

Bringing Justice to the Boardroom

**The Case against Voluntary Guidance and in Favour of a
Change in the Law to Impose Safety Duties on Directors**

A report by the Centre for Corporate Accountability for UCATT

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Copies of all documents referred to in this report can be downloaded from:
<http://www.corporateaccountability.org/directors/ucattreportoct07.htm>

Executive Summary

On 29 October 2007, the Institute of Directors and the Health and Safety Commission (HSC) will publish new 'authoritative' guidance on the responsibilities of directors for health and safety in their companies and organisations. This new voluntary guidance supercedes earlier guidance published by the HSC in 2001.

This report argues that the decision to publish new guidance - rather than introduce legislation as the government promised to do seven years ago in its 'Revitalising Health and Safety Strategy Statement' - fails to take into account of both the limited impact of the 2001 voluntary guidance as well as the significant health and safety gains and increased accountability that would be brought about by legal change.

The reports sets out how many of the key arguments used by the Health and Safety Executive (HSE) – the civil servants who support the HSC and who have been assertively arguing against legal change –are misleading.

In particular, the report shows¹ how the HSE has failed to publicise survey results it had itself commissioned which concluded that, despite the 2001 voluntary guidance, only 44% of organisations have a health and safety director at board level. Instead the HSE has highlighted the figure of 79% - which only applies to the very largest organisations, those with an average number of over 4000 employees.

The majority of companies have no health and safety director at board level - not a small rump of organisations as the HSE suggest. It is clear that the voluntary guidance has not worked.

The failure of voluntary guidance should be seen alongside more of HSE's commissioned research that shows that "legal regulations and their enforcement constitute a key, and perhaps the most important, driver of director actions in respect of health and safety at work."² And directors/managers themselves clearly recognise this. A more recently HSE published study shows that 61% agree or strongly agree that individuals believing they could possibly be imprisoned constitute an essential or important argument for enforcement to have a deterrent effect, whilst 52% cite individual legal consequence as essential or important.³

This report also explains how the HSE - again failing to appreciate more of its own research findings - which show that board level health and safety leadership has brought about average reductions of at least 25% in injury rates/levels of injury. This would suggest that legal change on directors' responsibilities could be highly significant in bringing about the government's targets of reducing injury levels by 20% by 2010, which at present the HSE is "not on track to meet."⁴

Legal change will also bring about greater accountability. The report shows how important this is – as HSE's prosecution database indicates that on average, only 7 directors/senior managers have been convicted of health and safety offences in each of the last five years. Over the five year period – in which around 350 construction workers died and 9000 suffered major injuries – only 13 construction company

¹ See page 20 – 21 of this report for discussion of this

² See page 25-26 of this report for discussion of this. "Directors' responsibilities for health and safety – the findings of a peer review of published research," Prof. Philip James, HSE, 2005. P.50

³ "Evaluation of EPS and enforcement action Main Report", Prepared by Greenstreet Berman Ltd for the Health and Safety Executive 2006, p.12 and Appendix D and E, p14

⁴ "Achieving the *Revitalising Health and Safety* targets: Statistical progress report, November 2006"

directors have been convicted for a health and safety offence. The HSE says that there may be some other convictions involving directors, but they are unable to provide details of these.

The report also rebuts HSE's other arguments against legal regulation in favour of voluntary guidance. It shows for example how:

- HSE's draft Regulatory Impact assessment – which purports to show that the costs of legislation outweigh the benefits – is deeply flawed. The report argues that the financial benefits of legal regulation are around ten times what the HSE have estimated;
- the Corporate Manslaughter and Corporate Homicide Act 2007, the Companies Act 2006 and the Regulatory Enforcement Bill do not assist with director accountability, and will have minimal impact on director conduct;
- there is no evidence to suggest that legal change will be “disproportionate risk averse and bureaucratic response.”

The report does not suggest that there is no need for guidance on directors responsibilities for health and safety – but that this should only be produced in the context of a change in the law to impose legal duties on directors.

2. INTRODUCTION

For over 25 years, the Health and Safety Commission/Executive (HSC/E) has been telling companies that director conduct is crucial to ensuring the health and safety of their workplace. As long ago as 1981, the HSE told organisations that “senior management has the influence, power and resources to take initiatives and set standards”.⁵ A decade later it further emphasised that “senior managers and directors are fundamental to the success of health and safety management.”⁶ And a further five years later it told directors that “Each member of the board needs to accept their individual role in providing health and safety leadership for their organisation.”⁷

It has not only exhorted directors over this period, the HSE has more recently shown organisations the real health and safety benefits of taking such action. HSE’s own study of 41 organisations with active director leadership indicates an average reduction of 25% in levels/rates of work-related injury as a result of director action⁸. In some organisations, director conduct resulted in injury levels reducing by 80%. At the same time, the HSE has also shown directors the clear business case for change – including reduced insurance premiums, improved staff retention and increased productivity.

Despite this encouragement over many years, HSE’s own research shows that most organisations appear uninterested in listening to these arguments. In 2004/5, between 64-67% of very large organisations (depending on what survey you pick, and whether verified or not), 52% of large, 39% of medium and 29% of small, and 17% of micro-organisations had a health and safety director! The survey report states that this is an average of only 44% of all organisations.

So how should the government respond to this? One option for the Government would be to follow through with its promise, made in 2000, to change the law and impose health and safety obligations on directors - to take the steps necessary to ensure that their company complies with the law. Legislation would, in fact have had the further benefit of facilitating the application of health and safety at work offences which currently are so rarely applied against directors.

In fact, in December 2005, the Health and Safety Commission did appear to support the legislative option. But within months it lost its nerve. Despite research showing the significant health and safety benefits arising from active director leadership, and the failure of voluntary initiatives over a period of many years to secure active director leadership in other than a small proportion of companies, the Government and the HSC have decided to produce, at the end of October 2007, yet more guidance. This is a decision that places de-regulatory ideology over and above the health and safety of workers, and forsakes real possibility of significant reductions in levels of death, injury and disease.

This report looks afresh at the issue of directors duties. It tells a story of the Health and Safety Establishment doing everything it can to run away from legislation – even when that decision would probably save tens of thousands of people every year from injury and disease. It sets out why the decision against legislation is an abrogation of its responsibility to those in Britain subject to unsafe conditions at work, and who in the years ahead will suffer injury and death.

⁵ From, “Managing Safety” – A Review of the role of Management in occupational health and safety by the Accident Prevention Advisory Unit, HSE Occasional Paper Series: OP3 HMSO, as quoted in “Directors Responsibilities for health and safety – a peer review of three key pieces of published research.” HSE, 2005

⁶ “Successful Health and Safety Management” (*HSG 65*), 1997

⁷ “Directors Responsibility for Health and Safety”, Voluntary Guidance, HSE, 2001

⁸ This is a conservative estimate – and assumes that in the 15 organisations where the levels and rate change was not mentioned, there was no improvement (see below, p.11)

Box 1: The Current Legal Position

It is often supposed that directors of organisations must have individual legal duties in relation to ensuring the health and safety of their organisation. This, however, is not the case.

The principle duties under the Health and Safety at Work Act 1974 (the 1974 Act), and indeed under the associated regulations, are placed primarily upon employers – though also on manufacturers, designers, suppliers of goods, and importers. In the case of an incorporated organisation, all these categories of duty holders refer to the legal entity of the company. This is created, by the process of incorporation, as an entirely separate legal entity from the directors who have the responsibility to manage it. It is the duty of the *company* – not the individual directors - to provide training, instruction, equipment, undertake risk assessments etc. There is no duty on directors to take steps to ensure the company complies with the law.

A duty is also imposed upon ‘employees’ under section 7 of the 1974 Act – “to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts of omissions at work”. Whilst technically this section could apply to *executive* board directors (those who are employed) it is not clear what this obligation requires of directors – particularly directors of large companies – since the wording is more appropriate to shop-floor workers or junior managers working in direct contact with other employees. And in any case it would only apply when a director was acting as an *employee* of the company, not when they were acting as *officers* of the company. So it would not impact upon decisions made at a boardroom level. The HSE have never prosecuted a director for breach of section 7.

Section 37 of the 1974 Act sets out the circumstances when a director of a company can be prosecuted – which is where an offence by the company is the result of consent, connivance or neglect on the part of the director. The section does not impose any *positive* obligations upon directors. It does, however, implicitly impose a duty upon directors to take action if they are aware that their company is committing an offence and are aware of the reasonable and practicable steps that can be taken to avoid it. This implicit duty exists because if directors did not act in such a situation, they could potentially be prosecuted for ‘conniving’ in the commission of an offence.

