



Macrory Review of Regulatory Penalties

Amicus is the UK's second largest trade union with 1.2 million members across the private and public sectors. Our members work in a range of industries including manufacturing, financial services, print, media, construction and not for profit sectors, local government, education and the NHS.

Amicus makes these comments as a representative of workers who are killed, made ill and injured as a result of regulatory breaches in the workplace. These comments are restricted to penalties and sanctions in relation to health and safety at work legislation, and particularly the work of Health and Safety Executive Inspectors and Local Authority H&S Inspectors.

There is no doubt that the right level of penalties and sentencing is crucial to the success of any health and safety law. Set out below are some of the general views of Amicus about health and safety penalties and sanctions. Following this some of the specific issues in the consultation document are addressed. Where there is no response to a specific question from the consultation, it is either because the issue has already been covered elsewhere, or Amicus has no specific comment to make.

The Amicus case in detail

- **Financial Penalties**

Amicus can safely say that all current fines coming out of health and safety cases are too low.

Recent cases taken by health and safety inspectors, under existing health and safety law, have seen fines in the region of only £100,000. This is where workers have been killed. That doesn't put much value on a life, and many fines have been much lower than this.

These cases and fines vary according to the circumstances, but they can hardly be seen as adequate when a worker has died, or been seriously injured. We take the view that all health and safety fines are too low, but in the case of deaths arising from work, or very serious breaches of health and safety law, fines must be much, much higher. In the case of deaths, we need to be talking millions, rather than tens of thousands.

We need to remember that even a million pound fine may be peanuts to some companies. It is worth looking to the financial sector to see what we might expect. The Financial Services Authority can impose fines of up to 10% of the gross turnover of a company. This might be closer to the appropriate level of fines for where breaches have resulted in deaths at work.

For example, in 2003 Abbey National was fined £2.3 million for money laundering failures. It did not break health and safety laws, and it did not kill anyone, but it was fined over £2 million. Surely killing someone should cost more than that.

- **Equity Fines**

Another option Amicus is keen to see in use in the UK that of Equity Fines. These are aimed at PLCs, requiring the company to create shares up to a particular value in a victim's compensation fund. An advantage is that this hits shareholders, something a Board of Directors will not be keen to do.

- **Public Companies**

Amicus recognises a problem in fining public companies. What is the point in Government money being paid back to the Government? It is a tricky issue and needs more thought, but it also points to the need for other forms of sentencing, many of which are identified in the Macrory Report.

Fines against corporate bodies, companies, organisations, are not enough. Corporate fines do not penalise the senior managers who are often responsible for the organisation's failings.

- **Individuals**

Unless high level managers feel the heat of the law against them, personally, Amicus does not think there will be a significant change to company behaviour on health and safety. Too many workers are being killed at work where action by managers could have saved lives. Too many breaches of health and safety legislation take place without consequences for senior managers or Directors.

Amicus wants to see massive fines imposed on companies, but also wants guilty directors sent to prison. This will not bring back dead workers, but it will at least punish the guilty parties, and make other companies realise that they must do more to provide for the health and safety of their workforce.

Even if Directors cannot be put behind bars, there are other potential sanctions that Amicus want in place. What about disqualification of Directors? What about personal fines? What about retraining or remedial training orders? What about something like Community Service – Workplace Health and Safety Service Orders against senior managers?

There is no shortage of potential measures against individual directors and senior managers if we are truly serious about protecting health and safety at work.

- **Sentencing Organisations**

As far as company penalties and sentencing are concerned, Amicus thinks there needs to be more than just big fines. Amicus would like to see the Courts exploring more imaginative, additional penalties, which is why many of the ideas set out in the Macrory Report are welcome. But, these should be additional, not as alternatives, to fines.

- **Corporate Probation**

There are other alternatives that might be more effective. For organisations, things like Corporate Probation should be considered.

The Court could have the power to place conditions on an organisation. These could include setting periods of time during which the organisation must deliver identified, good health and safety practices. The Court could require companies to employ additional safety advice, or train managers and so on.

- **Corporate Community Service**

Organisations could also be subject to Corporate Community Service Orders, requiring them to provide health and safety services to workers or to the local community. This would mean putting something back into a community, or to families, or to workers that have been affected by workplace breaches or deaths.

- **Negative Impact Orders**

Another type of order which, like the previous two exists, in the United States, is a Negative Impact Order. This would require a company to pay for prominent advertising informing people that they have been convicted.

