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Consultation Response

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Sentencing Council health and safety offences, corporate manslaughter and food safety and hygiene offences guidelines Consultation

About Which?

Which? is the largest consumer organisation in Europe with more than 800,000 members. We operate as an independent, apolitical, social enterprise working for all consumers and are funded solely by our commercial ventures. We receive no government money, public donations, or other fundraising income. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

Summary of our response

Which? welcomes the opportunity to comment on the Sentencing Council's review of these guidelines in the wake of a number of food incidents, most notably the wide scale contamination of beef products with horsemeat. We have limited our comments to the overarching issues set out in the guidance, as well as guidelines for food safety and hygiene offences.

We have been concerned that penalties for food safety and hygiene offences are limited compared to the potential nature of the crime and scale of consumer detriment. An effective deterrent is therefore needed to deal with an increasing complex and integrated supply chain.

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We work to make things better for consumers. Our advice helps them make informed decisions. **Our campaigns make people's lives fairer, simpler and safer.** Our services and products put consumers' needs first to bring them better value.

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We broadly support the approach that is proposed. In addition, we suggest that:

- Additional clarification is needed around the scope of legislation that is included so that all relevant national as well as European Union (EU) originated provisions are included.
- The guidelines need to be further strengthened in order to give greater weight to the potential to cause harm as well as actual harm.
- The potential severity of misleading practices needs to be better reflected, particularly where this could or does lead to people eating something that they find offensive, for example for religious reasons.
- The guidelines need to deal effectively with the diverse range of businesses involved in this sector and ensure that any fines are applied at the relevant scale, particularly when dealing with national businesses with multiple outlets.

While the ranges specified for individuals and different sizes of organisations have been strengthened, it is important that they are kept under review to ensure they are providing an effective deterrent. We are also concerned that the general £5000 cap for fines for individuals in a Magistrates' Court limits the ability to ensure deterrence for all potential offenders.

Introduction

Which? welcomes the opportunity to comment on the Sentencing Council's review of the guidance on health and safety, corporate manslaughter and food safety and hygiene offences guidelines. We have limited our comments to the overarching issues set out in the guidance, as well as guidelines for food safety and hygiene offences.

We strongly support the Council's initiative to review the guidelines on food safety and hygiene in the wake of a number of food incidents which have highlighted the discrepancy between the potential financial gain and consumer detriment from offending compared with the penalties that can be applied.

The food supply chain is now very complex, involving a very diverse range of businesses of varying sizes. It is therefore important that there are effective deterrents in place to ensure that there is compliance with food law requirements, whatever the size of business.

Food safety and hygiene offences can cause significant harm to consumers and even death. But as well as harm to health or economic loss, consumers' well-being can also be compromised by breaches to food law requirements. This includes where people are misled into consuming products that they find unacceptable.

The recent large scale contamination of beef products with horsemeat highlighted this, as well as illustrating how there can be many actors of varying sizes involved in the food supply chain. Many of the companies that are involved in the food supply chain are large multi-national corporations. While many will be responsible and abide by the law, it is important that the penalties that can be used reflect their scale if they are to deter unsafe or misleading practices. Professor Elliott's review into the integrity and assurance of food supply networks, following the horsemeat incident, also stressed the need for significant penalties for serious food crimes.



The consultation document highlights that there has been confusion around how to apply the current guidelines and that there may be unfamiliarity with them as there are a limited number of cases that make it to the courts. We therefore welcome this move to strengthen and clarify the guidelines in order to ensure that they better reflect the severity of these types of offences and act as an effective deterrent.

Aims and overarching issues

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

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

The fine must also remove any economic gain derived from the offence to ensure that it is not cheaper to offend again and risk being caught, rather than take the necessary precautions. We also agree with the principle that the fine should be sufficiently substantial to act as a real deterrent. We also welcome the distinction made between organisations and individuals.

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

We broadly agree with the proposed structure of the guidelines. It is important that the guidelines set out a minimum and/or starting point to give the courts some proper guidance, especially if there are to be significant increases proposed (as the court may otherwise find it difficult to impose a significant increase based on previous cases).

In relation to Step 4 (where factors that may warrant adjustment of the proposed fine are included), it is difficult to know what it will mean in practice to 'avoid any unjustifiable consequences' and so this may need further clarification. A business will always be able to argue that a high fine will lead to job losses, impact on future growth or make future compliance even more difficult, for example. This step should also expressly allow for an adjustment to reflect the economic benefit from the breach.