Directors, however, only have this duty when they are *aware* that an offence has been committed. There is no obligation upon directors to take action to inform themselves of offences being committed by the company or indeed to take steps to prevent offences being committed in the first place. Moreover, the existence of the implicit duty is in any case entirely dependent upon a decision by enforcing bodies to prosecute. It is not free-standing. Moreover, unless directors happen to know what ‘connivance’ means they would not necessarily know the extent of their duty. Even if they did, it would still be difficult to know what exactly they had to do to fulfill their duty

Section 37 also allows directors to be prosecuted when an offence by the company is attributable to their neglect. However the fact that directors can be prosecuted for neglect does not imply a corresponding legal duty. In fact, the only reason that directors can be prosecuted for ‘neglect’ is that the courts have ruled that the ‘duty’ - which it is alleged that the director has breached – does not have to be a ‘legal duty’ but rather imposed by the company itself, in a contract of employment or safety policy, for example. Companies that either decide not to impose safety responsibilities on directors or draft them in such a way that they can be complied with through the most minimal action – decrease the risk of prosecution.

3. Chronology and Background to Government/HSC decision-making

The need to change the law to impose safety responsibilities on company directors first seems to have come to public attention when, in a speech in Parliament in 1996, the then opposition Environment Spokesperson, Michael Meacher MP stated:

“I emphasise that responsibility for health and safety must be vested at the highest level of each organisation ... companies should appoint an individual at board level with overall responsibility for health and safety.”

Although this demand was made in a speech on the need to reform the law of corporate manslaughter, those in Britain who have argued in support of a change in the law to impose safety obligations upon directors have been motivated as much by the importance of prevention (and the need to ensure directors take an active interest in the safety of their companies) as with the need to facilitate criminal accountability.

With the election of a Labour Government in 1997, the Deputy Prime-Minister, John Prescott, and the then Chair of the Health and Safety Commission, Bill Callaghan published in 2000 a strategy statement, *Revitalising Health and Safety*.⁹ Action Point 11 stated:

“Health and Safety Commission will develop a code of practice on Directors' responsibilities for health and safety, in conjunction with stakeholders. It is intended that the code of practice will, in particular, stipulate that organisations should appoint an individual Director for health and safety, or responsible person of similar status (for example in organisations where there is no board of Directors).

The Health and Safety Commission will also advise Ministers on how the law would need to be changed to make these responsibilities statutory so that Directors and responsible persons of similar status are clear about what is expected of them in their management of health and safety. It is the intention of Ministers, when Parliamentary time allows, to introduce legislation on these responsibilities.”

A year later, the Health and Safety Commission (HSC) focused on the first part of this commitment and consulted on the publication of a leaflet on voluntary guidance for directors. At its meeting in 2001, the HSC stated, that there was overwhelming support for the need for guidance in this area but some concern was expressed over the voluntary nature of the proposed Code. The

Box 2: HSC Guidance on Directors Responsibilities, 2001

Action point 1

The board needs to accept formally and publicly its collective role in providing health and safety leadership in its organisation.

Action point 2

Each member of the board needs to accept their individual role in providing health and safety leadership for their organisation.

Action point 3

The board needs to ensure that all board decisions reflect its health and safety intentions, as articulated in the health and safety policy statement.

Action point 4

The board needs to recognise its role in engaging the active participation of workers in improving health and safety.

Action point 5

The board needs to ensure that it is kept informed of, and alert to, relevant health and safety risk management issues. The Health and Safety Commission recommends that boards appoint one of their number to be the ‘health and safety director’.

⁹ <http://www.hse.gov.uk/revitalising/strategy.pdf>

minutes of the May meeting state that it was considered that:

“The need for further legislation in this area was being considered in the context of the Safety Bill. The guidance should be viewed as the first stage in ensuring directors took up their responsibilities; this would be evaluated and provide evidence on the need for further methods.”¹⁰

The HSE then commissioned the consultancy company Greenstreet Berman (GSB) to undertake research that would identify the extent to which companies and other organisations currently operate in accordance with the guidance and to explore the impact of the guidance in improving the situation.

Two years later in 2003, the HSC met to consider the results of the GSB survey. This had found that the number of organisations which had reported that health and safety was directed at board level had risen from 58% in 2001 to 66% in 2003.¹¹ The HSE informed the HSC prior to the board meeting that although this was “progress”, it is clear also from the research that “the level of real Board involvement in some cases is fairly superficial – while health and safety may be on board agendas direction and leadership is lacking.”¹² The HSC were however content to continue down the voluntary path:

“Although legal obligations did make people take their responsibilities more seriously, further legislation should be seen as an option only once all other avenues, including voluntary approached, had been fully explored. An approach based on voluntarism might be the most appropriate way of bringing about cultural and behavioural change rather than separating out directors’ responsibilities for managing the risks to health and safety rather than as an integral part of the responsible management of businesses and other organisations. At this time the case for new law on directors’ responsibilities had not been made. Corporate social responsibility, reputation and other factors would contribute to further improvements.”¹³

The HSC concluded that,

“The Commission did not consider it appropriate at this time to recommend to Ministers a new legal duty on directors. The HSC/E would continue with their existing voluntary approach to promote and encourage greater corporate responsibility and accountability including through engagement and publicity and guidance.”

This may well have been the end of the argument on changing the law on director duties had the Select Committee on Work and Pension, a year later in 2004, not considered the issue as part of its inquiry into the work of the HSC/E. The Committee considered written and oral submissions¹⁴ which argued that in making its decision on continuing with the voluntary approach the HSC had not considered the evidence about the likely effectiveness of legal change. As a result the Committee recommended in its final report (see full text in box 3) that:

¹⁰ To read more about the consultation, go to <http://www.corporateaccountability.org/directors/duties/hscgovt/voluntary.htm>

¹¹ “Health and safety responsibilities of company directors and management board members”, report prepared by Greenstreet Berman for the HSE, 2003

¹² “Corporate Responsibility and Accountability for Occupational Health and Safety: A progress report on HSC/E initiatives and measures, ” Paper to the HSC, (*HSC/03/105*)

¹³ Minutes of HSC Meeting in October 2003

¹⁴ This was from the CCA, and can be accessed here: <http://www.corporateaccountability.org/directors/hse/selcom/2004/main.htm>

Box 3: Excerpt from Select Committee Report, 2004

56. The HSE recognises that, in organisations that are good at managing health and safety, it is a board room issue and a board member takes direct responsibility for co-ordination of that effort. Action Point 11 of Revitalising Health and Safety was that HSC would advise Ministers on how the law needed to be changed to make these responsibilities statutory, so that directors are clear about what is expected of them in their management of health and safety. It was the intention to legislate on these matters when Parliamentary time allows, as the weight of evidence suggests that the imposition of legally binding duties on directors would increase the likelihood of directors taking ownership of health and safety problems, positively impact on the current levels of preventable work-place death and injury and create more of a level playing field between those directors who take their health and safety responsibilities seriously and those who do not.

57. The CBI supported the idea that there should be a director for health and safety who is 'a champion, a reporting person, a motivator and a facilitator for good health and safety performance' but was concerned that it would move quickly to that same person being 'pinpointed to take a claim.' .. [It] was important to be 'careful about the wording'

58. The Government appears to have changed its mind since Revitalising, however, and has no current plans to legislate. The Minister, told us that HSE had published guidance on the issue in July 2001. The evidence since then suggested that 'increasingly, companies were directing health and safety at board level and that better guidance to companies is needed rather than legislation or further regulation.' A survey published in 2003, showed that the number of companies in which health and safety was being directed at board level had increased from 58 to 66 per cent. The Minister concluded that this progress diminished the need to regulate. Alternatively, it is worth noting that the perceived threat of legislation in this area might have led some employers to put such arrangements in place in order to pre-empt the need for legislation

59. The CCA argued that it is not clear that directors are giving leadership and direction on the issue. It says that HSC has acknowledged that in some cases board level involvement is 'fairly superficial.' Furthermore, it argues that the survey referred to by the Minister does not paint a straightforward picture of progress. While an increasing number of organisations were directing health and safety at board level, the study also showed that board level involvement on some issues actually decreased.

Box 4: Excerpt from Government Response to the Select Committee, 2004

The Government believes that there is already an appropriate balance of legislative and voluntary responsibilities on directors for occupational health and safety, and has no immediate plans to legislate as recommended. It, along with HSC, will continue to encourage and persuade directors in organisations across all sectors to take their responsibilities seriously and to provide leadership on occupational health and safety.

While the evidence is clear that growing numbers of board directors, in the private, public and voluntary sectors, are taking responsibility and providing leadership, there is still some way to go to achieve the goal of all boards exercising corporate responsibility. There is an estimated one in six organisations in which boards do not provide direction or take responsibility, and have no plans to do so.

A key theme in HSC's workplace strategy is helping people to understand and benefit from sensible health and safety policies and practices. HSC has been asked to build on and invigorate the current voluntary measures in place. This includes publicising examples of best practice, the benefits of board-level corporate responsibility and the persuasive evidence of the benefits, economic and social, that director leadership brings.