This is naming, shaming, publicising and then charging! It could be very effective.

- **Getting the right penalties and sanctions**

Amicus thinks these are the main issues around penalties and sentencing that are needed to make health and safety law effective.

Amicus wants legislation that works, and wants to make all organisations take health and safety seriously at the highest level. Many organisations already do that and if they do it, so can the others.

But, many of the others will only meet their duties to the full if they are penalised in the most effective way.

Specific response to issues in the Macrory Report

1. Improvement/Prohibition Notices

Improvement Notices (Ins) and Prohibition Notices (PNs) are proposed by Macrory as regulatory tools for enforcement authorities, but they have already been used by HSE for a long time. Amicus wants to point to the successful use of INs and PNs in H&S enforcement, though of course, Amicus is concerned about the fall in their use by HSE over the last couple of years. There is wide agreement in the health and safety community about the value of INs and PNs as part of the regulatory regime.

2. Enforceable Undertakings

However, it is also clear that there are limits to the effectiveness of INs and PNs, and that they are not sufficient to deal with all situations, especially broader management of H&S issues, and controls that might apply across groups and organisations with several sites. Amicus believes that enforceable undertakings could be a valuable addition to the enforcement armoury. This is particularly true where INs and PNs have to be drawn up specifically and narrowly, and generally on a relatively short timescale, whereas enforceable undertakings could be broader and longer term. The latter might also play an effective role in addressing failings in the overall management of health and safety, and in ensuring agreed measures to provide future and continuing compliance.

3. Adverse Publicity Orders

Amicus has strongly supported the use of adverse publicity orders. There is a place for them in creating an effective reputational sanction that would have a serious effect on some employers and would also have strong support from the victims of serious accidents or the relatives of those killed at work. In general Amicus would expect these to be imposed by a court, after a company was found to be guilty of a breach.

4. Information Provision Orders

More importantly, Amicus also wants to see information orders that can be applied much earlier in the process by an H&S enforcement officer. These would take the form of information about the details and nature of a serious accident that can be used by others in potentially similar circumstances to

prevent accidents. These would be very positive orders that would not attribute blame but would enable others to act. They could be designed to provide set information in circumstances where the inspector had enough evidence to justify further regulatory action, but would enable information to be released before such action was completed.

Currently, if a company is being prosecuted, useful information about the accident may not be publicly available for many months, or even a year or more. Amicus has experience of some insurers/solicitors deliberately restricting the sharing of such information.

5. Duties on individual directors or senior managers

Amicus envisages some problems within the proposed sanctions, where discussion or negotiation is required between companies and victims or their families. There is certainly a role here for safety reps and their unions, which is not mentioned at all, but there is also a difficulty in defining who represents a company. In the current law on corporate manslaughter there is reference to “a defining mind”, a concept that is seriously flawed and rife with problems. The need for such discussions and potential agreements, and the need to identify a representative of a company, highlights the importance of placing specific duties on directors and senior managers, as opposed to bodies corporate. Amicus wants the HSE/HSC to take this into account in their continuing discussions about Directors Duties, but it also has a relevance to the development of appropriate sanctions against individual directors and senior managers.

6. Additional, not alternative – High Status

Amicus also wants to make a couple of general points about the overall sanctioning regime. New penalties must be seen as additional, and not alternative. In many circumstances there will be a need for regulators to use of a suite of measures, and we strongly support the initial use of an IN or PN which could then be followed by an additional measure to sustain lasting compliance.

It is also very important to ensure that new sanctions and penalties have a high status and are considered to be a serious response to serious offences, breaches of which should lead to immediate prosecution.

Overall, Amicus strongly supports the principles behind the Macrory report, and has argued for some time for more imaginative use of penalties in relation to health and safety breaches. The biggest concern for Amicus is that alternative, lesser sanctions might be used in a deregulatory way. If this seems to be the case Amicus will oppose them in the strongest possible terms.

7. My Vision for Contemporary Sanctioning Regimes

1. Do you agree that criminal prosecution and the criminal courts should be reserved for the truly egregious offenders or where regulatory breach leads to severe actual or potential external consequences?

This is already the case with health and safety offenders, with current evidence being that the number of prosecutions is falling. Unfortunately this does not reflect the fact that there are fewer offences, but a change of approach by the regulators, mainly through lack of resources.

