

Bill Callaghan
Health and Safety Commission
Rose Court
2 Southwark Bridge
London SE1 3HS

25 June 2007

Dear Bill,

Commission Commitment to legal change on Directors' duties

I am writing to you concerning the Health and Safety Commission's (HSC) decision, at its meeting in December 2005, to support a change in the law relating to Directors Duties.

Following this meeting, you asked the HSE to provide the HSC with legal options for change. At its meeting in May 2006, the HSE informed you that, following a series of meetings, "a broad consensus existed around a specific leading [legislative] option". This option was to impose a duty on individual directors framed in terms of a general duty to "take all reasonable steps to ensure health and safety". As you may know, this is a legal option that exists in other jurisdictions.

However at this meeting in May, the Commissioners decided to delay putting this legal option forward to the Government – due, it said, to uncertainties in a number of reforms that were still ongoing – namely, the Corporate Manslaughter and Corporate Homicide Bill, the new Companies Act, and work on alternative sanctions. As you stated in the letter you wrote subsequently to the Minister:

"We noted the significant work done by the Executive to explore with stakeholders options for legislative change; we also noted the considerable uncertainty about developments on corporate manslaughter, wider progress on alternative penalties and on company law reform, which have the potential to drive improved director focus, and make more visible personal accountability at Board level (a point of much importance to victims and their families). We therefore concluded that we could not at this stage recommend legislation. We did however agree to return to the issue at a subsequent meeting once wider developments, notably on corporate manslaughter, penalties and directors' duties under company law are clearer and the implications for director responsibility for health and safety better understood." (our emphasis)

The implications of these wider reforms are now clear. None have the "potential to drive

improved director focus, and make more visible personal accountability at Board level”. None of these three reforms can be used against the argument for a change in the law or against the decision you and your colleagues made at your meeting in December 2005.

Although the Corporate Manslaughter and Corporate Homicide Bill is still going through its last parliamentary stages, it is clear that the Act will:

- not impose any further obligations on directors;
- not allow directors to be prosecuted;
- not give the courts the power to impose any sentence on directors.

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 (which was raised many times during the parliamentary debate) 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 pre-emptively affected by this Bill.

The draft Regulatory Enforcement and Sanctions Bill – which deals with alternative sanctions - has now been published. In relation to sanctions, this 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.

In relation to company law reform, 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 in the Companies Act – other than the one regarding “the impact of the company's operations on the community and the environment” - are very similar to the duties that existed prior to the Bill. 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 as with the duties that existed prior to this Act, these duties can only be enforced by shareholders through civil court action – so they will barely be enforced in practice.

The HSE has of course published its new voluntary guidance on directors’ duties. We were rather surprised that this was being drafted since the minutes of the HSC meeting of December 2005 state that although “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.” No change to this position was stated in the minutes of the May 2006 meeting.

Be that as it may, the HSE have started a process of drafting this guidance. However, I am sure that you have no intention for this guidance to replace the need for changes in the law – a decision made at your December 2005 meeting. As you will remember, this decision was based on research undertaken by Prof. Phil James, commissioned by the HSE itself, that concluded that voluntary guidance was not sufficiently effective and would be less effective than changing the law. The report concluded:

“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 penalised 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”.

Now, with there being no further obstacles, could you please therefore inform us when the Commission will be meeting to confirm its advice to the Government that it supports a change in the law on this matter? Further, please inform us when you will provide the Government with the legal option for change that you had informed the Minister that you would – and which was discussed at your May 2006 meeting?

Yours sincerely

David Bergman
Executive Director