

Directors' role in improving health and safety performance - leading legislative option

1. The following emerged from the bilaterals with stakeholders as the leading option, were the Commission to decide to recommend further legislation, i.e. a general duty on individual directors, framed in terms of a qualified duty 'to take all **reasonable steps** to ensure health and safety'.
2. This duty could be placed in a stand-alone Section in the main body of the HSW Act alongside the other main Sections such as 2 and 3, and would complement the long-established, general duties placed on duty-holders by the HSW Act which are qualified by 'reasonable practicability' and, as is the case with this duty, are **goal-setting** rather than prescriptive. Therefore, we would anticipate that the duty would fit relatively easily into the existing legislative architecture for occupational health and safety. Ultimately it is for Parliamentary Counsel to determine the exact legislative architecture.
3. An alternative way of qualifying a general duty, favoured by some stakeholders, is to provide a defence for duty-holders if they can show they have used "**due diligence**". Health and safety legislation does not typically use this kind of formulation. But there may be a case for this approach from the perspective of directors' who have responsibilities across the wider range of their obligations (e.g. financial control, consumer protection, product safety), as the 'due diligence' approach is more typical of that legislation.
4. In fact, a 'due diligence' defence does already appear in a few sets of health and safety regulations, notably COSHH, usually coupled with a requirement to prove that 'all reasonable precautions' were taken. However, a possible proposal is to use "due diligence" not as a defence, but as part of the duty imposed upon the director. Thus, the general duty on directors could be couched in terms of directors having to exercise '**due diligence**' to become aware of the risks and then to take '**all reasonable steps**' to set in place strategies for managing those risks.
5. The leading option is expressed as a **goal-setting** duty, again typical of those found throughout the health and safety legislative architecture. Goal-setting provides a degree of flexibility that may prove advantageous when considering the wide range of duty-holders that the legislation must encompass (i.e. directors from all sizes of organisation, both public and private sector).
6. The general duty could be extended by incorporating some specific duties (perhaps those that are considered fundamental to the directors' role), though this would reduce the flexibility. Alternatively, guidance could be provided for duty-holders which makes clear the arrangements that would, if put into effect, have the same result as that intended to be achieved by the specific duties - though unlike those duties, being 'guidance' it would not be compulsory for directors to follow.
7. **Compliance** with this general duty would, we believe, have to reflect the strategic leadership, as opposed to management, that directors are expected to exert generally in their organisation's affairs. Thus, we consider compliance would involve the board (or equivalent) setting a **health and safety strategy, monitoring progress** in meeting the strategy, **evaluating its success** in delivering the required improvements in health and safety and **revising** the strategy as necessary. Responsible directors need to ensure that this happens.