2. Do you agree with the vision that is laid out in Figure 1.3 of a contemporary regulatory enforcement toolkit?

No, because Amicus has serious doubts about the use of monetary administrative penalties in the context of health and safety breaches.

3. Do you agree or disagree with the 'Penalties Principles' proposed in chapter one? If you disagree with one or all of the Principles listed below, please elaborate?

- a. Principle # 1 – Sanctions should **change the behaviour** of the offender to prevent regulatory non-compliance.
- b. Principle # 2 – Sanctions should **eliminate any financial benefit** or benefit which was the result of regulatory non-compliance.
- c. Principle # 3 – Sanctions should be **responsive and take into account what is appropriate for the particular offender and the particular regulatory issue**.
- d. Principle # 4 – Sanctions should be **proportionate** to the nature of the offence and the harm caused
- e. Principle # 5 – Sanctions should include an element of ensuring that the **harm caused by regulatory non-compliance is put right**.
- f. Principle # 6 – Sanctions should aim to **deter future non-compliance**.

Amicus agrees with these principles, though Principles 4 and 5 should be amended to refer to actual harm and potential harm, since a very serious breach could have been committed without someone actually being harmed.

4. Are there any principles that should be added to this list? If yes, please provide details including supporting comments and evidence.

5. Do you agree that a regulator must ensure the following characteristics to be present in order for a sanctioning regime to be most effective?

- a. The regulator should have a published enforcement policy
- b. The regulator should attempt to measure regulatory outcomes (such as compliance rates) and as well as outputs (such as the number of enforcement actions taken).

- c. The regulator should be able to justify the enforcement actions they take
- d. The regulator should follow up enforcement actions
- e. The regulator should be transparent in the enforcement actions it takes
- f. The regulator should be transparent in the methodology it uses for setting and calculating monetary administrative penalties.

Yes, Amicus agrees with these, and believes that the Health and Safety Executive probably meets all of them except f., since this is not currently available to them.

6. How should regulators be required to report their performance and progress against their enforcement strategies?

7. Should regulators make a more focused effort to communicate their strategy for targeting businesses that are deliberately non-compliant? If yes, how should they approach this?

Yes, and in the case of deliberate non-compliance the regulator should favour the more serious sanctions available to them. We expect regulators to be transparent in their approach and actively target the poorest performers.

8. What can be done to capture the rogue elements within industries?

Greater inspection and enforcement by regulators, high visibility, and extensive publicity for successful enforcement action. The regulator also needs to provide clear indications of what is good practice and will be considered to be compliant behaviour.

9. Is there need for increased investigative powers to be afforded to regulators to better deal with rogue businesses?

Amicus believes that H&S enforcement officers already have considerable powers, though Amicus would welcome consideration of further powers if necessary.

10. Should due diligence defences be included in all areas of criminal offences involving regulatory breach?

11. Would more training be appropriate for judges in the area of regulatory non-compliance and appropriate sentencing?

Yes, for judges and magistrates.

8. Monetary Administrative Penalties (MAPs)

Amicus sees limited value in the use of fixed penalties in the health and safety enforcement regime, except perhaps for technical infringements, perhaps breaches of relatively minor information requirements. Certainly Amicus does not see these as alternatives to more serious sanctions, and, if used, would

want to see them accruing on a daily or weekly basis where the breach continued.

12. Should sentencing guidance be prepared for areas of regulatory non-compliance?

Yes.

13. Should the fine maxima in criminal courts be abolished? Should a cap be set?

Amicus does not believe there should be a set monetary sum for a maximum fine, though accept the principle of proportionality.

14. Should the cap follow the principles laid out in the Competition Act 1998 which provides that administrative penalties may not exceed ten percent of the relevant turnover of the undertaking concerned?

Elsewhere in this response Amicus has referred to the principles of the Competition Act, and believes that fines up to 10% of the relevant turnover are more realistic than the current system.

15. Should profits gained from non-compliance be subject to a separate profits order which is intended to remove any economic gains from non-compliance as well as a separate fine element?

Organisations must not be able to profit from non-compliance, therefore Amicus would support a separate profits order, and any other means to prevent this happening.

Amicus is also keen to see organisations investing in better health and safety provisions and standards, rather than paying fines alone. We see this element as very important, though it may fall into the areas of enforceable undertakings and restorative justice.

16. In general, do you agree that regulators should have Monetary Administrative Penalties available to them as an additional sanction option in their enforcement toolkits? If no, then please elaborate on your views.