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

The guidelines state that the court should 'examine the financial circumstances of the offender in the round to assess the economic realities of the organisation and the most efficacious way of giving effect to the purposes of sentencing'. This includes the profitability of an organisation, any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings and whether the fine will have the effect of putting the offender out of business will be relevant. It is recognised that in some cases this may be an acceptable consequence. We do not have any comments.



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

We strongly agree that the quantifiable economic benefit derived from the offence should be considered in calculating the fine.

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

We agree with the four broad categories in the guidelines. We agree that in addition, when sentencing 'very large' organisations - defined as those whose turnover very greatly exceeds the threshold for large organisations, it will sometimes be appropriate to move outside the range to achieve a proportionate sentence.

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

We agree that the court should consider any wider impacts of the fine within the organisation or on innocent third parties, such as impact on the offender's ability to improve conditions in the organisation to comply with the law or the impact of the fine on the employment of staff, service users, customers and local economy (but not shareholders or directors). But it is important that care is taken at this step not to undermine the importance of the deterrent, so as noted above, we think the guidelines may benefit from further clarification and detailed guidance on how this will apply in practice.

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

We broadly agree with the approach, ie. (1) determine the sentencing category, (2) starting point and category range, (3) review and financial element of the sentence and then steps 4 to 9 as the standard steps in the Sentencing Council's guidelines including factors such as reduction of guilty pleas and consideration of the totality if sentencing for more than one offence.

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

These seem reasonable. Care is needed in the interpretation of advice that the court should consider any wider impacts of the fine on the offender's ability to make restitution to victims, comply with the law, or on the employment of staff, service users, customers and the local economy to ensure that this does not undermine the deterrent.

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

Given the flexibility already provided within the guidelines with regards to providing for compensation, the suggested approach seems sensible.



Guideline for food safety and hygiene offences

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

We agree that to express offences in terms of failing to comply with Community (or EU) provisions will ensure most relevant offences are covered. Some important provisions do, however, seem to be excluded where they are specific national provisions. This includes for example the requirement to display food hygiene rating certificates in Wales and the reserved descriptions which specify the amount of meat that needs to be included in a meat product for it to be correctly described. We are also unclear why offences under the Food Safety Act 1990 should be excluded given the significance of this Act. The low number of prosecutions taken should not mean that it is excluded, but instead reinforces the need for greater clarity within the guidelines.

We consider that it is essential that the guidelines cover issues around misleading labelling and misdescription of food products, as well as food hygiene and safety - and that the title should make this clearer. In the current economic climate, food fraud and adulteration is becoming more common. Our own research over the past 12 months has for example found problems with lamb takeaways that contain other meat species, fish that is wrongly described (cheaper whiting instead of haddock) and goat's cheese that is sheep's cheese. This suggests a much wider problem across the food supply chain. Professor Chris Elliott and the FSA have for example recently highlighted concern about substitution of cumin with almond because the price of cumin has increased. This also has possible health implication for allergy sufferers.

More generally, we consider that breaches to food labelling breaches that can leave consumers out of pocket, but in more extreme cases lead to consumers eating something that they object to on ethical or religious grounds, are often not treated seriously enough.

The consultation document emphasises that as food safety and hygiene offences do not come before the courts very frequently, there can often be confusion about how the guidelines apply. We therefore think it is important that food safety, hygiene and misleading labelling issues are dealt with in the guidance.

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

We agree that a different approach is needed to culpability for individuals and organisations and generally agree with the categorisation proposed. Where the offender is an individual, we agree that culpability will need to take account of their attitude towards the standards and whether they have knowingly and intentionally ignored the relevant standards through to whether they have fallen just slightly short of the standard of due diligence.

We therefore agree with the categorisations of deliberate, reckless, negligent and low. We do, however, consider that there is a need to distinguish between people who (i) try but due to their negligence fail; and (ii) those who through their negligence fail to try.

We also consider that great care is needed with regard to organisations. An organisation that has put in place procedures and processes that are ignored may appear better than one that



has not put in place anything. However, if the former shows they are aware of the risks/need for good practice, it may also indicate a more deliberate breach with an intent to show it was just a one-off mistake. We think that the guidance should also address this scenario and ensure 'how' policies and processes have been implemented, as well as 'have'.

