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HEALTH AND SAFETY COMMISSION

Directors role in improving health and safety performance - possible legislative options

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Issue

1. To update the Commission on possible legislative options for strengthening director leadership on health and safety and on the review of enforcement against individual directors¹.

Timing

2. For discussion at the May meeting and subsequent advice to Ministers.

Recommendation

3. That the Commission:
 - o note the work done on identifying possible legislative options, and in particular the leading option; amendments to instructions to inspectors; the need for credible guidance; and in light of the above
 - o decide if the combination of actions should include a legislative option.

Background

4. Following the Commission's discussion in December, they instructed the Executive to take forward further work as set out in the Chair's letter to Ministers (Annex 1). The overarching policy imperative is to improve health and safety outcomes through improved director motivation and performance.
5. A significant amount has been done to examine the possible legislative options; engage with stakeholders; and revise the instructions to inspectors on enforcing against individuals and directors under current legislation. Although existing legislation is clear and is enforced, the current framework (Annex 2) gives rise to real and perceived concerns about its effectiveness in motivating directors from some stakeholders, as discussed at the Commission meeting in December 2005.

¹ The term director includes those of both public and private organisations. See Annex 1 for the issues around defining a director. Duties may fall on one or a number of directors.

6. In consultation with Legal Advisors Office a full range of possible legislative options for improving director leadership on health and safety was identified. These centred around two broad approaches to amend the body of the Act: inserting a new Section on directors duties; possible revisions of Section 37.
7. Intensive consultation with key stakeholders (Annex 3) then took place through a series of bilaterals. These focussed on discussing the pros and cons of each option and seeking further possible options. No further options were forthcoming.
8. Following the bilaterals it was apparent that, **if** legislation were to be proposed, a broad consensus existed around a specific leading option (Annex 4). This option was further worked up and a draft Regulatory Impact Assessment developed, to help focus future discussions on costs and benefits. Both the leading option and the draft RIA were exposed to further scrutiny by a leading group of 20 prominent key stakeholders at an event on 3 April, and presented to the Small Business Trade Association Forum on 11 April.
9. The outcome from this work is evidence that **significant areas of agreement exist amongst our key stakeholders**. They agree that –
 - **Director leadership plays a key role** in securing good health and safety performance;
 - **Improvement in director leadership** is needed to improve health and safety outcomes;
 - **Credible and clear guidance** on director leadership for health and safety is essential; and
 - Current **legislation needs enforcing** effectively.
10. However, **significant disagreement remains** amongst stakeholders as to whether further legislation is needed in order to motivate directors.
11. It is also apparent that **stakeholders** do not see this work, and the considerations on whether or not to legislate, as existing in isolation. They see strong links with Government thinking on Corporate Manslaughter, Company Law Reform, Better Regulation, and work on alternative penalties (specifically those targeted at individuals). Some **stakeholders** view it as important that decisions on directors duties should take account both of this broader agenda and the timing of likely decisions over the next few months.

Discussion

12. There is strong support for **credible and clear guidance**, focussed on the role of directors, as distinct from managers. It is recognised that guidance needs to take account of the broader context in which directors operate and to reflect the language of governance. Therefore we recommend, in the light of stakeholder comments, that the guidance is produced by a leading business figure, supported by the Institute of Directors, and in consultation with the wider stakeholder grouping.

13. All stakeholders see **effective enforcement** of the current legislation as vital. HSE, in reviewing its enforcement procedures, processes and guidance, has taken a number of actions in relation to this area. Two changes have been made to operational guidance in light of this review:

(i) greater clarity of information on prosecuting individuals generally and;

(ii) expanding the guidance on director disqualification and making it clear that HSE considers it is appropriate for the court to consider disqualification in all cases where the law makes provision for it, reminding the court that it has this additional post-conviction power.

14. Work is in hand to promulgate the updated guidance formally, and all relevant staff have been alerted to the changes and advised they take immediate effect.

