THE CENTRE

FOR

CORPORATE ACCOUNTABILITY

RESPONSE TO THE CONSULTATION

OF THE

SENTENCING ADVISORY PANEL

November 1999

RESPONSE TO SENTENCING ADVISORY PANEL CONSULTATION ON ENVIRONMENTAL OFFENCES

From: **The Centre for Corporate Accountability**
Date: **17 November 1999**

1. This is a response to the Sentencing Advisory Panel, consultation paper on "Environmental Offences". The Centre for Corporate Accountability is concerned about the manner in which courts sentence *companies* in relation to offences involving either the "causing of harm" or the "risk of harm". Our concern relates to both offences contained in regulatory legislation (as in the five offences under present consideration) as well as conventional crimes (like manslaughter) and also extends to offences that are not "environmental" in origin but where the victims are "workers" or "consumers".

2. The Centre for Corporate Accountability is a new organisation, which through research, advocacy and advice aims to increase the accountability of companies and their senior officers whose negligent, reckless or intentional conduct causes harm. The Centre undertakes research into how the criminal justice system deals with corporate harm and advocates changes to law and practice where necessary. The Centre's Management Committee and Advisory Council includes many of Britain's leading lawyers, academics and hazard reform advocates working in this area.[i]

3. Although, our comments in this response focus on the five offences in question (since this is what the consultation document asks us to do) it is our view that there needs to be a much fuller consideration by the Panel, on how courts sentence companies for all offences involving harm or the risk of harm.[ii] Although, sentencing guidelines for different categories of corporate offences (as in the *Howe* guidelines for health and safety offences, and the future guidelines on these environmental offences) are useful in that each of these offence categories are distinctive, they should exist within a wider set of guidelines/law relating to the sentencing of companies.

4. Our comments primarily relate to the sentencing of companies discussed in the consultation document between paragraphs 4.17 and 4.23. Although the sentencing of individuals convicted of these offences is obviously of importance, more controversy and criticism revolves around the sentencing of convicted companies. Furthermore this is an area which has in the past been seriously neglected, yet about which many of those involved in the Centre have worked.

5. Our comments on the Panel's consultation document needs to be prefaced with a discussion on the purpose and effectiveness of sentencing companies.

WHY SENTENCE A COMPANY?

6. Conventionally, the purpose of sentencing an individual is to achieve at least one of four main objectives: the punishment of the convicted person; his or her incapacitation; deterrence of both the convicted person and others who may, in the future, consider carrying out the crime; and, finally, the convicted person's rehabilitation.

7. There is no reason to think that the sentencing objectives in relation to companies should be any different: i.e. the punishment, incapacitation and rehabilitation of criminal companies and the deterring of them and others who could commit the offence in the future. Courts are, we would argue, in fact in a *better* position to achieve these objectives - particularly that of punishment, deterrence and rehabilitation - in relation to companies than individuals. This is because companies are primarily economically rational undertakings. As one criminologist has noted:

> 'The corporation probably comes closer to the "economic man" and "pure reason" than any other person or organisation. The executives and directors not only have explicit and consistent objectives of maximum pecuniary gain but also have research and accounting departments by which precise determination of results is facilitated.'[iii]

8. The importance of the above to sentencing is that rational and purposeful conduct is the type of conduct which is most amenable to control by law. And when this is conduct is linked to profits, fines can be a very effective punishment and therefore deterrent. In relation to "health and safety" offences, this idea can be articulated in the following way. The same principles apply to environmental offences:

9. 'Companies are constrained from acting in a socially responsible manner by the need to maximise their short or long-term economic profitability. Cost benefit analysis ensures that companies are more able than traditional offenders to calculate accurately the expected cost of any action. Such costs need not be purely financial; the profitability of a company, and the continued motivation of its management and workforce, can rest upon its good reputation in the market. It may also prove profitable to have safe operating policies. However, if the total cost of putting safety first is greater than the cost of conducting its operations in a manner that could be "violent" only the most irrational company could fail to *be deterred from prioritising safety* ... The main costs incurred by a company when convicted of a criminal offence are related to its profits and reputation. If the expected penalty for violent conduct - which depends upon the perceived likelihood of prosecution and the severity of the punishment - is greater than the benefits which accrue to a company from increased profits, the company will more likely change its operations.'

10. Companies are not only potentially highly sensitive to punishment and more deterrable than individuals, they can also be more effectively rehabilitated. As one academic states, 'It is often assumed in debates about corporate liability that the only option is a fine. This shows a failure in imagination as well as a certain ignorance about corporate penalties in other jurisdictions.'[iv]

11. For, unlike the minds of individuals, which cannot be re-modelled, the components of a company can be analysed and reformed. New polices can be adopted, new job positions created and new management systems set up. The organisational defects of a company - its 'psyche' - can be taken to pieces and put together. Unsafe companies can be turned into safe ones.

