

Health and Safety Commission Paper		HSC/05/90	
Meeting Date:	6 th December 2005	Open Gov. Status:	Open
Type of Paper:	Above the line	Paper File Ref:	
Exemptions:	None		

HEALTH AND SAFETY COMMISSION

Directors responsibilities for improving health and safety performance - proposed report to the Government

A Paper by Jonathan Russell

Advisor(s): Paul Kloss, Victoria Jeffreys, Giles Denham, Jenny Eastabrook, Elizabeth Hodgkinson,

Cleared by Jonathan Rees on 25th November 2005

Issue

To decide, in the light of HSC's evaluation, if specific legislation, or some other approach, is needed to ensure directors actively manage health and safety performance to secure positive outcomes.

Timing

1. Immediate. Commitment to advise Ministers by the end of the year.

Recommendation

2. That the Commission advises Ministers -
 - i. that HSC will publish authoritative guidance on what is expected of directors in all sectors and businesses, and which is integrated into the wider approach to corporate governance and risk management
 - ii. that this should be allied with more effective enforcement by HSE/LAs regarding HSWA s. 37 and Directors Disqualification.

Background

3. It has long been established that directors have a key role in health and safety management and performance of their organisations. The issue is how best to motivate Directors effectively to fill this role. Following a Work and Pensions Select Committee recommendation last year the Government asked HSC to evaluate the effectiveness of current measures, legislative and voluntary, and to report with recommendations, to Ministers by the end of 2005. A chronology of events, and further background, is at Annex 1.
4. **Evidence:** HSE has sought evidence, summarised in Annex 2, on the effectiveness of the current law and what possible changes to the law might bring about improvements in Director motivation. The main themes to emerge are:
 - director behaviour is not determined by one factor, but by **a range of key drivers** that make up the overall framework in which they operate. The effectiveness of key drivers will vary according to the organisational circumstances;
 - businesses which are high performers on health and safety rely on **effective director behaviour** to set the organisational culture and embed health and safety firmly into everyday business operations, irrespective of the legal framework;
 - existence of legal duties and the **realistic prospect of enforcement** can motivate directors behaviour;
 - **broader motivators** include aspects such as, appreciation of the risks and how to manage them, peer pressure, shareholder pressure, reputation management and Corporate Social Responsibility.
5. **Current situation:** Sections 2 and 3 of HSWA provide the main duties on employers. Under the current law individual directors are liable to prosecution under s.37. However, it is apparent that evidence gathering, to enable realistic expectation of securing a conviction, is easier in small organisations than large ones. Nevertheless, research indicates that, in the last 10 years proceedings have been brought against a total of 111 directors, of which 86 convicted and 11 were jailed. In 2001 HSC\E published guidance to reinforce directors health and safety responsibilities.
6. Under separate legislation (The Company Directors Disqualification Act 1986) HSE can also press for disqualification following a conviction under certain offences in health and safety legislation (Annex 3). There is a potential for directors to be convicted under several sections of HSWA such as failure to comply with an Improvement Notice.

7. Evidence supports HSE's philosophy that a large proportion of health and safety breaches are the result of organisational, systemic failings in the management systems. This is reflected in the amount of enforcement action that is brought against the organisation as opposed to the individual.
8. The recent increase in the level of penalties being imposed, in some high profile cases, for corporate failings, may well have a positive impact on director behaviour and therefore organisational compliance. Additionally, there is the realistic prospect of additional penalties that may improve compliance and director motivation possibly via the Corporate Manslaughter Bill or the Better Regulation Bill.
9. HSC's current strategy recognises the need and importance of **non-legislative measures** aimed at educating, promoting, and providing tools to aid effective improvements in health and safety management including the promotion of case studies and corporate reporting. Research has shown an increase in the number of large organisations who have appointed a health and safety director from 75% in 2001 to 85% in 2005 following the publication of guidance. The recently launched Business Involvement Programme is driving this approach forward. However the research only applies to larger organisations. A significant minority of trade union/employee representatives dispute the results.
10. **Stakeholders Views:** There is a wide range of views amongst social partners on the most effective way to motivate directors to improve health and safety performance. This ranges from those such as Trades Unions who favour putting new specific legal duties on directors to actively manage health and safety, to those such as employer's organisations who oppose specific legal duties but favour explicit authoritative guidance.
11. **Wider Context:** Any legislative proposals on directors duties would need testing against other Government policy priorities. There is a particular need to tackle risk aversion, and in the light of Hampton/BRTF agenda, minimise unnecessary burdens on business. Arguably, legislative proposals run the risk of driving business towards risk averse decisions and overly bureaucratic processes to produce a "paper trail", without necessarily securing a significant step change in health and safety culture or performance.
12. Other legislative developments may well attract debate on director duties:
 - *Corporate Manslaughter.* The draft Bill (for England and Wales – Scotland will have separate legislation) proposes financial sanctions and remedial orders for a death