This includes publicising examples of best practice, the benefits of board-level corporate responsibility and the persuasive evidence of the benefits, economic and social, that director leadership brings.

“The Government reconsiders its decision not to legislate on directors duties and brings forward proposals for pre-legislative scrutiny in the next session of Parliament.¹⁵”

In its response to the Committee’s report, the Government supported the HSC/E position saying that it believed that there is already an appropriate balance of legislative and voluntary responsibilities on directors for occupational health and safety, and had no immediate plans to legislate as recommended (see full text in Box 4). However, the Government asked the HSC to:

“undertake further evaluation to assess the effectiveness and progress of the current measures in place, legislative and voluntary, and to report its findings and recommendations by December 2005.”

Following this decision, the HSE commissioned a number of pieces of research – including a further evaluation of the voluntary guidance, research on the relative effectiveness of voluntary and legislative duties, and international comparisons. Perhaps the most significant piece of work was undertaken by Prof. Phil James who undertook a peer review of three pieces of research¹⁶ (two of which were themselves commissioned by the HSE) that looked either in whole or part on what motivates directors and concluded that there was “reasonably good, evidence based, ground for trying ‘the legislative’ route.”

Box 5: Except from Report by Prof. Phil James

“On the basis of the evidence reviewed in the report, there would seem reasonably good, evidence based, ground for trying ‘the legislative’ route, as suggested in the CCA report. Thus this evidence does indicate that statutory requirements are a major and perhaps the main driver of director behavior with regard to the issue of health and safety at work. It also indicates that directors are influenced by potential personal legal liabilities, even when the likelihood of their being penalized is low – a point which further suggests that the presence of such liabilities can have a positive impact notwithstanding the existence of a low probability of their actually being imposed – and suggested that many managers believe that beneficial consequences would flow from making directors more vulnerable to prosecution and the imposition of fines) ... [O]n balance the research evidence consequently provides a strong, but not conclusive basis for arguing that the imposition of ‘positive’ health and safety duties on directors would serve to usefully supplement the liability that they currently face under section 37 of the Health and Safety [at work] Act. (pp. 14 and 17) “

In December 2005, the HSC met to review the research that had been undertaken. Despite the research findings, in its paper to the HSC prior to this meeting¹⁷, the HSE took a very strong position against the introduction of legal duties and in favour of further voluntary guidance. It stated that:

“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.”¹⁸

¹⁵ Para 60

¹⁶ “Making Companies Safe: What Works?”, CCA (2004); “Response to the CCA report, ‘Making Companies Safe: What Works’”, Greenstreet Berman for the HSE, 2005; “Director Leadership of Health and Safety” Health and Safety Laboratory for the HSE, 2005

¹⁷ “Directors responsibilities for improving health and safety performance – proposed report to the Government” HSC/05/90

¹⁸ Para 17 of HSE paper

In addition, it made a series of points against the introduction of legal duties:

- a large proportion of health and safety breaches are the result of organizational, systemic failings in the management systems;
- the increase in the level of fines in some high profile cases may well have a positive impact on director behaviour and therefore organizational compliance;
- realistic prospect of additional penalties in the Corporate Manslaughter Bill or the Better Regulation Bill that may improve compliance and director motivation;
- 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;
- Research shows an increase in the number of large organisations who have appointed a health and safety director from 75% in 2001 to 85% in 2005;
- employers organisations oppose specific legal duties but favour guidance;
- research evidence does not provide a conclusive case in favour of a specific law on directors duties.

Despite these arguments, the HSE's position was surprisingly not supported at the meeting. The minutes of the meeting state that the Commission agreed that:

"HSE should explore the possibilities of a duty on directors and/or changes to section 37 and provide a paper to the Commission in April on the options, their implications, what the legislation might look like and timescales;

There was a need to produce authoritative guidance which had widespread stakeholder buy in. Work on this should not start until a decision on how to amend the legislation is made."¹⁹

The then Chair of the Commission, Bill Callaghan denies that at the

¹⁹ Minutes of HSC Meeting, 6 Dec 2005, HSC/06/M09

Box 6: Excerpt from Minutes of the HSC Meeting, April 2007

Comments supporting a legislative approach included:

- legislative change would have a greater impact on large firms in changing behaviour than guidance;
- the voluntary approach had been tried and had only a limited effect;
- the current situation discriminated against small firms;
- although large firms were prosecuted no individual was held accountable, and it was in the public interest for such an individual to have a general duty;
- whilst a broad package of measures was needed to achieve change, this should include legislation to be effective. This also ensured that those not influenced by other means were brought to justice;
- waiting to see what emerged from other areas such as Company law would delay the process too long.

Views favouring other options included:

- legislation was not guaranteed to change behaviour and any change would be likely to impact more on small firms which did not have the capacity to set up defensive arrangements;
- the construction industry had demonstrated that it was possible to change culture without new legislation. Leadership and setting the right example would be more likely to change behaviour, than legislation;
- was the purpose of new legislation improved health and safety or retribution? The former was more likely to be achieved through leadership, worker involvement, and competent advice;
- 50% of accidents were caused through inadequate risk assessments. Unless there was engagement in these areas there would not be an impact;
- the first step should be to see how proposals interacted with developments on Corporate Manslaughter, Company Law and the Better Regulation Executive led work on developing alternative penalties;
- there were questions around the workability of the legislative options which it was felt hadn't been fully explored in the paper. There were differences and confusions over the titles and functions of directors and senior managers, which would need to be addressed. Support for a legal obligation depended on it working and achieving change.

meeting the Commission had in effect agreed in principle to support the introduction of legal duties – though many who attended the meeting understood this to be the case.²⁰

Following the meeting, the HSE consulted groups on options for legal change, produced a Regulatory Impact Assessment (RIA) of the costs/benefits in changing the law and produced another paper for consideration by the Commission for its meeting in April.

In its paper to the Board, the HSE advised that if legal change was to take place the “leading option” was “a general duty on individual directors, framed in terms of a qualified duty 'to take all reasonable steps to ensure health and safety'. It went on to say that;

“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.”

This duty was similar to the ones that currently exist in a number of jurisdictions in Australia and Canada.

The RIA concluded that the costs of imposing legal change outweighed the benefit (see page 21 for discussion of this).

In its paper to the HSC, the HSE again argued strongly against legal duties. The HSE paper itself stated that although there was consensus amongst stakeholders on the need for director action, there continued to be “significant disagreement as to whether further legislation is needed in order to motivate directors.” It went on to say that:

“In general, the employers’ representatives are not in favour of legislation. Indeed some would see it as having a negative impact in terms of risk aversion and an increase in bureaucracy. There was a feeling this could lead to directors not tackling issues of real concern. Representatives of both large and small organisations were concerned that legislation would focus activity on compliance and not provide the desired cultural shifts on leading health and safety improvement.”

This time, when they met, the HSC members were no longer unanimous on the principle of legislation – and the minutes of the meeting reflect different positions held by different members (see Box 6). It was therefore quite easy for the Chair of the Commission to conclude that “there was no firm view on legislative options on which he could advise Ministers” but that this “was an issue the Commission should return to without too much delay.” He thought that “the development of clear and credible guidance, which the Commission supported, might give a better understanding on which interventions changed behaviour.”

As a result of this meeting, the HSE put its effort into drafting new “authoritative guidance’ and in collaboration with the Institute of Directors established a working group for this purpose. The Guidance will be published at the end of October 2007.

²⁰ The Centre for Corporate Accountability was present at the meeting, and discussions with a number of the Commissioner following the meeting, reflected our understanding that a principled decision had in fact been made in favour of a change in the law. The former HSC Chair’s position on this matter has been made in correspondence with CCA, 26 July 2007.

Box 7: Time line Summary

2000: Government commitment to produce voluntary guidance and to legislate

2001: Publication of voluntary guidance

2003: HSC decide against legal duties and to continue with directors duties

2004: Select Committee calls for legislation on directors duties; Government asks HSE to do more research

2005: HSC agree to support legislation, but ask for options paper to be prepared before advising minister

2006: HSC delay decision on legislation (April)

2007: New voluntary guidance publishes (October)

4. THE BENEFITS OF LEGAL CHANGE

There are a number of considerable benefits that would result from legal change. Two are particularly significant - reductions in levels of death, injury and disease, and increased accountability of directors for offences under the health and safety at work and manslaughter.

