



Sentencing for Corporate Manslaughter Consultation paper

Introduction

Unite the union 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 on penalties and sanctions in relation to Corporate Manslaughter legislation, and breach of health and safety legislation leading to deaths.

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 Unite 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 Unite has no specific comment to make.

Executive summary

1. Financial Penalties

- 1.1. Unite can safely say that all current fines coming out of health and safety cases are too low.
- 1.2. 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.
- 1.3. 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. Unite takes 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 significantly higher. In the case of deaths, Unite believes that fines should be in the millions, rather than tens of thousands.

1.4. Unite believes that it would be worthwhile 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.

1.5. 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. Unite would argue that killing someone should cost more than that.

2. Equity Fines

2.1. Another option Unite is keen to see in use in the UK is 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 impacts upon shareholders, something a Board of Directors will not be keen to do.

3. Public Companies

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

3.2. 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.

4. Individuals

4.1. Unite recognises that the Corporate Manslaughter Act does not apply to individual directors or senior managers, and that the consultation on that Act only applies to corporate penalties. However the consultation does refer to other breaches of Health and Safety at Work legislation that lead to deaths at work.

4.2. Unite wishes to stress the very strong belief that unless high level managers feel the weight of the law against them personally, there will

not 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.

4.3. For that reason Unite wants not only 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.

4.4. Even if Directors cannot be put behind bars, there are other potential sanctions that Unite argue should be in place. These include disqualification of Directors; personal fines; retraining or remedial training orders; and something like Community Service such as Workplace Health and Safety Service Orders against senior managers.

4.5. 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.

5. Sentencing Organisations

5.1. As far as company penalties and sentencing are concerned, Unite thinks there needs to be more than just big fines. Unite 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.

6. Corporate Probation

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

6.2. 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.

7. Corporate Community Service

7.1. 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.

8. Negative Impact Orders

8.1. Another type of order which exists, like the previous two, 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.

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

9. Getting the right penalties and sanctions

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

9.2. Unite 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.

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

Responses to specific questions

Question 1

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

Unite generally supports the approach to “seriousness” but with some doubts about the suitability to corporations of the analogy with death by dangerous driving. The problem with the analogy in relation to corporations is that their health and safety failures can be a product of long term neglect and inadequate systems, rather than serious one-off events.

However, if the law was to apply properly to individual directors and senior managers Unite would welcome an approach to deaths at work which was viewed as seriously as death by dangerous driving.

Question 2

Is each of the above aggravating and mitigating factors relevant to sentencing for a) an offence of corporate manslaughter and b) an offence under the HSWA involving death? Are there any other factors which may aggravate or mitigate either or both of these types of offence?

Unite welcomes the approach taken to aggravating and mitigating factors. In addition to failures to act on advice, cautions or warnings from regulatory authorities, Unite would expect account to be taken also of previous health and safety prosecutions.

Unite does have some concerns about the reference to employee failures being a mitigating factor. Whilst the action of a genuinely maverick employee (a very rare event) might constitute a mitigating factor, Unite would expect a high level of caution in relation to any “breach due to an employee acting outside authority or failing in duties”. Unite does not expect this to be used as a major mitigating factor, since experience suggests that employers erroneously, often try to claim this as a defence of their own failures. Unite’s view is that it is generally management failures, and “blind eyes”, that lead directly to so-called employee failures.

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 HSWA involving death? Should there be any difference between the two types of offence and, if so, why?

Sentencing must necessarily involve punishment of offending organisations, but it should seek to deliver justice for the families and fellow workers of those killed at work.

Another longer term aim is to change the behaviour of those organisations that are failing in their management of health and safety, and thereby deliver improved health and safety arrangements. Similarly, it should be a warning to other organisations that they too must improve. This is particularly important in support of the role, and activities, of trade union appointed safety representatives in other organisations. Part of the sentencing process, or post sentencing process, must be widespread publicity of breaches and penalties.

Unite believes there is some difference between a corporate manslaughter offence and an offence under the HSWA causing death, though this may not be very significant for the victim and their families. In principle an offence under the CMA will involve a breach at a senior management level, and will probably go the very root of organisational failure. This may not be the case under the HSWA.

However, Unite believes that the HSWA needs to be amended to provide specific duties on directors and senior managers, whether or not their failures lead to deaths at work.

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 the HSWA involving death?

Question 4 is, in effect, very similar to Question 3, and a response has already been given. The fine under CMA should be significantly higher than that under HSWA, but it should not lead to any reductions in other fines.