12. This response to the Panel's document focuses on what factors courts should consider in sentencing companies for these five environmental offences. It must be recognised that there are a number of other sentences other than the cash fine that courts could impose upon companies. These include:
    • Equity fines
    • Adverse Publicity Orders
    • Corporate Probation
    • Corporate Community Service.
    • Penalty Point System
    These are not dealt with in the main text of this paper – since the Panel's consultation document was framed narrowly. However, in two annexes to this response, these other sentences are discussed. It is our view that the Sentencing Advisory Panel should in the future, give serious consideration to these options.

THE PANEL'S PAPER: ASSESSING THE PROPER LEVEL OF FINES.

13. Since the prime reason for the existence of companies is financial success, it is easy to imagine that cash fines might work particularly effectively as a sentencing technique.[v] However, due to current inadequacies in sentencing procedures, fines fail to be proportionate either to the seriousness of the offence or the wealth of the company.

    We support the view held by the Panel, that fines should take into account:
    • culpability of the company
    • the extent of the damage or harm which has actually occurred or has been risked
    • the wealth of the company

Culpability

14. In relation to the culpability of the company, we support the factors (a) to (g) set out in paragraph 4.17, as criteria to be used by the courts in determining the level of culpability of a convicted company. However, in our view, another factor, effectively an extension of (g) needs to be added, to take into account not just previous "offending" but also a history of enforcement notices and written advice subsequent to discovery of breach of environmental

law. The wording could be along the lines of: "whether the breach was part of a continuing pattern of environmental failure as indicated by the past need of the environment authorities to provide advice or enforcement notices.

15. It is not enough for the courts to be given a list of factors to take into account when assessing the culpability. The courts should be obliged to request from the regulatory authorities information in relation to each of these factors. Although at the moment, in relation to individual crimes, every attempt, particularly through social inquiry reports, is made to ensure that the magistrate or judge has access to all the information that may be relevant to his decision on sentencing, no such care is taken in relation to companies. There is no report such as the social enquiry report. The court often remains unaware of basic information concerning history of its relationship with the regulatory agencies, or its general environmental record. Moreover, much of this information will not be known to the court as a result of the cases – particularly since most companies plead guilty.

16. In our view, the courts should routinely receive a Corporate Inquiry Report which will contain details of the factors relating to culpability as well as issues relating to harm/risk of harm and means (see below).

Issue of Harm

17. In relation to the second point – "the extent of damage which has actually occurred or has been risked." – we believe that a court should distinguish cases where "harm has been caused" by the conduct in question and cases where "harm has been risked." In our view courts should treat more strictly cases where it can be shown that harm has either occurred or is likely to have occurred from cases where harm has been risked.

Means of the Company

18. Whilst it is unclear the extent to which courts currently fail to ensure that fines reflect issues of culpability and harm, there is evidence to suggest that fines do not currently reflect the means of the company. The Chief Executive of the Environment Agency recently stated that fines paid by polluters were 'small change ... they sent the wrong signal to boardrooms and the public at large'. He said that the largest fine imposed on a company was the 'equivalent of a £15-fine on someone earning £30,000. To be realistic fines have to bear more relation to the financial strength of the offending company as well as to the damage done to the environment.'[vi]

19. Analysis of fines for health and safety offences – and there is no reason why the same should not apply in relation to environmental offences – indicate that there is a clear inverse relationship between fines imposed and the profits or turnover of the convicted company. In the only study of its kind, details of the annual profits of 65 of the 260 companies sentenced between 1987 and 1993 in the West Midlands was obtained.[vii] The five companies with average profits of £1-£10,000 received an average fine of £750 per offence - 16% of their profits. The biggest category of companies with profits of between £100,000-£150,000

received fines of £1290 per offence - 0.5% of their profits. Whilst at the other extreme, the five companies with profits of over £10 million received average fines of £1185, equivalent to 0.002% of their profits.

20. We therefore strongly support, Paragraph 4.19 of the consultation document which states that:

> "The fine which is imposed should reflect the means of the company concerned. In the case of a large company the fine should be substantial enough to have a real economic impact which together with the attendant bad publicity resulting from prosecution will create sufficient pressure on management and shareholder to tighten regulatory compliance and change company policy."

Making fines Proportionate to the "Means" of the Company.

