

# Health and safety Time for change

*Reclaiming health and safety at work*



## Directors Duties – the need for action

Many people would be surprised to know that although there is a positive duty on companies and public bodies to ensure, as far as is reasonably practicable, the health, safety and welfare of all his employees, there is no such duty on the directors of companies.

Most prosecutions for breaches of health and safety laws are against employers. In the case of most workplaces, the employer is not an individual but a company or public body. So the prosecution is of the body. In some cases individual managers are also prosecuted, but in most cases the prosecution is of the company or organisation that is the employer.

However that organisation really only exists as a piece of paper. You cannot put a company or local authority in jail if it kills someone. Also it is not companies that make decisions – individuals do.

### Current Legislation

The Health and Safety at Work Act (HSW Act) says “it shall be the duty of every employer to ensure, as far as is reasonably practicable, the health, safety and welfare of all his employees” It also places a duty on employers and the self-employed to conduct their business in a way that does not expose the public to risks to their health or safety. These are positive duties. This means that the courts can prosecute them not just because of something they have done, but because they have failed to do something. Most prosecutions take place because of that. There are also duties imposed on designers, manufacturers, importers and suppliers.

Most prosecutions for breaches of the HSW Act are against employers. However in the case of most workplaces, the employer is not an individual but a company or public body. So the prosecution is of the organisation.

The HSW Act does mention directors, but unlike employers, directors have no positive duties imposed on them. Section 37 says a director can be prosecuted if an offence committed by the company or other body “is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate”. This is very different from the situation of employers who have a positive duty to protect the health and safety of their workforce.

What the law means in effect is that a director can only be prosecuted for something they have done, or if they have neglected to carry out a duty that they had. As the HSW Act does not impose any duty on directors they can only be prosecuted if it was part of their duty as a director in the organisation to do something. This means that while it may be possible to prosecute a director who is given responsibility for health and safety or who has specific duties that relate to safety as part of their role, directors who choose to take on no responsibility cannot be prosecuted unless you can show that they specifically did something which contributed to a death or injury.

The latest figures available show that 43 directors, company secretaries and senior managers were prosecuted in 2010/11, but do not show how many were actually just directors as opposed to full-time employees of the company. In addition the use of Section 37 prosecutions against directors on the HSE database fell in 2011 and 2012<sup>1</sup>.

The current law means that if a board of directors refuses to have any involvement in health and safety, however bad the record of the company, there is almost nothing that can be done to force them to take responsibility beyond disqualification.

Unfortunately disqualification of directors for health and safety failings is very rare. There is a power to disqualify a director for health and safety failures under the Companies Directors Disqualification Act 1986, but research for the HSE only managed to identify 7 cases where this had been used since 1986 and 2005, and in every case the director had been prosecuted under section 37 of the HSW Act<sup>2</sup>. Since then the use of disqualification has remained sporadic with three directors disqualified in 2010/11 but none the previous year. At the same time there are many companies that have been prosecuted on several occasions for breaches of the HSW Act where no application has been made for the disqualification of their directors.

However just disqualifying directors after a conviction, while it may help prevent these people from continuing to break the law, is not enough. The important issue is changing attitudes before an incident happens, and that is why we need a specific duty.

The demand for a duty on directors is not new. In 2000 the Government published its strategy on health and Safety “Revitalising Health and Safety”<sup>3</sup>. One of the planks of the strategy was the need for greater corporate responsibility and a review of the role of directors. The strategy called for two things. Firstly that the HSE develop a code of practice on Director’s responsibilities and secondly that “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.***” They have not done so.

Since then we have had the voluntary guidance (twice in fact) but, almost ten years after the strategy was launched, we are still awaiting the promised legislation. In July 2009 the independent inquiry into construction, chaired by Rita Donaghy<sup>4</sup>, recommended “that there should be positive duties on directors to ensure good health and safety management through a framework of planning, delivering, monitoring and reviewing”. Four days later the Work and Pensions Select Committee also called for a legal duty on directors to be introduced as soon as possible.

## Need for change

Many directors of both public bodies and private companies do in fact take an interest in health and safety. 65% of larger companies claim that health and safety appears on the agenda for board meetings, and 58% have nominated a member to champion health and safety at board level. Both of these are key recommendations in the current voluntary guidance. However that means that 35% of companies have boards that never have health and safety on the agenda of their board. This is despite eight years of voluntary guidance stating that they should do so. Additionally, only 31% of boards set targets for health and safety. This is another recommendation within the voluntary guidance<sup>5</sup>.

It is clear that the voluntary approach has failed to ensure that directors in all organisations, public and private, take responsibility for the health and safety of the staff they employ. Even if it has led to a majority of boards of big organisations receiving regular reports on health and safety, or appointing a “champion” at board level, there is still nothing that can be done about those companies that do not. These are companies where the only concern of the board members is the bottom line. It is because of these organisations that we need a specific legal duty on directors. Directors of companies who are already complying with good practice will have nothing to hear from such a duty. It is only those who think they can continue to get away with ignoring the call for corporate responsibility that would be at risk if they continue to run organisations that put the lives of their workers at risk.

The preference of the TUC would be for a new general duty on directors, under the HSW Act, as suggested to the HSC in 2006, but backed up with an Approved Code of Practice which spelled out exactly what directors should do. This could be based on the current voluntary guidance. It would mean that directors, individually and collectively would have to take steps to assure themselves that their organisation was ensuring health and safety, but through the provisions of an Approved Code of Practice it would be made quite clear to directors what this means in practice.

***Trade unions want a new general duty on directors, under the Health and Safety at Work Act, backed up with an Approved Code of Practice which spells out exactly what directors should do. This new duty would be the biggest driver yet in changing boardroom attitudes towards health and safety.***

---

<sup>1</sup> HSE prosecutions Database

<sup>2</sup> <http://www.hse.gov.uk/research/rrpdf/rr597.pdf>

<sup>3</sup> Revitalising health and safety 2010 DCLG

<sup>4</sup> <http://www.dwp.gov.uk/docs/one-death-is-too-many.pdf>

<sup>5</sup> <http://www.hse.gov.uk/leadership/steering-group-report.pdf>