Unite believes however, that sanctions should go beyond fines, and should include other measures identified in the introductory remarks to this response.

Question 5

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

Unite supports totally the principle that no organisation should gain financially from any breaches of health and safety legislation. Unite assumes that this principle will be adopted.

Clearly the court will need to gather enough information to establish that this is not the case, and this may require the use of powers of financial disclosure.

Question 6

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

Unite supports penalties for corporate manslaughter that are entirely separate from offences under the HSWA.

Unite can give some support to the corporate manslaughter starting point of 5% of average annual turnover, however Unite has already referred to the FSA powers to impose penalties of 10% of gross turnover. Unite believes that this is more likely to be the appropriate level of fine in cases of workplace deaths, as opposed to financial irregularities, and would expect higher percentage fines in the most serious of cases.

In general Unite supports the proposed HSWA starting point of 2.5% of annual turnover.

In both cases any consideration of fines needs to make sure that a full analysis of the structure of the organisation is available. Furthermore, Unite wants to emphasise the importance of additional sanctions other than fines.

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?

Unite accepts that it is inevitable that issues of profitability and liquidity will be raised in these cases by both prosecution and defence. In the context of suitable punishment and the delivery of justice, as referred to above, Unite would also expect to see resources of all kinds put towards improving health and safety in the guilty organisation. It is certainly not in the union's interests to see workers lose their jobs in these circumstances.

This is why Unite wants to see a full range of penalties in addition to fines, including publicity orders, remedial orders, equity fines, corporate probation, corporate community orders and disqualification of directors. In the event of fines being reduced due to the financial position of an organisation Unite would expect director disqualifications to be automatic, and other penalties to be imposed.

Unite would not be opposed to fines being phased over a period of years and would support orders requiring funds being devoted to health and safety improvement.

Question 8

Do you consider that there should be a minimum fine for a) offences of corporate manslaughter and b) offences under the HSWA involving death? If so, what amount do you think would be appropriate?

Unite supports the minimum levels of fines proposed, provided these are considered to be a true minimum, such that most fines are higher, and provided that other penalties are also applied, as referred to above.

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?

Unite supports the preparation of an independent report on the financial status of an organisation, conducted by an appropriate professional organisation.

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?

Unite generally agrees with the Panel's approach on the impact of fines.

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?

Unite is concerned that if public bodies are simply fined then public money could simply be diverted to the Treasury. In principle, all organisations affected by health and safety legislation and corporate manslaughter legislation should be treated in the same way. However, issues of profitability and turnover may be difficult to apply to many public, or semi public, bodies.

This is another reason why Unite wants to see the widespread use of sanctions other than fines, which can be applied to organisations, irrespective of their structures and financial arrangements. This may involve the need to disqualify senior managers who do not fit totally into the concept of a company director.

Question 12

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

Unite cannot see any reason for not issuing a publicity order when an organisation is found guilty under the Corporate Manslaughter Act. Unite believes such orders should be issued in every case.

Question 13

What should the extent of the publicity be and how (if at all) will this differ between offences of corporate manslaughter?

It is not clear what is meant by the second half of the question ie “how will this differ between offences of corporate manslaughter”.

The nature of any publicity order will depend on the organisation concerned. The actual order made should be the subject of consultation with victim’s relatives and the victim’s trade union.

Unite would expect to see local publicity, eg local press and TV, trade sector publicity, eg trade press, and in the case of national organisations, potentially national TV and press publicity.

Since most organisations now have web sites, prominent publicity on a web site might also be appropriate.

The aim must be to notify employees, customers, shareholders and local communities of the nature and consequences of an organisation’s failures, and the action they are taking to correct those failures.

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?

Yes, Unite believes that publicity orders should be additional to any other sanctions.

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 HSWA involving death?

Again, Unite believes that remedial orders should be additional to fines. The only circumstance that this may vary is when a range of other measures are being applied due to the situation discussed in relation to Question 11 concerning public bodies.

Unite wants remedial orders to include requirements for organisations to issue information about the circumstances of a death. Within the constraints of the justice system these need to be applied as soon as possible after the death occurs. These would take the form of information about the details and nature of a serious accident, or development of ill health, that can be used by others in potentially similar circumstances to prevent accidents and ill health. 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 an enforcement officer 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. Unite has experience of some insurers/solicitors deliberately restricting the sharing of such information.

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