21. **The Case of *Howe*:** In the case of *Howe*, the court of appeal explicitly stated that, in relation to health and safety offences**,** any 'fine should reflect not only the gravity of the offence but also *the means of the offender'*. The court therefore supported the principle of proportionate fines. However it is important to recognise the limitations of the Howe guidelines. The court.
    - specifically ruled out that the fine 'should bear any specific relationship to the [company's] turnover or net profit'.
    - did *not* suggest that the courts should, on a routine basis, receive information about the financial affairs of the company. A company need only supply this information to the court when the company 'wished to make any submission ... about its ability to pay a fine'. [viii]

22. We support the Panels view in paragraph 4.22 that "There is no settled formula for determining the level of fine which a corporation should pay. … The Panel is of the view that the establishing of a more settled formula for determining the level of fine in cases involving corporations would enhance consistency in sentencing."

23. Before looking at what this formula might be, it might be useful to discuss (1) the system of unit fines, that was briefly part of the law, and (2) the system of fines under competiton law

24. **'Unit Fines':** In 1990, the Government of the day produced a White Paper, 'Crime, Justice and the Community' which promoted both the greater use of fines and greater justice in fining. 'It is in the interests of justice that offenders should be fined in a way which takes account of their means; otherwise fines have a different impact on offenders,' it stated. This principle found a legislative basis in the Criminal Justice Act 1991. Magistrates courts when dealing with an individual - but not a company - should calculate the fine by deciding first how many units on a scale from 1 to 50 represented the seriousness of the offence. The courts would then calculate each offender's weekly disposable income and determine how much the offender should pay per unit.

25. The Government did not explain why this principle could not be extended to companies. The White Paper implied that the unit fine might apply to them when it stated that '... companies which see commercial advantage in creating pollution or neglecting safety precautions cannot be punished effectively by fines at the levels given to most offenders'. Yet, when it came to the legislation, the focus was solely on the individual offender.

26. When the Health and Safety Commission was asked by a Select Committee to comment on the idea of unit fines, it stated: 'The HSC would welcome the proposal for a unit fine system if it meant magistrates could take into account a combination of "ability to pay" and heinousness. For the Commission, the most important principle is that those who gain the most, taking into account their economic status, should pay the most.'[ix]

27. The unit fine system did not last long, although this had nothing to do with deficiencies in the principle of proportionality itself. The unit fines failed for a number of reasons, none of which rebutted the idea 'that different financial penalties can provide the same punishment for offenders of different means'.[x] The Criminal Justice Act 1993 repealed the unit fine system replacing it with a section which simply states that the fine should reflect the seriousness of the offence and that in fixing the level, a court should take account of the offender's financial circumstances. Like the 1991 Act, the 1993 Act does not directly apply to companies and since it only applies in the magistrates court, even if it did, it would have no impact on Crown court sentencing.

28. **Competition law:** Under the European Union's competition law provisions, a (civil) fine of up to 10% of the company's previous global turnover can be imposed:[xi] It states that:

> "The Commission may by decision impose on undertakings or associations of undertakings fines of from one thousand to one million units of account, or a sum in excess therefore but not exceeding 10 per cent of the turnover in the preceding business year or each of the undertakings participating in the infringement where, either intentionally or negligently (a) they infringe Article 85(1) or Article 86 of the treat; or (b) they commit a breach of any obligations imposed pursuant to Article 8(1). In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

29. The Commission, for example, imposed a fine of over £35 million on a number of companies in a price-fixing case.[xii] These fines are only proportionate in the sense that the maximum fine is linked to the turnover. This principle has now been incorporated into British law through the Competition Act 1998.[xiii]

30. In a submission to the Law Commission, the Criminal Bar Association appears to support the principle of proportionate fines:

'Recent statistics show enormous disparities in fines imposed upon corporations convicted of health and safety offences, when those fines are expressed as a percentage of annual corporate profit. In our view, the maximum penalty for a corporate offender should be expressed as the greater of either a percentage of the average corporate profit in the three years preceding the offence, or a percentage of the corporate turnover during the same period. We would tentatively suggest 50% of corporate profit or 5% of turnover as the appropriate statutory maxima.' [xiv]

A proposed Formula

31. In response to the Panel's question in paragraph 4.23 on devising a formula, there are two issues that need to be addressed. (1) the relationship between "means" on the one hand, and culpability/harm on the other; and (2) the financial "measure" which should be used by the courts to determine the "means" of the company, and to which the court must compare any fine.

32. Our proposal is as follows – and to some extent reflects the previous system of unit fines. Each of these five environmental offences – and we would argue other offences as well – should be given a set of percentage ranges which would reflect the seriousness of the offence itself. For example, it could be for these offences, the range would be 5%-15%. In relation to each case resulting in a conviction, the magistrate or judge would use the "culpability" and "harm" criteria to determine the exact % level. So, if the offence was at the top end of "culpability" and the harm caused or likely to be caused was great, then the percentage level should be at the higher end of the percentage range (i.e. 14 or 15%).

