

**THE CENTRE**

**FOR**

**CORPORATE ACCOUNTABILITY**

**RESPONSE TO HSC**

CONSULTATION DOCUMENT

*“Health and Safety Responsibilities  
of Directors”*

**March 2001**

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**Tel:** (0207) 490 4494  
**e-mail:** [info@corporateaccountability.org](mailto:info@corporateaccountability.org)  
**Address:** Fourth Floor, 197/199 City Road, London EC1V 1JN  
**Web Page** [www.corporateaccountability.org](http://www.corporateaccountability.org)

## INTRODUCTION

- 1.1 In June 2000, the DETR published its strategy Statement for “Revitalising Health and Safety”. Action Point 11 of this document stated that

The 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.”<sup>i</sup>

The document “Health and safety responsibilities of Directors” – which is subject to this consultation - relates to the first part of this Action Point.

- 1.2 The CCA welcomes any HSC guidance that sets out the health and safety responsibilities of directors. It is our view – and indeed has in recent years been the view of the HSC, the British Standards Institute and other organisations – that the conduct of directors directly impinge upon whether or not their company’s activities are safe. This is hardly surprising since company directors control the company and make all the significant decisions about the company. What is surprising is how long it has taken for the HSC to publish guidance
- 1.3 However it is our view that any HSC “voluntary” guidance on Directors duties should occur within a legal regime that establishes that directors have safety duties by law. Currently, although many are unaware of it, the legal regime does not impose safety duties upon company directors. This means that directors:
- have no obligations upon them to make their company safe, or at least no obligations to ensure that their company complies with the law;
  - are able to escape accountability however serious their failures or actions may be in relation to the safety of the company
- 1.4 It would have made more sense:
- first, to establish by statute (or, if possible, by regulations) legal duties upon directors;
  - secondly, to develop an Approved Code of Practice;

- thirdly, to publish guidelines – similar to the ones contained in this consultation document – which set out best practice;

1.5 However the Centre does recognise that the publication of this consultation document has provided an important opportunity for the HSC to initiate a wide debate on:

- why the conduct of directors directly impinges upon whether a company operates safely;
- why the imposition of legal duties upon directors will ensure that companies operate in a safe manner;
- why, the lack of legal duties allows company directors to escape criminal accountability under section 37 of the Health and Safety at Work Act 1974 and manslaughter;
- the limitations of voluntary guidelines – unless they are part of a legal regime that imposes duties upon directors – in promoting “prevention” and increasing “accountability”.

1.6 It is of course particularly important that the HSC consider these issues since the second part of Action Point 11 requires the HSC to:

“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.”

1.7 **Company directors and the “managers” of non-corporate bodies:** The Strategy statement states that the code should not only concern itself with “company directors” but also “organisations where there is no board of Directors.” Reflecting this, the introduction to HSC’s voluntary code therefore states that the Code is of relevance not only to company directors but to “boards of all types of organisations in both the private and public sectors.”<sup>1</sup> It goes on to state that the:

“code is for people who provide strategic leadership, direction and oversight and set the policy on health and safety ... in public sector organisation this will be the senior management board.”

1.8 In the Centre’s view, that although the HSC is right to be concerned with the safety of non-corporate bodies and therefore to consider the position of those individuals in a similar position to company directors, it is important to recognise – as we shall see - that company directors have a very distinct legal status. The legal position of company directors and their relationship with (a) the organisation (i.e. the company) that they manage and (b) the individuals that own its (i.e. the shareholders) is set out in some detail in an existing body of law. The relationship between managers of non-corporate bodies and their organisation and those that “own” it is not established in a similar way.

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<sup>1</sup> Para 1

1.9 In our view, therefore, any code (and indeed any law or regulation that imposes duties) should separate out the duties which are imposed upon company directors from the duties which are imposed upon managers of other organisations. This may not mean that the duties are different in any substantive manner, but only that the way in which they are articulated should be distinct. As a result the Centre's response to this document focuses primarily upon the responsibilities of company directors, and only considers the position of managers or other organisations at the end of this document.

1.10 **Structure of Response:** This response is set out in the following manner.

- The **second** section attempts to clarify the relationship between Companies and their Directors and considers the following issues:
  - what are companies;
  - who are directors;
  - what is the function of company directors;
  - what is the relationship between companies, shareholders and directors;

This section is important, since the imposition of any legal duties or indeed the drafting of any voluntary guidance must take into account the existing legal reality and reflect it. In particular, this should indicate that any legal duties or any voluntary code:

- must state explicitly that it is concerned not only with the conduct of directors whose names are registered at company's house but also de-facto directors and shadow directors.
  - should be written in such a way that the duty upon the director is to ensure that the company acts in a particular way. This is because the it is the purpose fo company directors to "manage" the company
- The **third** section considers what common law and statutory duties are imposed upon directors concerning the financial management of the company. This section is significant since it indicates:
    - that in law, company directors owe duties towards the company, not towards employees, or individual shareholders;
    - the extent to which, in relation to the financial management of a company, directors are obliged to remain informed about certain activities within the company and to ensure that they supervise delegated functions;

