account the overall effect of those financial consequences adjusting, if appropriate, to take account of the finances of the organisation. To do otherwise would be to substantially increase the prospects of damage to innocent parties of the sort already considered above. Such an approach to the imposition of financial orders has been adopted by Courts for many years, save in cases of "hidden assets" which are unlikely to arise with corporate defendants facing the process envisaged in this consultation. An obvious example is the Compensation Order which may be made in criminal proceedings, including proceedings of the type contemplated in this Paper, but which can only be made when the Court has taken into account the means of the offender. There is no sensible basis for departing from that general rule. We appreciate that may require a balance to be struck between the punishment and the rehabilitation but the striking of such a balance is a matter for which Courts are equipped and cannot easily be the subject of Guidelines.

HH Judge David Swift
Chairman Criminal Sub Committee
Council of HM Circuit Judges
14th January 2008