33. The percentage level chosen should then be multiplied with a "measure" reflecting the company's means. The Panel suggests that "any such measure might take account of a number of different factors including:
    - turnover (the sales revenue of the company over, say, the last three years);
    - profitability (the scale of net profits before tax and dividends over the last three years
    - liquidity (the value of current short term assets set against short term liquidity).

34. We believe that the measure should be an average over a three year period of either (a) or (b). We have no comment on which of these two measures is more appropriate – except to note that competition law uses "turnover" as its measure.

35. A number of other points on this need to be clarified:
    - if the company has not been in existence for three years, the court should use accounts over the years that it has been in existence.
    - if the company is part of a large corporate group, the court should, in addition, be furnished with information on the profits of the corporate group, and the court should be allowed to take into account the profits of the corporate group in assessing what the final fine should be.

[i] The Management Committee is composed of Louise Christian (solicitor); Alan Dalton (Environment Agency Commissioner); Professor Steve Tombs (John Moores University); Charles Woolfson (University of Glasgow); Deborah Coles, (Co-director, INQUEST): Conor Foley (Amnesty International). The Advisory Council is composed of Upendra Baxi (Professor, University of Warwick); Barrie Berkley (Disaster Action); Chris Clarkson (Professor, University of Leicester); Martyn Day (Partner, Leigh Day Solicitors); Barbara Dinham (Co-Director, Pesticide Trust); Ann Elvin (Relatives Support Group); Colin Ettinger (Irwin Mitchell Solicitors); John Hendy QC (Barrister); Mick Holder (London Hazard Centre); Sadiq Khan (Partner, Christian Fisher); Michael Mansfield Q.C. (Barrister): Richard Meeran (Partner, Leigh Day); Fiona Murie (Officer, Spanish Trade Union, (Departamento Confederal de Salud Laboral); Michael Napier (Partner, Irwin Mitchell Solicitors): Rory O'Neill, (Editor, Workers Health International Newsletter); Professor Phil Scraton (Centre for Studies in Crime and Social Justice); Dr Gary Slapper (Director of Law, Open University); Stephanie Trotter (Co-Gas Safety, Executive Director); Owen Tudor (Health and Safety Officer, Trades Union Congress): Celia Wells (Professor of Law, Cardiff University): Marlene Winfield (National Consumer Council)

[ii] Much of this response is based on a report to be published shortly by Disaster Action, written by David Bergman, who is now the Director of the Centre for Corporate Accountability.

[iii] This is unlike many crimes committed by individuals. See, for example, Home Office (1990), para. 2.8, which states, 'Much crime is committed on impulse, given the opportunity presented by an open window or unlocked door and it is committed by offenders who live from moment to moment ... It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. Often they do not.'

[iv] Wells (1993).

[v] 'Whereas the greatest threat to an individual may be the loss of his or her liberty, the greatest threat to a company is the loss of its profitability,' Gobert (1998).

[vi] *Financial Times* (1997). Also see Environment Agency Press Release, 2 September 1998: 'These fines of a few thousand pounds are no deterrent to multi-million pound companies - we want fines that reflect the seriousness of the crime.'

[vii] This related to convictions for all health and safety offences, irrespective of whether any harm had resulted.

[viii] Paragraph 4.22 of the Panel's document is rather misleading when it states that "In Howe it was made clear that the company should supply full information to the court as to its turnover and its net profits, since the courts will need to consider both when fixing gthe fine". As the panel itslef makes clear in the previous paragraph, this is only the case "if the company wishes to make any submission to the court about its ability to pay"

[ix] Letter from Health and Safety Commission to Employment committee, 2 May 1990, Employment committee, Minutes of Evidence, 14 March 1990.

[x] See Ashworth (1995), p 263 for lengthy explanation of why unit fines were abandoned.

[xi] E C Council Article 15 of Regulation 17. See Gobert (1998). As Wells states, 'Unless fines levied against corporations are related both to the severity of the harm caused by the offence and to the resources of the company, they will be little more than token applications of a sanction which is used for less serious offences committed by individuals.' Wells (1993), p. 32.

[xii] Re Polypropylene [1988] 4 CMLR 347.

[xiii] Section 36(8) states that 'No penalty fixed by the Director [of the Office of Fair Trading] ... may exceed 10% of the turnover of the undertaking ...'

[xiv] Para. 14, comment on Law Commission (1994).