A. Improved Safety and Reductions in Injury rates

There has been a wide consensus for a long time that director leadership on health and safety will result in health and safety benefits. As far back as 1981, the HSE stated:

“It is not enough to declare certain safety goals. People have to be convinced of the importance and that the organisation intends to achieve them. The cue will be taken from the top. Senior management has the influence, power and resources to take initiatives and set standards. This is demonstrated where positive attitudes of directors and senior managers are reflected in a high degree of safety awareness at all levels through the undertaking. If management at the highest level demonstrates its interest and commitment to the provision of satisfactory standards of health, safety and welfare, then subordinates are much more likely to know what is expected of them, know that they will be held accountability and give priority to this subject.”²¹

The HSE subsequently developed this position in its guidance document, *Successful Health and Safety Management*:

“Organisations that are good at managing health and safety create an effective framework to maximise the contribution of individuals and groups. Health and safety objectives are regarded in the same way as other business objectives. They become part of the culture and this is recognised explicitly by making health and safety a line management responsibility. The approach has to start at the top. Visible and active support, strong leadership and commitment of senior managers and directors are fundamental to the success of health and safety management. Senior managers and directors are fundamental to the success of health and safety management. Senior managers communicate the beliefs which underlie the policy through their individual behavior and management practice. Health and safety is a boardroom issue and a board member takes direct responsibility for the co-ordination of effort.” (emphasis added)²²

And the British Standards Institute stated in 1996:

"Ultimate responsibility for occupational health and safety rests with top management. Here best practice is to allocate to a person at the most senior management level (e.g. in a large organisation, a board or executive committee member) with particular responsibility for ensuring that the [occupational health and safety] management system is properly implemented and performing to requirement in all locations and spheres of operation within the organisation... Senior management should demonstrate by example their commitment by being actively involved in the continual improvement of occupational health and safety performance."²³

²¹ From, “Managing Safety” – A Review of the role of Management in occupational health and safety by the Accident Prevention Advisory Unit, HSE Occasional Paper Series: OP3 HMSO, as quoted in “Directors Responsibilities for health and safety – a peer review of three key pieces of published research.” HSE, 2005, p.5

²² Successful Health and Safety Management (*HSG 65*), 1997

²³ BS 8800: "Guide to Occupational Health and Safety Management Systems" BSI 1996

The 1999 HSE document *Reducing Error and Influencing Behaviour* identifies senior management commitment as an essential part of health and safety management and shows that ‘commitment by top management to involving the workforce’ is a key aspect of an effective culture.²⁴

Though this may all sound like common-sense, the excerpts above are by nature of assertion; they do not provide evidence that this kind of conduct on the part of directors will result in health and safety benefits. Significant academic research evidence does however exist to support this contention.

- the main influence on employees’ safety commitment was how workers perceived ‘management concern for safety.’²⁵
- senior managers/directors can exert a significant influence over the attitudes and behaviour of line managers, notably in shaping how they deal ‘with safety versus productivity’ issues.²⁶
- the attitude of senior management towards safety was a significant factor in influencing accident records on construction sites.²⁷
- that ‘senior management taking an active part in health and safety was consistently linked with lower injury rates’.²⁸
- company performance on hearing conservation directly matched the attitudes of senior management on the topic in most of the organisations visited.²⁹
- that ‘leadership by senior management, and by the CEO in particular, is critically important to OHS outcomes.’³⁰
- a review in 1999 of five further studies suggest that ‘continuous and genuine management support is the key to a safe and healthy working environment.’³¹

However, what levels of benefit can be achieved by director engagement? The HSE researched 41 organisations whose directors had undertaken positive steps in relation to health and safety and considered whether there had been any measurable health and safety benefits.

Each of the 41 case studies – available in summary on HSE’s website³² and detailed more fully in a report³³ – state that, as a result of director leadership, there have been positive health and safety benefits within the organisation. However, 26 of them provided detailed figures on the percentage reduction in the number/rate of injuries.

As set out in Table 1 these figures show that amongst these 26 HSE case-studies there was an average reduction in the level/rate of injury of 38%: eleven of these organisations had reductions in injury levels/rate of over 50%.³⁴

²⁴ HSG48, HSE, 1999)

²⁵ Cox, S. and Flin, R. 1998 (see Annex for details of all academic papers footnoted in this section)

²⁶ O’Dea, A and Flin, R. 2003

²⁷ Sawacha *et al* (1999))

²⁸ Shannon, H.S., Mayr, J and Haines, T. 1997

²⁹ Thomson-MTS. 1993

³⁰ Gallagher, C. 1997

³¹ This is Gunningham, N. (1991) The additional studies were Braithwaite, J. 1985: Ferry, T. 1990: Grimaldi, J. and Simmonds, R. 1989: Hammer, W. 1985: Peterson, D. 1975.

³² <http://www.hse.gov.uk/corporateresponsibility/casestudies/>

³³ “Case studies that identify and exemplify boards of directors who provide leadership and direction on occupational health and safety” Prepared by Greenstreet Berman Ltd for the Health and Safety Executive 2006

³⁴ These figures were taken from the case studies on the HSE website, and from the detailed report that provided the basis for these studies. Only 34 of the 41 case studies are dealt within the report. Some of the figures are only in the main report and not in the case studies.

Table 1: Levels of reduction in numbers or rates of injury as reported in HSE case-studies undertaken between 2003-2005, in order of increasing reductions

	Organisation	Levels of Reduction
1	Neales Waste	Accident Incident Rate shows 4.3% reduction in the last year
2	Grampian Country Food group	An 8% reduction in accidents across all sites”
3	Anchor Homes	13% reduction in all reported accidents from 2003 to 2004
4	Buckingham Council	15% reduction in reportable injury rate in the last 3 years
5	De La Rue	15% reduction in reportable injury rate in the last 3 years
6	Renfrewshire Council	In the last four years there has been an overall trend in the reduction in accidents of 16%
7	North Staffordshire combined health care NHS Trust	Reduced rates of injury by 16% over the last two years
8	London Ambulance Service	18% fall in RIDDOR over 3-day incidents
9	Debenhams	20% reduction in Reportable incidents to staff in one year period
10	Sainsburys	28% reduction in reportable incidents since 2002
11	Glasgow	Rates of reportable injury reduced by 40% between 1997 to 2003
12	Stoke on Trent College	RIDDOR’s reduced by 42% over 3 years
13	British Sugar	43% reduction in lost time injuries (reportable) between periods 03/04 to 04/05
14	Zurich	Reduced numbers of accidents by 46% between 2001-2003 from 290 to 155
15	Environment agency	50% reduction in reportable injuries per 1000 – as set out in table
16	Boulting Group Ltd	50% reduction in injury (table)
17	Bre	50% reduction in lost time accidents since 2002
18	Greencore Group	Reduced level of reportable injury of 52% (from 17 report to 8) between 2003/4 and 2004/5
19	Mid and West Wales Fire Rescue	Reduced injury incidence rate by over 50% during the last 3 years
20	TTE Training	60% reduction in injuries since 2000
21	DCS Europe PLC	Reduction in accidents of approximately 63% over 13 months
22	Norfolk and Norwich University Hospital NHS Trust	60% decrease in Riddor injuries from 64 to 23 reports
23	Visit Britain	Over 75% reduction in accidents over seven year period (table)
24	Joy Mining Machine Ltd	60% reduction in incident rate (table)
25	Legoland Windsor	80% reduction in numbers of Riddor incidents from 18 to 3 in a three year period
26	Esso Petroleum Co Ltd – Fawley Refinery	Refinery recordable incidents down from 7 year average of 9 to 0 for 2004. 100% decrease

If we take into account the other 15 organisations, which did not provide detailed injury rates, and assume that they did **not** achieve any improvement – which is highly unlikely – then the average level of improvement still remains high at 25%. It is important to note that most of these organisations are very large. This research however provides currently the best estimates of likely improvements from directors leadership.

This HSE research supports the view that director leadership has very significant health and safety benefits. It also shows that it has other financial and productive advantages for an organisation (see box 8).

Box 8: Business Benefits of Director Leadership

In addition to director leadership resulting in reductions in levels of injury, the HSE reported that many of the 40 organisations achieved other significant benefits. These included:

- helping to win new business;
- reducing corporate risks and protecting the organisation's reputation;
- helping to attract high quality staff;
- retaining staff;
- improved relationship with external regulators;
- reduction in employers liability insurance premiums;
- improved staff morale;
- decreased absenteeism;
- improved public profile of the organisation;
- increased productivity, sales and helping to win new business;
- reduced work delays;
- early detection of ill-health problems;
- reduced corporate risks;
- improved relationship with workforce;

B. Increased Accountability of Directors

Legal duties will not only reduce the level of death, injury and disease, it will also facilitate the prosecution and conviction of errant directors who commit offences under health and safety law and manslaughter. This is because both of these offences require evidence of breach of a duty – and the imposition of legal duties on directors will both establish that all directors have clear positive safety (something which is not the case now) and will provide a standard by which to assess their conduct.

The HSE have argued that “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 large organisations.”³⁵ It is not clear why the HSE consider that director duties could result in increased delegation – since a key purpose of directors duties is to prevent this kind of approach on the part of directors.

The figures below indicate the importance of legal change.