following a senior management failing. Some campaigners are disappointed this does not provide for penalties against individual directors. The joint House of Commons Committee, which undertook pre-legislative scrutiny of the Government's draft Bill, is likely to cover the issue in its report later this month. In any event, it is likely that some MPs will propose amendments to this effect when the Corporate Manslaughter Bill is introduced. An alternative approach might be to strengthen any corporate manslaughter bill to enable individual directors to be disqualified if identified as playing a key role in the organisational failing, which led to the conviction.

- *Company Law Reform Bill*: includes a provision requiring directors, in promoting the success of the company, to have regard to the interests of its employees. These interests include the health and safety of its employees and are one of a number of such considerations - such as the environment. But the success of the company (judged by reference to value for shareholders or some other specific purpose of the company such as a fair deal for suppliers) remains paramount. The law is not changed in this respect, but some may seek to exploit its potential.

Options

13. The 3 main options for ensuring directors actively manage health and safety performance are -

Option 1 – Continue With Current Approach

14. This would involve continuing with a voluntary approach, promoting and advocating the current guidance. This might incorporate wider promotion and publicity for current enforcement action involving directors. This is the most straightforward option but is unlikely to satisfy the many stakeholders who think more should be done to ensure Directors actively manage health and safety performance. However, there is a spectrum of views on what should be done.

Option 2 – Authoritative Guidance allied with more effective enforcement.

15. Authoritative guidance, produced with the backing of stakeholders, would contain explicit information aimed at a variety of situations for all sectors and sizes of organisation. This would guide and aid director involvement as well as set defined standards of compliance expected of directors. Guidance could offer flexibility and

relevance across a wide range of situations. Any published guidance should integrate with existing and emerging codes of governance and risk management.

16. Authoritative guidance that helped directors comply by encouraging the development of skills required to improve health and safety performance, would also aid enforcing authorities to target poorly performing companies. To optimise the effectiveness of the guidance it would need linking with **effective enforcement** that uses all possible penalties including greater use of director disqualification. This could command wide support as it provides tools for compliance as well as enabling effective enforcement.

Option 3 - Legislation

17. This would require primary legislation to amend the HSWA for example, to a positive duty to manage health and safety effectively. While clearly providing a signal to reinforce Directors focus upon their responsibilities, such legislation could lead to a disproportionate risk averse and bureaucratic response. If directors were to respond to new duties by introducing systematic delegation and reporting arrangements on health and safety it might still be difficult to secure prosecution particularly in larger organisations. Moreover legislation of this kind could add to administrative burdens at a time when HSE will be expected to contribute significantly to the overall government target of 25% administration burden reduction.

Argument/Conclusions

18. Against the background of the evidence base and recent experience in operating current legislation **our conclusions are as follows –**
- a) There is a need for **explicit guidance detailing what is expected of directors** in terms of improving health and safety performance. Any guidance needs to be authoritative i.e. with the backing of stakeholders, and be integrated into the wider corporate governance agenda and risk management developments. Effective guidance should be relevant to large and small, private and public organisations.
 - b) There is a need for both **HSE/LA to be more effective and consistent in applying the current law** regarding HSWA s. 37 and director disqualification. We propose new operational guidance and will look to the Enforcement Programme to deliver improvements in this area, including publicity for key convictions.
 - c) The draft Corporate Manslaughter Bill, provides **opportunities for addressing corporate level responsibility** where there are fatalities through collective

responsibility. The Bill could allow an opportunity for HSE to press for individual accountability through disqualification of one or more directors following a conviction of an organisation. HSE is interested in looking further to see how it might operate in practice. As the Bill passes through Parliament it is highly probable that these and other linked issues will be raised.