If legislation is recommended, what would it look like?

15. Irrespective of their fundamental view on the need for legislation, stakeholders were united in their desire for a **simple, stand-alone duty**, clearly and concisely setting out directors main responsibilities. Key policy choices within this leading option are -

- whether/how to qualify the duty; eg use of “reasonableness” and/or some other approach such as due diligence; and
- whether to include some specific duties on the face of the legislation or, to leave these to guidance.

Both of these issues, and other areas of detail, should be developed/explored in any formal consultation on possible legislation.

16. There was **no support amongst stakeholders for amending Section 37**. The overriding desire was for a duty that motivates directors and not simply one that makes it easier to prosecute them.

17. At the stakeholder conference on 3 April the leading legislative option and the draft RIA were examined further and a range of comments made on the assumptions we had used in the RIA: in particular the level of compliance expected from legislation and guidance, and the costs of compliance. These comments helped us refine the RIA (Annex 5). In summary, 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.

18. Whilst there is agreement on “the what” in terms of legislation, there remains fundamental disagreement on whether legislation would effectively motivate directors to lead on health and safety. Employees’ representatives and others, such as the Centre for Corporate Accountability, remain strongly in favour of a legislative option as they believe it will motivate directors. 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.

19. Although our policy intent is for any new legislation to apply to all types of organisation, **some stakeholders** feel that a possible unintended consequence of legislation is that it may have a disproportionate impact on small organisations. Directors in large organisations are more distanced from the day to day activities of their organisation, in a way that those of small organisations cannot be.

Presentation

20. There is a considerable amount of interest in the issue and the Commission's advice to Ministers is eagerly awaited. Of particular significance is the possibility that the Home Office's draft Bill on Corporate Manslaughter will be put before the House of Commons in the near future.
21. There is a strong expectation that the Commission's advice to the Minister will be open. A media handling strategy will be developed in light of the Commission's decision.

Costs and Benefits

22. The draft RIA demonstrates that, using the assumptions we have refined in light of stakeholder comments, the costs of either package are greater than the benefits. However, the results of the RIA are very sensitive to assumptions, so it does not provide a definitive view. The only clear evidence we have is that publication of the 2001 guidance was followed by an increase in director/board activity on health and safety.

Financial/Resource Implications for HSE

23. The extent of the financial and resource implications to HSE from training, raising awareness, developing legislation and/or guidance will be dependent on the agreed package of actions e.g. the estimated additional cost to HSE from the introduction of legislation and guidance would be just under £1,000,000 and for new guidance almost £500,000. HSE anticipates the costs for any agreed package of actions would be absorbed within existing budgets but would inevitably take resources from priority work within the Business Involvement Programme.
24. Any duty on directors would have an operational impact for HSE. Investigating and prosecuting any such offence could be a significant drain on, and diversion of, resources resulting in less time spent on strategic priority areas.

Other Implications

25. Any decision made will have an impact on HSC/E and LAs reputation as a regulator and will impact on our role in the wider Government themes including the risk debate and the Better Regulation Executive work on minimising unnecessary burdens on business. In addition any regulatory proposal will need to go for scrutiny by the Prime Minister's Panel for Regulatory Accountability. The timing of any subsequent proposal is difficult to predict in advance of Ministers' decisions. If it were agreed to change the Act this would require either primary legislation or the use of powers not yet in existence, but might be brought in under the Legislative and Regulatory Reform Bill.

26. To provide an indication of how any new legislation might be viewed in the context of current demands on directors, a list of other areas where there are duties can be found in Annex 6.

Conclusion

27. There is agreement amongst stakeholders on the value of director leadership, the need for credible guidance, and effective enforcement of the current legislation. There is not agreement on the need for new legislation.

28. The Commission is invited to agree a proposed package of actions for improving director leadership on health and safety.

Next Steps

29. Commission to advise Ministers on the proposed package of actions for improving director leadership on health and safety.

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