

The existing legal framework for enforcing HSWA against directors

1. Directors who are employees can be guilty of an offence under section 7:

- breach of a duty to take reasonable care for the health and safety of himself and of people who may be affected by his acts or omissions at work;
- breach of a duty to cooperate in the performance or compliance of the relevant statutory requirements.

There is no reversal of the burden of proof (section 40 HSWA) for section 7 offences.

2. Directors are dealt with specifically in section 37 and commit an offence when:

- the body corporate is proved to have committed an offence under the relevant statutory provisions;
- that offence is shown to have been committed with the consent or connivance or is attributable to the neglect of a director;
- director here means a director, manager, secretary or other similar officer of the body corporate.

There is no reversal of the burden of proof, so the prosecution has to prove the consent, connivance or neglect and its link to the company's commission of the offence.

3. Case law is that "any degree of attributability" will satisfy the test for "neglect" in this section. More than one director can be found to have committed the offence.

There is case law on "neglect". It is said that 'neglect' "in its natural meaning pre-supposes the existence of some obligation or duty on the person charged with neglect"; the step he has failed to take should be expressed or implied within the functions of his office.

Directors Disqualification

4. Under section 2 of the Directors Disqualification Act 1986, both Magistrates' and Crown Courts have power to disqualify a person from acting as a director, if appropriate, following the conviction of that person of an indictable offence, if the offence was 'in connection with the management of a company'. The maximum period of disqualification is five years if imposed by a Magistrates' court and fifteen years in the Crown Court.

5. The definition of 'in connection with the management of a company' has been judicially considered, leaving little room for doubt that section 2 extends to indictable offences under health and safety legislation.

6. It is entirely within the court's discretion whether to exercise this power, based on the facts set out in the case for the prosecution. It is part of the prosecutor's duty to bring this additional post-conviction power to the court's attention, whenever it arises regardless of the prosecutor's view on the merits of disqualification in the particular case.

Who is a director of a company?

7. Surprisingly, there is no definition of director in the Companies Acts. Section 74(1) of the Companies Act 1985 ('CA') refers to – 'any person occupying the position of director, by whatever name called'. It follows that a director can only be recognised by function, not title, and to establish the extent of functions might require consideration of, amongst other things, the type and size of company, the Articles and any service contract. There is no formula for determining who is a director; it will depend on the circumstances in each case.
8. Some consequences of this are that an individual who bears the title might, on analysis not be a director for the purposes of companies legislation or HSWA, but an individual bearing the title governor, trustee or council member might be; and although not sitting on the board and not bearing the title 'director' (or anything like it) an individual may have powers and responsibilities (and be so held by the company) such as to make him a 'de facto' director. A fully empowered, entitled director who sits on the board is, in contrast, sometimes referred to as a 'de jure' director.
9. A director may also be an employee with executive responsibilities in addition to his general supervisory role – e.g. for finance or personnel matters and is customarily referred to as an 'executive' director. Alternatively, the director might not be an employee, but have a role only in respect of the governance of the company – by attending and voting at board meetings. Such a director will be remunerated with fees rather than a salary and be referred to as 'non-executive'.
10. In addition to 'de facto' directors, mentioned above, section 74 (2) CA recognises the concept of 'shadow' director by defining the individual as someone 'in accordance with whose instructions or directions the directors are accustomed to act.'
11. Whilst this will not usually catch the independent professional (e.g. lawyer, accountant, merchant banker) who is engaged to advise the company, it could apply to for example, the major shareholder or secured lender who has influence over the majority of the board. Notwithstanding the statutory definition, in order for an individual to qualify as a shadow director, the board do not have to comply with all the individual's instructions, they merely have to be influenced by them.
12. A shadow director is, like the 'de facto' director and the 'non-executive' director, subject to all the sanctions (including section 2 of the Company Directors Disqualification Act: CDDA) that apply to properly appointed and registered 'de jure' directors.
13. Two further sub species bear mention:
 - the 'alternate' director – recognised by legislation; such a director may be appointed temporarily by a 'de jure' director to perform the latter's functions – usually voting at board meetings - the duties of alternates are frequently severely circumscribed and are not therefore likely to come into HSE's sights;
 - the 'managing' director – not defined by statute and not amenable otherwise to precise definition – in some circumstances merely a director with additional duties and remuneration, or the holder of two distinct offices - as director and manager – there is case law to suggest that the managing director is not 'first amongst equals' of board members. Regulations specify that 'the directors may appoint one or more of their number to the office of managing director or to any other executive office of the company....'.

Corporations outside the scope of the Companies Acts

14. Whilst some voluntary and public sector bodies may be bodies corporate, and as such will be under the control of individuals who are indistinguishable, functionally, from company directors, these bodies will not necessarily be either (a) companies for the purposes of the Companies Acts or (b) specifically brought within the scope of the CDDA. Thus, whilst such bodies corporate, their directors and managers (and others) can be guilty of indictable HSWA offences, the provisions of section 2 CDDA will not bite. However, for some public sector bodies the position of senior managers has been aligned with their private sector counterparts for CDDA purposes (e.g. NHS foundation trusts, Building Societies, Friendly Societies and Limited Liability Partnerships).