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

We do not consider that it should always be the case, in relation to harm caused, that the fine is higher if someone is hurt than if they are not. Putting the lives of many at risk may be as serious as giving food poisoning to one person. The nature of food poisoning also means that people may have been affected who never came forward or were unable to attribute the food source behind it. It can, for example, take up to 10 days for the symptoms of the most common type of food poisoning, Campylobacter, to become apparent. We therefore think that category one harm should also include risk of serious adverse effects.

Financial harm should not always necessarily be a lower penalty. We therefore consider it inappropriate that this is only included in category 3. The level and nature of harm caused need to be considered overall, including wider harm caused through mislabelling that results in consumption of something that the consumer finds unacceptable, as we have outlined. This could be particularly abhorrent if it is a food that is not eaten for religious reasons.

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

Risk of serious harm should be included in category 1. We also suggest that consideration is given to the nature of the risk. While we appreciate that it is difficult to differentiate severity based on factors such as the type of bacteria and resilience of the person affected, this will be more straightforward in some situations, rather than others. There are inherent risks within some practices that individuals and organisations should be aware of, such as *E coli* O157 which can be particularly severe and often fatal.

We agree that while custodial sentences will generally only be applied to category 1 offences, this should also be possible for category 2 and 3 - and be available in cases of misleading practices, as well as harm to health.

We are concerned that the more general cap of £5000 for an individual in a Magistrates' Court is, however, too limiting in order to ensure deterrence for all potential offenders.

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

The suggested approach seems sensible. We hope the proposed starting points will serve as a deterrent for individuals and agree that a fine will generally be more appropriate than a community order as it removes, or should remove, the incentive of non-compliance.

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



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

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

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

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

In general, we consider that the starting points and ranges for the businesses concerned are much more appropriate as they are likely to have a greater impact on the business and therefore deter those who think that it may be worth taking a risk by cutting corners or committing offences.

It is important that they are kept under review given the complex nature of food businesses within the supply chain. It is also important to ensure that the penalty reflects the correct nature of the business and its true scale, rather than being determined based on one outlet, if this is part of a wider national or multi-national business that has ultimate responsibility.

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

We consider that the proposed aggravating factors for individuals and organisations are generally appropriate, ie. as set out in the consultation document:

- previous convictions
- motivated by financial gain
- deliberate concealment of illegal nature of activity
- established evidence of wider/ community impact
- breach of any court order
- obstruction of justice
- poor food safety or hygiene record
- refusal of free advice or training.

We would add ‘poor food standards record’ and as stated above think that the nature of the harm to health and also the misleading practice (if it contravenes ethical boundaries for example) are also very important.

We consider that the factors reducing seriousness or reflecting personal mitigation are also generally appropriate, ie:

- no previous convictions or no relevant/ recent convictions
- evidence of steps taken to remedy problem
- business closed voluntarily on discovery of problems in order to take remedial steps
- high level of co-operation with the investigation, beyond that expected



- good food safety/ hygiene record
- effective food safety/ hygiene procedures in place
- self-reporting, co-operation and acceptance of responsibility.

And in the case of individuals:

- good character or exemplary conduct
- mental disorder or learning disability
- serious medical conditions
- age and/ or lack of maturity
- sole or primary carer for dependent relatives.

These however need to be applied with care as a high level of co-operation after the event, for example, does not compensate for failures or breaches leading to consumer harm before they were uncovered and does not necessarily reflect whether they are likely to repeat the offence or not.

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

The ability to issue a Hygiene Prohibition Order is an important power that can be used to prevent the offender running a food business or premises being used for a food business. We think that the guidance seems sufficient, although it may be helpful to illustrate it with possible scenarios.

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

With the suggested improvements we have proposed, we consider that the guidelines should increase the severity of food safety and hygiene, including misleading labelling, breaches and therefore help to incentivise compliance and deter offenders. As we have stated, we are concerned that broader limits set for fines in Magistrates' Courts will still limit the impact on individuals.

Conclusion

Overall we consider that the review of the Council's guidelines is a very positive step that should help to ensure that the Courts deal more effectively with food safety and hygiene breaches.

We broadly support the approach that is proposed. However, we think that additional clarification is needed around the scope of legislation that is included. We also consider that the guidelines need to be further strengthened in order to give greater weight to the potential to cause harm as well as actual harm and to reflect the potential severity of misleading practices. We also think that the guidelines need to deal effectively with the diverse range of businesses involved in this sector and ensure that any fines are applied at the relevant scale, particularly when dealing with national businesses with multiple outlets.

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