- d) **Increased penalties** for health and safety offences, along with associated publicity, have a positive effect on director motivation. We should exploit the Hampton agenda to secure higher fines consistently. Additionally alternative methods of effective penalty are being explored to increase health and safety compliance. These include restorative justice - aimed at bringing about reparation, cultural change and further improvement via for example, the defendant organisation might make a formal apology to the victim and agree to provide a local stress consultancy service for employees.
- e) **If an Approved Code of Practice (AcoP)**, under HSWA, consisting of direct duties for directors were required, this would **need changes to primary legislation** because a link to an existing section of the Act would be extremely difficult to make. HSWA s. 16(1) allows the Commission to create or amend ACOPS in relation to s. 2 –7. Even if a change to s. 16(1) was made to allow an ACOP for s. 37, we do not advise this as s. 37 does not set out the remit of directors duties. An ACOP under existing s. 37 could only provide guidance on what connivance, consent and neglect mean. Changes to the Act should ensure application of new duties to bodies whatever their structure and whether in the private or public sector.
- f) **If it were decided** to impose a positive legislative duty on directors **the most appropriate approach would also be a change in primary legislation.** Amending the Companies Act, as proposed in the Hepburn Bill, would neither cover the public sector nor companies below 250 employees.

19. On balance, HSE's recommendation is to **proceed with actions a to d above**. Whilst there is strong pressure from Trade Unions and campaigning groups to proceed to legislate, other stakeholders can reasonably argue the voluntary approach has not been exhausted (particularly in absence of detailed guidance). Moreover reviewing the results of the various pieces of research it is apparent that a conclusive case has not been made for a specific law on directors duties. Due to the nature of the issue it is

acknowledged (by some researchers) that any decision, while taking into account the evidence, is a matter of judgement.

Consultation

20. Extensive consultation has taken place including two stakeholder gatherings recently held to put forward the evidence and gather stakeholder opinion. Further consultations have also taken place with major stakeholders including the TUC, CBI, IOD, EEF, LACORS and small business stakeholders.

Presentation

21. Considerable parliamentary, stakeholder and media interest in any decision. Any decision made will have an impact on HSC\E and LAs reputation as a regulator and impact on the wider Government themes including the risk debate and Hampton\BRTF work on minimising unnecessary burdens on business. Any course of action taken will involve a planned press release and communication strategy.

Costs and Benefits

22. Proposed authoritative guidance would lead to costs associated with reading guidance, implementing it and subsequent adjustment of behaviours and procedures. The benefits will include an improved benchmark for directors, which should improve health and safety standards.

Financial/Resource Implications for HSE

23. The cost of producing the recommendation's authoritative guidance is estimated to be at around £220,000. Further costs may be incurred through more effective enforcement in relation to s. 37 and director disqualification.

Action

24. The Commission is invited to consider HSE's recommendation that the best way forward is to produce authoritative guidance and that this is allied with more effective enforcement by HSE\LAs.

Next Steps

25. Possible next steps following acceptance of proposed recommendation -
 - Commission to advise Ministers by letter of its recommendation – By end of December 2005
 - Directors Disqualification Research review – By end of June 2006
 - Revise Operational Circular on Inspectors Enforcement - By end of June 2006
 - Exploit opportunities with Better Regulation Executive on penalties - looking for a conclusion in September 2006
 - Look to publish authoritative Directors Guidance – By Spring 2007

Document2

Annex List

Annex 1 - Current Legislation and Chronology of Directors Duties.

Annex 2 – Research and Stakeholder Gatherings.

Annex 3 – Survey of the Use and Effectiveness of The Company's Directors Disqualification Act 1986 as a Legal Sanction Against Directors Convicted of Health and Safety Offences.