Interrogation of HSE's prosecution database indicates that in the last five years only 33 company directors/senior managers have been convicted of health and safety offences under section 37 of the Health and Safety at Work Act – two of which were convicted at the same time for manslaughter³⁶ (see Table 2 for details of convictions). The average fine was £10,500. Thirteen of these were directors of companies involved in construction³⁷ related incidents.

³⁵ “Directors responsibilities for improving health and safety performance – proposed report to the Government” HSC/05/90. This is the HSE paper for December 2005 HSC meeting.

³⁶ These were obtained by undertaking the following searches. (a) convictions following section 37 of the Health and Safety at Work Act 1974 ([click here](#)); (b) convictions where the word ‘director’ is mentioned in case summary – though not all of these are relevant ([click here](#)).

³⁷ As determined by what is stated in HSE's prosecution database as the kind of work taking place when the offence took place.

None of these convictions involve directors of medium sized or large companies. It is also important to keep in mind that five years of convictions covers about 1,100 worker deaths, over 700 member of the public deaths and over 120,000 major injuries to workers, and that number of convictions is only three more than the 30 employees (workers or junior managers) convicted of offences.³⁸ The level of accountability of directors for health and safety offences is therefore very low.

The HSE says that the number of director convictions set out above may be an underestimate³⁹. Perhaps reflecting a lack of interest that it has in director accountability – the HSE does not routinely monitor prosecutions of directors, and therefore cannot say with certainty what is the conviction level. However, they are the best figures currently available.

In the same five year period, a further five directors were convicted of manslaughter. Two involved the construction sector.⁴⁰ (see Table 3)

It is of course not just the lack of legal duties that results in low rates of convictions – HSE must be committed to enforcing them where appropriate. However, legal duties will certainly remove an important obstacle to prosecution.

In addition, imposing duties would provide regulatory bodies with a more straightforward option of enforcement action that does not require prosecution - the imposition of enforcement notices. Any reform would allow enforcing bodies to impose notices directly on directors who are in breach of the new duty. This would be an alternative to prosecution and likely to be a very effective tool to produce rapid change within an organisation.

Box 9: Voluntary Guidance's Perverse Incentive

The introduction of new voluntary guidance, has perverse consequences on directors. Voluntary guidance (without an accompanying legal duty) makes it (a) easier for regulatory bodies to prosecute those directors that take up the responsibilities that are suggested by the Guidance; and therefore (b) provide a perverse incentive on directors not to take the required action. Such an incentive exists as the greater the level of responsibility companies place on directors (in safety policies or contracts of employment etc), the more able are regulatory bodies to prove that they acted with 'neglect' under section 37 (see box 1) The introduction of legal duties would establish a level playing field amongst all directors.

Equity between workers and directors

Imposing duties would ensure that there was equity between workers and directors. Workers have positive safety obligations through section 7 of the Health and Safety at Work Act. Directors do not – although they are of course the people with the most power and control within the organisation.

³⁸ To see the sub-set of prosecutions on HSE's prosecution database relating to section 7 prosecutions, [click here](#)

³⁹ Correspondence with the HSE over this data

⁴⁰ Research by the Centre for Corporate Accountability, available at: <http://www.corporateaccountability.org/manslaughter/cases/convictions.htm>

Table 2: Convictions of Directors under section 37 of the Health and Safety at Work Act in the last five years, 2002 – 2007.

Name of Director	Company Involved	Date of offence	Date of conviction	Region	Industry	Sentence	Summary
David Farrell	Hough Green Garage Ltd		July 07			£10,000 for two offences	Involved death of worker trying to recover broken down bus
William Beach	Techlink Enterprises	Jun 06	April 07	North West	Manufacturing	£2,000 for two offences	Failure to comply with two Improvement Notices - relating to exposure to wood-dust and handrail
Paul Hanton	Wardrop Joinery Ltd	Jan 05	April 07	Eastern	Manufacturing	£7,500	Following amputation of fingers - no guard on machi
Paul Buckle	B&W Asbestos Removal Specialists Ltd	Jul 03	April 07	East Midlands	Construction	£10,000	Asbestos offences
Henry Robinson	North East Environmental Ltd	Sep 06	March 07	North East	Construction	£4,600	Unlicensed removal of asbestos
Keith Roshier	Unknown	Jun 04	Feb 07	Unspecified	Unknown	£3,500	Circumstances unknown
Roger Clark	Enviro-Waste Ltd	Jul 04	Feb 07	Eastern	Agriculture	£10,000	Death of 3 employees trapped in slurry holding tanks
Gordon Betts	Enviro-Waste Ltd	Jul 04	Feb 07	Eastern	Agriculture	£10,000	Death of 3 employees trapped in slurry holding tanks
M J Griffin	Constructional and vehicle Welders Ltd	Apr 04	Feb 07	Eastern	Manufacturing	£10,000	Employee killed when he began welding inside a petrol tanker which had not been properly purged
Robert Parkins	Parkins Fee Construction Limited	Oct 04	Feb 07	Eastern	Construction	£12,500 (three offences)	Employee received fatal injuries as a result of a retaining wall collapsing on to him
Adrian Smikle	Benjiman Developments (UK) Ltd	Apr 05	Jan 07	Unknown	Unknown	£12,000 (two offences)	No details
Nicola Brett		Apr 05	Jan 07	York + Humberside	Construction	£1,000	Director's daughter standing in for him as disqualified. Failure to appoint competent person
Singh Atwal	Rosekey Limited	Dec 04	Dec 06	London	Unknown	£90,000	Collapse of shops and flats due to trench that weakened foundations.

Name of Director	Company Involved	Date of offence	Date of conviction	Region	Industry	Sentence	Summary
Robert Spencer	Tipping Services (Construction) Ltd	Aug 05	Dec 06	York and Humberside	Manufacturing	£5,000	Breach of prohibition notice
Paul Everall	CJ Everall Transport Ltd	Feb 06	Nov 06	North West	Service	£1,800	Prosecution following death.
David Pettit	Fenland Pine & Interiors Limite	Feb 05	Sept 06	Unknown	Manufacturing	£4,000 (two offences)	Failure to comply with improvement notice and other failures
Colin Arnold	N.A.P Anglia Ltd	Oct 05	July 06	South East	Construction	£0 (conviction for five offences)	Multiple Breaches at construction site
Arran Import	Unknown	April 04	June 06	York and Humberside	Construction	£2,000 (two offences)	Asbestos related offences
Michael Phillip Shaw	Change of Style Ltd	May 03	June 06	South East	Manufacturing	£40,000 (Eight offences, also convicted of manslaughter)	Involved the death of David Ball
Gavin Shaw	Change of Style Ltd	May 03	June 06	South East	Manufacturing	£1,500	Involved the death of David Ball
Robert Batchford	RJB Waste Ltd	Oct 03	June 06	Eastern	Manufacturing	£10,000 (4 offences)	Incident involving two injuries
Christopher O'Mahoney		Sep 03	April 06	London	Construction	Five offences – no fine	Relating to gas offences.
Louise Chubb		Jun 04	Nov 05	Eastern	Extractive and utility supply industries	Two offences - £10,000	Unsafe workplace at Strayground Quarry
Graham Marfleet		May 05	Sept 05	Eastern	Construction	£15,000	Worker asked to remove asbestos containing materials without appropriate precautions, instruction and training
Andrew Payne	4imprint Ltd	May 03	Sept 05	North West	Construction	£2,500	No details
Paul White	M W White Ltd	Dec 03	Sept 05	Eastern	Manufacturing	£0 (also convicted of manslaughter)	Involving death of Kevin Arnup in a paper shredding Machine

Name of Director	Company Involved	Date of offence	Date of conviction	Region	Industry	Sentence	Summary
Mike Thom	Unknown	Dec 03	Sept 05	North East	Manufacturing	£1,500	Workers exposed to coating powders – no assessment of risks
Chris Jones	Lemec Ltd	Aug 03	May 05	East Midlands	Construction	£1,500	Asbestos Related Offence
Gordon Logan	Unknown	May 04	Apr 05	North West	Construction	£12,500	Injured person fell through roof
Paul Hobbis	Unknown	Jun 04	Dec 04	West Midlands	Construction	£10,000	Serious injuries following fall through rooflight
Anthony Eden	Unknown	Aug 03	Dec 04	West Midlands	Service	£1,000	Director of security company providing services to construction site
Lewis Courtney	Clearserve Ltd	Dec 01	Sept 03	Eastern	Construction	£6,000 (3 offences)	Involving death of Dean Butler
Mr Boradbent	Moore's Timber Ltd	Aug 97	June 03	North East	Service	2 offences – total £5,000	Involving death of Omar Akhter who was killed by a forklift truck

Table 3: Manslaughter Convictions of company directors in the last five years, 2002 - 2007

