

## HOW CAN WE CHANGE HEALTH & SAFETY ENFORCEMENT TO IMPROVE OCCUPATIONAL HEALTH & SAFETY?

*England and Wales is on the verge of a revolution in sentencing for health & safety criminal offences. The combined effect of the Court of Appeal's June 2015 judgement against Thames Water Utilities and the proposed new guidelines from the Sentencing Council are set to increase dramatically the level of fines for very large organisations beyond the £100million mark (see <http://nebula.wsimg.com/32618ea5de28f718361599ce7ae311a6?AccessKeyId=12CD98B2E32F20649B96&disposition=0&alloworigin=1> )*

*There are respectable arguments on both sides as to whether ratcheting up the level of fines will lead organisations to improve their health & safety performance. Whatever the case, criminal fines are a blunt tool to achieve the goal of behaviour change and accident prevention. So, do the forthcoming sentencing guidelines present us with a practical opportunity to make a real difference and save lives? I believe they might.*

The sentencing guidelines could be used to encourage offenders to get together with prosecutors and agree appropriate remedial measures ahead of the sentencing hearing. This would gain traction in an environment of increasing fines if, subject to the discretion of the court, such an agreement would be a factor pointing towards a reduction or suspension of the sentence in combination with a remedial order.

### How would this change be achieved?

The currently proposed sentencing guidelines already make reference to remediation and remedial orders. For example, for health & safety offences by organisations, the draft states that in all cases the court must consider whether to make ancillary orders and these may include remedial orders “in addition to or instead of imposing any punishment” on the offender.

This route would be taken up more often and more constructively if the guidelines went a little further. The problem is that in almost all cases the court does not have the time or the experience to initiate an appropriately worded remedial order. In the run up to sentencing, the prosecutors are focusing on getting a ‘respectable’ fine and the defence are focusing on keeping the fine down. However, **if the offender had a real incentive to agree a remediation plan with the prosecutor, things might be different. The guidelines should create such an incentive.**

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For example, the existing wording in the guidelines could be supplemented as follows:

*“Where the enforcement authority and the offender have agreed a remedial measure or measures that are sufficiently specific to be enforceable, then a remedial order may be imposed and the sentence may be reduced, or the sentence may be suspended in whole or in part subject to compliance with the remedial order. Without limitation, examples of such remedial measures might include completion of recognised training for holders of specific positions within the defendant organisation, or recruitment or engagement and retention of health & safety personnel with recognised qualifications. In appropriate cases, the required remit for such personnel could include: assessing weaknesses in the offender’s health & safety arrangements and culture; then developing and overseeing the implementation of suitable and sufficient measures to remedy weaknesses; and finally reporting back to the enforcement authority.”*

This approach would also work for sentencing of individuals and for sentencing of corporate manslaughter with minor modifications. It should be enough to bring the parties to the negotiating table before many sentencing hearings and allow the HSE or other enforcement authority to make a real difference to the offender’s behaviour in a much more targeted manner than the blunt instrument of a large fine. It could also provide a 'safety valve' for prosecutors as well as defendants against the negative publicity that might arise from the highest fines under the new regime.

**In summary**, if the Sentencing Council can be persuaded to incentivise intelligent remedial measures that can be discussed and agreed ahead of the sentencing hearing and converted into a remedial order, then the new tougher enforcement regime will stand a much better chance of improving health & safety performance by offenders and gaining public approval.

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