Amicus would only support MAPs in a very limited way, as stated above.

17. Do you prefer Model # 1 (paragraphs 3.40 – 3.44), Model # 2 (paragraphs 3.45 – 3.47) or Model # 3 (paragraphs 3.48 – 3.51). Please explain why you would prefer one particular model?

18. Should regulators have FMAPs available to them? For what types of offences (either in general or giving specific examples) would they be appropriate? What level of financial penalty would be appropriate for FMAPs?

19. Should regulators have VMAPs available to them? For what types of offences (either in general or giving specific examples) would they be appropriate?

20. Should the level of VMAPs be determined with regard to one or more of the following aggravating or mitigating factors:

- Financial gain made by the offender
- Offender's past record of compliance
- Annual turnover of the offender
- The co-operation of the offender
- The timely and accurate reporting of the issue
- Timeliness of corrective action
- Please provide other relevant factors which you feel should be included.

21. Should the level of VMAP be unlimited?

22. Should the maximum level of VMAPs set out in legislation be capped to never exceed ten percent of the relevant annual turnover as per the details of the Competition Act 1998?

23. Should there be provision to supersede the cap if the financial benefit is greater than the capped amount?

24. Should there be an option for settlement as an alternative to a MAP? In what sort of cases should this be considered?

9. Enforcement Notices

25. Should regulators follow-up statutory notices such as Enforcement or Improvement Notices on a risk adjusted basis?

Amicus believes that all enforcement or improvement notices must be followed up, and that a clear requirement should be included in the notice for the offender to contact the regulator.

26. If a statutory notice is not complied with, should regulators be able to apply a Monetary Administrative Penalty for non-compliance with an Enforcement Notice?

Amicus believes that failure to comply should lead to much more serious sanctions than a MAP alone, but might be accompanied by a MAP that increases with the period of non-compliance.

27. If a regulatory appeals tribunal exists, should appeals for statutory notices be heard in this venue?

10. Enforceable Undertakings and Undertakings Plus

28. Do you think Enforceable Undertakings are a good alternative sanction to have available to regulators?

Amicus supports the use of Enforceable Undertakings in relation to health and safety breaches. In particular EUs could provide for the range of more imaginative sanctions against companies and individual managers that Amicus supports elsewhere in this response.

29. Does the described model suggest the correct key elements for introducing Enforceable Undertakings in the UK?

Yes.

30. Should business be able to apply to the regulator to enter an Enforceable Undertaking or should it be solely at the discretion of the regulator to suggest an Enforceable Undertaking?

Both avenues should be available, but they should not replace the most serious of sanctions.

31. Should Enforceable Undertakings be disclosed publicly? Should regulators follow-up Enforceable Undertakings?

Yes they should be disclosed publicly, and this should be a clear condition, and they must be followed up. Amicus believes that Trade Union safety representatives should be a part of this follow up procedure (see below)

32. Would Enforceable Undertakings in principle be appropriate for all types of offences, or are they more appropriate for particular types of offences (please provide details of types of offence or specific offences)?

In principle Amicus doubts whether they should apply to all offences.

33. Should enforceable undertakings be accompanied by a Monetary Administrative Penalty in order to effectively sanction serious offences?

Possibly, though Amicus believes that the negotiation of the nature of the Enforceable Undertaking, in health and safety cases, should involve representatives of the workforce, and specifically trade unions in recognised workplaces. (see below)

34. What sort of conditions on a business should an Enforceable Undertakings seek to impose.

On the point of enforceable undertakings, Amicus sees considerable advantage, as a trade union, in the possibility of involving safety reps and their unions in the regulatory process. Currently they are effectively excluded from the process of the issuing and agreeing of INs and PNs. Within the scope of enforceable undertakings, safety reps in particular should have an input to the agreement, and should be part of the monitoring process as representatives of the victims, or potential victims, of employers' health and safety failings. This is something Amicus would welcome, and which would add considerable value to the enforcement process.

In fact, Amicus would like to see more consideration given to the involvement of safety reps in the whole process, building upon existing rights set out in the safety reps regulations, and where necessary, developing those rights. This is something the consultation could have given more thought to, and which should be considered in the final report.

11. Restorative Justice

35. Do you agree that Restorative Justice is something that can be applied to the area of regulatory non-compliance? Please elaborate on your views.