DIRECTOR	Offence	Conviction Date	Sentence
Timothy Dighton	Death of Christopher Meachen in Nov 05	Jun 2007	
Michael Shaw	Death of David Ball in May 2003	Aug 2006	15 months imprisonment
Paul White	Death of Kevin Arnup in Dec 2003	Jun 2005	1 year imprisonment
Lee Harper	Death of Daryl Arnold in Jun 2003. <i>CONSTRUCTION</i>	Jan 2005	16 months imprisonment
Melvyn Spree	Death of Stephen Law, Neil Owen and Benjamin Kwapong in Feb 2002	Dec 04	Seven years imprisonment
Alan James Mark	Death of Ben Pinkham in Feb 2003	Jul 2004	One year imprisonment
William Horner	Death of Christopher Longrigg in Apr 2000 <i>CONSTRUCTION</i>	Feb 2003	Five months suspended sentence
Stephen Hayfield	Death of Stephen Hayfield in Nov 2000	Oct 2002	240 hours community service

5. RESPONDING TO THE ARGUMENTS AGAINST LEGAL CHANGE

A. “Voluntary Guidance Works”?

The HSE has been promoting board leadership for years – but until recently, the HSE had not undertaken research into the extent to which organisations had heard their call and appointed a board director responsible for safety. However, soon after the publication in 2001 of new guidance on directors responsibilities, the HSE commissioned Greenstreet Berman (GSB) to undertake a base-line survey and then two subsequent surveys in 2003 and 2005 to look at the impact of the guidance.⁴¹

The Government and the HSE has argued that the results of the ‘2005’ GSB survey show that the voluntary guidance approach works, and there is no need to introduce directors duties in law. Significant focus has been given to the percentage of organisations reporting that health and safety is directed at board level, which rose from 58% in 2001 to 66% in 2003 and 79% in 2005 – an apparent increase of 21%. At first glance this appears to be quite a significant finding – suggesting both that a significant majority of organisations have health and safety directed at board level, and that over the three year period, without any law, there was a significant increase in director conduct on health and safety.

However, the GSB survey headline figure of 79% is not at all what it seems.

These surveys themselves were principally undertaken by telephone interview and, in 2005, in response to concern that respondents to the survey might exaggerate the role of the company’s directors, the GSB interviewed worker-representatives.⁴² This ‘verification’ survey found that 14% of these representatives disagreed with their organisation’s claim to have a health and safety director. GSB concluded that this is a

“significant minority. Even if they are wrong to disagree with the Directors’ claims, this result indicates that either the level of director involvement or the internal communications have not succeeded in making safety representatives aware of the director’s H&S role. This in itself would be a matter of concern.”

Therefore according to the GSB 2005 survey, only 64% - not 79% - of the surveyed organisations had verified board level H&S directors.⁴³

Secondly, and most significantly, the GSB survey is only relevant to ‘very large’ organisations – those whose number of employees are in the thousands. This is because the average number of people employed by organisations that were surveyed by GSB was 4,380.⁴⁴ Although in the study GSB describes these organisations as ‘large’, they are clearly right at the very top end of that category – a category which includes all organisations employing more than 250 people.

The extent to which the GSB survey is totally unrepresentative of anything other than the very top end of organisations is shown by looking at a separate postal survey in 2004, also undertaken by GSB, which this time looked at a range of different sized organisations.

⁴¹ “Health and safety responsibilities of company directors and management board members: 2001, 2003 and 2005 surveys. Final report”, prepared by Greenstreet Berman Ltd for the Health and Safety Executive 2006

⁴² It should be noted that these individuals were nominated by the director to GSB - and although GSB tried to counter the nomination of individuals with a more positive view of the actions of the company, it is likely that this bias would not have been entirely overcome. (p. 3 of the GSB report)

⁴³ P. xiv, GSB report

⁴⁴ P.7, GSB Report

Table 4: The percentage of small and medium sized companies with a health and safety director⁴⁵

Size (by number of employees)	% of organisations with a H&S Director in HSE 2004 survey	Numbers of companies (2006) in different sized categories	Number of companies with a H&S Board director applying survey results	Number of employees in different sized companies (2006)	Number of employees working in companies with a H&S director, applying survey results
Micro (less than 10)	17	1,064,170	189,908	3,274,000	556,580
Small (11 – 50)	29	178,695	51,821	3,424,000	992,960
Medium (51 – 250)	39	29,855	11,643	2,978,000	1,161,420
Total		1,226,765	253,372	9,189,000	2,710,960
Average			21%		30%

⁴⁵ Figures from <http://stats.berr.gov.uk/ed/sme/index.htm> and from Table 4, p.31, SBS Research & Evaluation, Sheffield “SME Ownership Succession - Business Support and Policy Implications” Chris Martin, Dr Lynn Martin & Alan Mabbett

This 2004 survey was undertaken as part of the HSE’s review of the Enforcement Policy Statement. One of the questions asked was, “does your organisation have a health and safety (Board) director”? This was answered affirmatively by 67% of ‘very large organisations’ (a percentage intriguingly close to the *verified* GSB result in the survey discussed above of organisations whose average worker numbers was over 4,000), 52% of large, 39% of medium, 29% of small organisations, and 17% of micro-organisations.⁴⁶

This survey showed that there was in fact an average of only 44% of organisations – very different from the 79% of the GSB survey – with a health and safety board director.

Furthermore, if ones focuses on small and medium sized companies⁴⁷ (with upto 250 employers each), which together employ just under 50% of the total workforce in Britain, only 20% of these companies have a health and safety director (see Table 4).

Box 10: The GSB Surveys – understanding the figures

The report refers to two different surveys

1. *Survey of organisations whose average level of employment was over 4000.*
 - This is referred to in this report as survey of ‘very large’ organisation;
 - Commissioned by the HSE specifically to test the success of voluntary guidance;
 - The surveys were undertaken in 2001, 2003 and 2005;
 - Interviews with directors and senior managers found that the number of organisations with a board director responsible for health and safety increased over the surveys from 58% to 79%;
 - Verification interviews with worker representatives claimed that 14% of these organisations did not have such directors in such a position;
 - As a result, the GSB report accepts that verified level is 65%;
2. *Survey of organisations of different sizes*
 - This was also commissioned by the HSE and also undertaken by GSB at about the same time as the final 2005 survey
 - Survey undertaken as part of HSE review of its Enforcement Policy Statement. Question on whether board director with health and safety responsibility part of wider set of questions dealing with enforcement and not director responsibility
 - Found the following: 67% of very large organisations, 52% of large, 39% of medium, 29% of small organisations, and 17% of micro-organisations had such directors;
 - GSB note that the two statistics 67% in this survey and 65% in previous survey are very similar.
 - This survey reported in two GSB reports – but seemingly not mentioned in any HSE policy paper on directors duties

It is notable that no reference is made to this particular survey in any HSE policy document discussing directors duties.

What these surveys show is that although the voluntary guidance may have had an impact upon very large organisations – it has apparently had no, or in any case a very limited, impact upon all other sized organisations.⁴⁸ It is clear that overall voluntary guidance on directors responsibilities has not been a success story in getting companies to appoint directors in charge of health and safety – except in the very largest-sized organisations.

B. “The Costs of Legal Change Outweigh the Benefits?”

Following the Health and Safety Commission (HSC) meeting in December 2005, the HSE drafted a regulatory impact assessment (RIA)⁴⁹ concerning the costs and benefits attached to new legislation. It concluded that the costs of introducing such a change would be £877 million over 10 years (£102 mil. annualised) and the benefits of legal change between £284 million (£26 mil. annualised) and £457 million (£48 mil. annualised).

⁴⁶ p. 24 of GSB report, and, Table 65, p.90, “Evaluation of EPS and Enforcement Action: Appendix D &E, Surveys of Inspectors and duty holders”

⁴⁷ Those employing less than 250 employees

⁴⁸ It is true that as there was no survey taken in 2001 of these small, large and medium sized companies, so it is possible that the low percentages in 2004 represent an improvement from even lower figures in 2001!

⁴⁹“Directors’ Duties in Health and Safety Regulatory Impact Assessment (Initial)” Annex 5 to HSC/06/44

The HSE does accept that “the results of the RIA are very sensitive to assumptions, so it does not provide a definitive view.”⁵⁰ However the RIA so under-estimates the potential benefits of legal change for the RIA to be positively distorting and misleading.

First of all, it fails to consider medium and small companies. One of the key assumptions made in the RIA is that there are 70% of companies with an actively engaged health and safety director and 30% without one. It does this by only applying the GSB ‘very large’ survey results. So the RIA states:

“[The GSB] research showed that 79% of the directors surveyed felt that health and safety was directed at board level. However, when these figures were verified by interviewing other representatives of the organisations, the figure fell to 64%. For the purpose of this RIA, the assumption has therefore been made that 70% of organisations direct health and safety at board level.”⁵¹

The RIA does not take into account the other survey that showed that whilst 67% of large organisations may have a health and safety director, only 20% of small and medium sized companies did. Had the RIA taken this survey into account, the assumption here would have been that 44% of companies have engaged health and safety directors and 56% do not.

The second set of problems with the RIA relate to what impact legal change would have on those companies who currently have no health and safety director. The RIA states the following of this category:

“**50%** [of these companies] would ensure that their directors take time to familiarize themselves with the new duties placed upon them. **Thirty five percent** of those 50% would go onto to enact changes in the organizations. This gives a total of around **5%** of all enterprises that will direct health and safety at Board level after the introduction of new legislation and guidance.”⁵² (emphasis added)

This was a change from an earlier draft of the RIA, which stated:

“**80%** [of companies] would ensure that their directors take time to familiarize themselves with the new duties placed upon them. **Sixty percent** of those 80% would go onto exact changes in their organisation. This gives a total of **15%** of all enterprises what will direct health and safety at board level after the introduction of the new legislation and guidance”⁵³

In effect the revised RIA cut by one third - from 15% to 5% - the total number of new enterprises that the final draft states will, following legal change, direct health and safety at a board level. The RIA states that these figures “were derived following consultation with prominent stakeholders in April 2006.”⁵⁴ However, this is highly misleading as there was nothing agreed at this meeting, which could justify such fundamental changes in these numbers – and the RIA does not explain what could be the rationale for making a change.⁵⁵

⁵⁰ “Directors role in improving health and safety performance - possible legislative options” Paper to HSC meeting in April 2006

⁵¹ para 4, Regulatory Impact Assessment

⁵² para 9, Regulatory Impact Assessment

⁵³ para 7, Regulatory Impact Assessment

⁵⁴ Para 17, Regulatory Impact Assessment

⁵⁵ The Centre for Corporate Accountability was present at this meeting, and notes taken do not correspond with HSE claim.

The third set of problem relates to the level of injury reduction that the RIA estimates to result from active director engagement. The RIA states that:

“HSE has commissioned case studies which indicate that, in organisations which set out to tackle health and safety issues at director level, there may be between a 5% and 10% reduction in incidences. (This range has been taken from the HSE leadership case studies. While some of these case studies show reductions in injuries of up to 25%, it is considered that these are unlikely to be replicated in the majority of enterprises.)”⁵⁶

Interestingly, an earlier version of the RIA stated:

“when an enterprise actively engages with health and safety at director level, it achieves between a 5% and **25%** reduction in work-related accidents and incidences of ill health”.

In a paper to the Board, the HSE stated another reason for the figures, namely that:

“stakeholders told us we could assume, with a package comprising legislation and guidance, at best between 5-10% rise in health and safety outcomes in those organisations that changed their behaviours and to increase by 5% those Boards actively leading on health and safety.”

However, the **actual** range contained in the 41 case studies published by the HSE on its website to which the document refers is not between 5 and 25% but between 5 and **80%** (see above, Table 1 and text). As explained above, taking into account all these case studies then the average reduction in the level of injury was 25%.

It would, therefore, be much more appropriate had the RIA used a figure of 25% to show the likely benefits of active director engagement rather than either 5% or 10%.

The fourth set of problems relate to those organisations that do have director engagement”. Early in the document it is stated that:

“enterprises in this group are assumed to familiarise themselves with the new duties and 40% of this group decide to take some action as a result.”⁵⁷

That is to say, 40% of 70% (using the RIA figure). This is about 30% of the total population of enterprises. The RIA, however states later on in the same document that “we assume that this will mean that around 2% of the total population of enterprises will take some action ... ” and it is the figure of 2% - rather than 30% - that is used as part of their calculations. No reason is given for this significant inconsistency in the RIA.

Fifth, in estimating the financial savings from director action, the RIA fails to take into account a number of other savings that the HSE case studies showed also resulted from director action. In particular reduced insurance premiums and reduced recruitment costs which were specifically mentioned in a number of the case studies as distinct benefits (see Box 8)

Sixth, in estimating the costs to business of any legal change, the RIA forgets that most companies are not very large, but are medium and small. So whilst directors of very large or large companies might attend a £1,000 training course, or have administrative staff spend five additional days preparing in

⁵⁶ para 28, Regulatory Impact Assessment

⁵⁷ This is para 10 and again in para 17, second bullet point.

support of briefings given by the Health and Safety Director to the Board, this is unlikely to happen in other sized companies. We cannot see how training for all companies would be necessary – since guidance and other information will in many cases be sufficient.

It is clear that the RIA significantly under-estimates the financial benefits and over-estimates the costs to business from changing the law and. If one just takes the first three problems set out above the following changes need to be made to the RIA:

- it is not 30% of organisations that have no health and safety director, but 56%;
- it is not 50% of these organisations that would ensure that their directors take time to familiarize themselves with the new duties placed upon them, but 80%; and it is not 35% of these that would then go onto to enact changes in the organizations, but 60%. As a result it is not 5% of all organisations that will take action, but 15%;
- action on the part of directors will not result in between 5-10% reduction in levels of injury and disease, but 25%.

Box 11:

Financial Benefit from legal change is about ten times more than HSE estimates in its RIA

If we use these corrected figures (see above), whilst retaining all the other assumptions used by HSE in its RIA, the level of financial benefit will increase by over ten times. This can be shown by looking at just the number of ill health incident reductions.

How many companies will take action

- The HSE use data to show that there are 1.2 million companies. Therefore the number of companies without a board director is 672,000 (56% of these companies)
- 80% of these take time to familiarize themselves with the new duties. This is 537,600;
- 60% of these then go on to take action. This is 322,560.

What level of reduction in ill health will these companies make?

- The HSE say that there are 576,000 new incidents of ill-health each year – and so each of the 1.2 million companies in Britain is responsible for 0.48 incidents (576,000 divided by 1.2 million)
- The 322,560 companies (who will take action) currently are responsible for 154,828 incidents of these ill health incidents (322,560 multiply by 0.48).
- Each of these companies will have a 25% reduction in the number of ill health incidents. This is a total of **38,707 less incidents of ill health (25% of 154,828)**.

The HSE, in contrast estimates that there will only be about **3000 or so** less cases consequent to the introduction of legal duties.

C. “Directors are motivated by things other than the law and their personal liability?”

The argument about whether or not law is the prime motivator for directors is linked closely with discussion about the effectiveness of voluntary guidance. HSE’s argument that voluntary guidance does work implies, in effect, that factors other than law can be prime motivators of directors.

The increase between 2001 and 2005 in the number of very large organisations with a health and safety director does indicate that for some directors in these organisations (though clearly not all), this law is not necessary for them to make change. Though the perceived threat of legislation will have been a motivation for some of them.

However, as we have seen, this survey only looked at the very largest of organisations; there is no evidence that the voluntary guidance has had **any** impact upon organisations employing less than 1000 people – that is to say, large, medium, small or micro (see discussion of voluntary guidance above).

It would be clearly wrong to suggest – and we don't - that law and enforcement is the only motivator for directors. The HSE is correct when it states that “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.”⁵⁸ It is true that 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.

However the research evidence points clearly in the direction that it is a very significant motivator indeed. Moreover, many of the other non-legal motivating factors are themselves highly contingent on the existence of law and its enforcement.

This position is summed up by Professor James who in 2005 undertook a peer review for the HSE of three pieces of research (two of which were themselves commissioned by the HSE) that looked either in whole or part on what motivates directors. This concluded that:

“existing evidence suggests that legal regulations and their enforcement constitute a key, and perhaps the most important, driver of director actions in respect of health and safety at work and that this motivational force is intimately connected to a number of others, such as corporate reputation, competitive damage and a sense of moral responsibility to protect workers from injury and ill health. It also suggests that the creation of individual personal liabilities on the part of directors can particularly serve to motivate them to improve health and safety. ... At the same time, it would seem that many managers do believe that making directors more vulnerable to prosecution and financial penalties would yield positive benefits.”⁵⁹

Since this was published the HSE commissioned some further research relating to its enforcement review, which found that:

“61% of duty holders agree or strongly agree that individuals believing they could possibly be imprisoned is essential or important for enforcement to have a deterrent effect – just ahead of fear of personal reputation damage at 60% whilst 52% cite individual legal consequence as essential or important”⁶⁰

It is therefore flying against the evidence for the HSC/E to be promoting voluntary guidance at this stage.

D. “Safety Breaches are not individual failures?”

The HSE argue that, because a large proportion of health and safety breaches are the result of organisational, systemic failings in the management systems, changing the law on duties is not appropriate.

This is a bit of an odd argument because it cuts across HSC's own attempts to encourage directors duties through a voluntary approach and also, more importantly, HSE's own research that shows the benefits of directors taking clear role in health and safety.