Yes, Amicus would support requirements for restorative justice, as elaborated above, and within the Amicus response to enforceable undertakings. As stated elsewhere, Amicus is also keen to see organisations investing in better health and safety provisions and standards, rather than paying fines alone.

36. For what types of offences would it be appropriate?

37. Do you agree with Option #1 (paragraphs 5.27 – 5.29) of RJ as a pre-court diversion? If you disagree, please elaborate on your views.

38. In what cases or for what offences would the use of RJ as a pre-court diversion be appropriate?

39. Should RJ be an alternative to administrative penalties as set out in Option #2 (paragraph 5.30 - 5.31)? In what cases or for what offences would it be appropriate?

40. Do you agree with Option #3 (paragraph 5.32) of RJ having a role within the criminal justice system when dealing with regulatory non-compliance? Please elaborate on your views.

a. Could it be used at the pre-sentence stage?

b. Could judges include an RJ element as part of a sentence?

41. In what cases or what types of offences would the use of RJ as part of a criminal proceeding be appropriate?

42. Should regulators undertake pilots to explore the potential of Restorative Justice to improve outcomes for victims, offenders, and communities in business regulation?

43. Who should contribute to the cost of the RJ process?

Those guilty of the breach.

44. What safeguards are necessary in the RJ process?

There must be safeguards to ensure that those organisations guilty of a breach cannot use the RJ process to avoid a more serious sanction.

45. Does Restorative Justice have a role to play in remedying regulatory breaches where no identifiable individual victim(s) exists such as in cases of environmental damage?

46. RJ is a voluntary process, so should it ever be suggested by a judge or a regulator as an alternative to a more formal sanction?

This will depend on the content of the restorative justice order, and the degree to which it has been agreed by the victims of the breach, or their representatives.

47. Will corporate or business offenders be under pressure to accept an offer to enter into an RJ process because it is seen as a lesser or softer alternative?

This is possible, but it must be made clear that these are serious offences and sanctions, and that failure to comply will lead to increased penalties.

48. What should happen if a company does not adhere to the agreed upon outcomes of an RJ process?

They should be held to account and subject to increased fines and other increased sanctions.

12. Alternative Sentencing in Criminal Courts

49. Are financial penalties or imprisonment adequate sanctions for addressing regulatory non-compliance in a criminal setting?

No, not alone.

50. Why do judges not use other legislative provisions for alternative sentences such as compensation orders?

51. Should judges be afforded a broader range of sentencing options to deal with companies and individuals who have not met their regulatory obligations?

Yes.

52. Are financial penalties alone sufficient to deter companies from not complying with regulatory obligations?

No, Amicus believes there needs to be a set of measures that are additional to financial penalties.

53. Should regulators and government departments look to amend their legislative provisions to extend the sanctioning options available to judges?

54. Would the following potential extended sanctioning options be appropriate for sentencing in cases of regulatory non-compliance?

- a. Publicity orders
- b. Corporate rehabilitation orders
- c. Corporate probation orders
- d. Mandatory audits
- e. Community service orders
- f. Remediation orders

Amicus considers all of these sanctions to be appropriate for sentencing in cases of regulatory non-compliance.

55. Which offences would be appropriate for alternative sanctions?

56. Which firms would be considered appropriate for alternative sanctions?

57. Do you have any suggestions for other types of sanctions that should be considered not mentioned on the above list?

As already stated above, Amicus wants to see an additional sanction available to health and safety inspectors. This is an Information Provision Order that can be applied much earlier in the process by an H&S enforcement officer. These would take the form of information about the details and nature of a serious accident that can be used by others in potentially similar circumstances to prevent accidents. These would be very positive orders that would not attribute blame but would enable others to act. They could be designed to provide set information in circumstances where the inspector had enough evidence to justify further regulatory action, but would enable information to be released before such action was completed.

Currently, if a company is being prosecuted, useful information about the accident may not be publicly available for many months, or even a year or more. In our experience, some insurers/solicitors are deliberately restricting the sharing of such information.

In addition, throughout the regulatory process Amicus would like to see explicit requirements for the involvement of worker representatives, especially trade union appointed safety representatives and their trade unions.

58. Should judges seek to remove all of the financial benefit obtained as a result of regulatory non-compliance in their sentencing through a profits order plus a fine?

Amicus agrees that organisations must not be able to benefit financially through regulatory non-compliance. Judges should be able to assess this and take whatever measures are necessary.

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