⁵⁸ “Directors responsibilities for improving health and safety performance – proposed report to the Government: Paper to the HSC meeting, Dec 05” HSC/05/90. Para 4

⁵⁹ Directors' responsibilities for health and safety – the findings of a peer review of published research,” Prof. Philip James, HSE, 2005, p.50

⁶⁰ “Evaluation of EPS and enforcement action Main Report”, Prepared by Greenstreet Berman Ltd for the Health and Safety Executive 2006, p.12 and Appendix D and E, p14

Imposing directors duties will not correct every failure within an organisation – however by ensuring that certain steps are taken at the top of an organisation, it should ensure that the chance of systemic failures are less, and increases the likelihood of corrective action. Directors duties will not eradicate all problems within companies – they could never do so. But the chances of systemic failure should reduce as a result.

E. “Legal change would result in a ‘disproportionate risk averse and bureaucratic response’”?

The HSE has not produced evidence that would support this claim.

There is no doubt that such things are probably said by employers organisations – but they are entirely speculative. More significantly, the HSE does have evidence that the majority of individual directors at least in very large organisations – rather than employer organisations with particular vested interests - support legal duties. As Greenstreet Berman says, “There seems to be a majority opinion amongst respondents that defining directors’ duties in law would not pose significant problems and indeed many would welcome them as useful.”⁶¹ This evidence is entirely ignored by the HSE.

F. “Directors might respond to by “introducing ‘systematic delegation’ on health and safety?”

It is unclear what the HSE means when it argues this – and it provides no explanation. It is bemusing since the very purpose of directors duties would be to prevent inappropriate and total delegation of safety responsibilities resulting in their legal insulation.

G. “Existing sanctions will motivate directors?”

The HSE has argued that the recent large fines upon companies will be sufficient to motivate directors. Whilst clearly high fines on companies will no doubt be an important motivating factor on directors, the following points need to be made:

- The two cases where high fines have been imposed both involve mass deaths of members of the public. In fact, where there have been mass deaths of workers the courts have imposed much lower fines. The two companies involved in the Avonmouth bridge collapse where four workers were killed were fined only £250,000 each and the explosion at the Stockline plastics company where nine workers were killed the two companies were fined a total of £400,000. In fact the courts have indicated that they are limited by case law in imposing large fines when only workers are affected.
- If the HSE considers significant sentencing of large companies has an impact, surely the deterrence impact would be the far greater if individual directors of large and medium sized companies were convicted – an impact which is reflected in the research evidence.

H. “New proposed sanctions will motivate directors even further”

The draft Regulatory Enforcement and Sanction Bill allows for regulatory bodies to impose new fixed penalties and negotiate enforceable undertakings in lieu of fines. There is nothing in this bill that remotely impacts upon the conduct of directors.

I. “The Corporate Manslaughter and Corporate Homicide Act will also motive directors”

The Act does not:

- impose any obligations on directors;
- allow for directors to be prosecuted;
- give the courts the power to impose any sentence on directors;

⁶¹ “Health and safety responsibilities of company directors and management board members: 2001, 2003 and 2005 surveys. Final report”, prepared by Greenstreet Berman Ltd for the Health and Safety Executive 2006, p.80

In fact, since organisations will escape prosecution if any serious management failure within the organisation that caused the death cannot be connected in a substantial way to the organisation's senior managers, the offence's drawback is that it can provide an incentive on directors to delegate responsibility to those outside the circle of senior managers. The offence therefore provides a new reason in favour of changing the law on directors duties – to remove this incentive.

Moreover, since the offence only applies where a death has taken place, and where there have been gross management failures – its deterrent impact on the individual conduct of directors will be limited. Only those very few organisations who foresee a corporate manslaughter prosecution as a possibility will be effected by this Bill.

J. “The new duties in the new Companies Act will impact on directors and health and safety?”

Section 172 of the Companies Act 2006 does impose the following duty on company directors:

- “(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to-
- (a) the likely consequences of any decision in the long term,
 - (b) the interests of the company's employees,
 - (c) the need to foster the company's business relationships with suppliers, customers and others,
 - (d) the impact of the company's operations on the community and the environment,
 - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
 - (f) the need to act fairly as between members of the company. “

In broad terms, these duties are very similar to the duties that existed prior to the Act. The duty to take into account “the interests of the company's employees” is not new at all – it was part of the Companies Act 1985. There is no mention of health and safety responsibilities. And it remains the case that these duties can only be enforced by shareholders through civil court action – so they are barely enforced.

Conclusion

This report is intended to show that the Government/HSC must stop and think again before wasting further years on ‘assessing’ whether the publication of new guidance on directors duties will work. Voluntary guidance published in 2001 has already shown to have resulted in only 44% of all companies having a board room director responsible for safety. At the same time the evidence strongly supports the effectiveness of law and enforcement as a principle motivating factor for directors. Moreover the very significant reductions in levels of injury that can result from director action mandate the government to legislate – rather than just hope for the best with voluntary guidance. Other arguments used by the HSE against a change in the law – that, the costs of legal change would outweigh the benefits, that new corporate manslaughter, and other legislation would provide sufficient new motivators for directors – have also been shown to be flawed.

There is nothing wrong with having voluntary guidance – but it should have been part of a package of legislative change and an Approved Code of Practice. The HSC and the Government should carry out the promise it made in 2000 and impose safety obligations on directors

Box 12: What Change in the Law is Required

In December 2005, the HSC asked the HSE to provide it with a series of legal options. The option that was proposed as the most popular option amongst stakeholders, which the CCA also supports, is a simple legal change to the Health and Safety at Work Act 1974 which would impose a general duty on individual directors 'to take all reasonable steps to ensure health and safety'. As the HSE stated in its paper to the HSC

“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.”

There would also need to be relevant amendments ensuring that breach of the duty could result in imposition of enforcement notices and there was a link with section 37 of the Act so that a breach of this duty could be deemed to be 'neglect' on the part of the directors for the purposes of prosecution

Annex 1: Legal Duties in other countries

Research commissioned by the HSE found that seven out of nine countries contain safety legislation that imposes positive safety obligations upon either directors or senior managers of companies. These are: Germany, France, Italy, Sweden, Japan, Canada (four out of fourteen jurisdictions) and Australia (two out of nine jurisdictions). These jurisdictions can be divided into two categories:

- Those with legislation that imposes direct and clear positive safety obligations upon directors (Germany, the Canadian jurisdictions of Ontario, British Columbia and the Northwest Territories, and the Australian state of Queensland). The manner in which this is done is relatively similar in each of the jurisdictions. A duty is imposed upon all directors to ensure that the company, the primary duty holder, complies with the obligations that are imposed upon it. In at least two of these jurisdictions enforcement notices can be imposed directly upon directors.
- Those with legislation that imposes positive duties upon a person who is either a director or senior manager (France, Italy, Sweden, Japan, the state of South Australia and the Canadian state of Alberta).

In both France and Italy – the legal entity of the company is almost entirely bypassed as an object upon which duties are imposed and instead duties are imposed upon individuals within the company. In Sweden the legislation imposes its principal duties upon an employer who will, in relation to incorporated businesses, be the company; but case law says that this responsibility is 'borne primarily by the highest manager i.e. in a limited company usually by its managing director'. In France, Italy and Sweden, the law allows directors to delegate their responsibilities – in each, however, certain conditions need to apply, principally that the person to whom responsibility has been delegated has sufficient control and autonomy.

The situation in Japan and South Australia is relatively similar to each other. In both the legislation imposes its principal duties upon the company (as the employer) and requires the company to appoint a particular person with safety responsibilities. In the Canadian province of Alberta, duties are imposed upon employers who are defined to include not only companies but also the director or officer of the company who "oversees the occupational health and safety of the workers". It is notable that Alberta and Japan are the only jurisdictions that talk about companies appointing a senior company manager/ director with particular responsibilities for safety.

- There is, in addition, another category of jurisdictions, which, whilst not imposing explicit positive duties upon directors, do impose significant responsibilities through the creation of offences that are targeted at directors. This category includes the four Australian states of Victoria, Tasmania, New South Wales, and Australian Capital Territory, and Canadian Federal law.

There are also, however, jurisdictions which either impose minimal or no duties upon directors. These can be grouped into three categories.

- Those that create an offence similar to that of section 37 of the Health and Safety at Work Act 1974. This category includes two Australian states of Western Australia and Northern Territories, and seven Canadian jurisdictions of New Brunswick, Manitoba, Saskatchewan, Prince Edward Island, New Foundland and Labrador, Nova Scotia and Quebec;
- Those that impose duties upon an employer or supervisor that could theoretically apply to directors but either do not in practice, or only do so rarely. In this category are the Canadian provinces/territories of New Brunswick, Northwest Territories, Yukon, Manitoba and Saskatchewan;
- Those that do not impose any duties and do not create any relevant offences. These are the Netherlands and the United States.

ANNEX 2: Academic References relating to footnotes, 25-31

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