Both should be important in the drafting of a legal or voluntary code of duties

- The **fourth** section looks at the extent to which safety law imposes obligations upon company directors. This indicates that the law imposes minimal duties upon company directors.
- The **fifth** section considers why the imposition of duties would have significant benefits to the safety of companies as well as improving accountability of directors.
- The **Sixth** section considers the background to the Voluntary code
- The **Seventh** Section consider the legal status of the voluntary code and its limitations.
- The **eighth** section considers how any voluntary code or any legal duty should be constructed and proposes a number of paragraphs that should be included in the voluntary code
- The final section looks at the issue of imposing legal duties upon directors

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## ‘COMPANIES’ AND COMPANY DIRECTORS

- 2.1 In order to appreciate the position of company directors it is important to consider what exactly is a company.
- 2.2 **What are companies:** Companies are usually businesses set up for profit; however many government and other not-for profit-organisations set themselves up as a companies.
- 2.3 The main reason why businesses and other organisations *incorporate* (i.e. become a company) is that it results in the company – which then owns the business – receiving its own separate *legal status*, distinct from both:
- the legal status of company directors – who are appointed as the ‘managers’ of the company;
  - the legal status of shareholders – who own the company:
- 2.4 So, as a *separate legal entity*, it is *the company*, not the directors or shareholders that:
- owns the business;
  - becomes the employer;
  - makes contracts with individuals and other organisations

2.5 The advantage to this form of organisation is that the company shoulders most of the legal liabilities and obligations to the outside world– not the individual directors or shareholders of the company. As noted below, company directors only owe obligations towards the company which they manage.

2.6 **What are the Different types of Company:** There are two main types of company. These are:

- Private Limited companies: Most businesses are private limited companies. The shares of the company are owned by a small number of family members or private investors:
- Public Limited Companies: These are companies that can sell shares to the public on the open market.

2.7 Most companies are “*registered companies*” – that is to say that they are brought into existence by “registration of documents” – the most important being the “*memorandum of association*” - with a public official (i.e. Companies House).

However many companies have been incorporated by *statute*. This includes:

- the Health and Safety Commission and the Health and Safety Executive.
- Local Councils
- Hospital Trusts;

Although these organisations are “companies”, company law does not necessarily apply to them

2.7 **What and who are company directors:** A company is an artificial legal person with a separate legal identity. Because of its artificiality it cannot perform its own acts and therefore requires others to perform them on its behalf. These “others” are the company “directors”

2.8 Company law does not say very much about the purpose of company directors. It does however state that:

“the business of the company shall be managed by the directors”<sup>2</sup>.

Directors are responsible for managing the company’s affairs on behalf of the company (indirectly therefore on behalf of its shareholders who own the company.)

2.9 It should be noted that in many small or medium sized companies, the directors (or some of the directors) will also be the main share-holders.

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<sup>2</sup> Regulation 70 of Table A

When different people are the directors and shareholders – which is always the case in public limited companies – a tension may exist between the two since company directors must take independent judgments on what they should do for the benefit of the company and not act on behalf of any individual shareholders.

- 2.10 Although shareholders can decide who are the company directors, on a day to day basis, most important decisions are taken by either:
- the board of directors,
  - a committee of the Board that has been delegated by the Board to make that decision on behalf of the Board; or by
  - an individual director who has been delegated by the Board.
- 2.11 It should be noted that when an individual director makes a decision in relation to powers delegated to him or to her by the Board, it is assumed that the decision has been made by *all the directors collectively* on behalf of the company. It is therefore possible that misconduct on the part of one director can result in the liability of all the directors. This is known as “joint and several liability”.
- 2.12 **Who are the Directors?:** By law, every company must have at least one director. A private company (that is to say a company whose shares cannot be sold to the public) can have one or more directors; a public company must have at least two.
- 2.13 When a company is initially registered, a written statement must be given to Companies House, with the name or names of the first director or directors. These names will be determined by the initial shareholders and may well be the initial shareholders.
- 2.14 Subsequent directors will be appointed in accordance with the company’s constitution known as its “Articles of Association”. These, for example, may allow that:
- only the shareholders can appoint new directors, or
  - that the directors can appoint new directors themselves.
- 2.15 **Types of Directors:** These directors, whose names have been formally registered with Companies House fall into two main categories:
- **Executive Directors:** these are the most common. These are individuals who are not only a “director” – that is to say an “officer” - of the company - but are also “employees” of the company, under a contract of employment. This would for example be the case for most “Managing Directors”.
  - **Non-Executive Directors:** these are individuals who have been appointed as Directors of a company, but who are *not employed* by the company. They will receive a fee or an honorarium – often very

substantial - from the company as payment for their duties as a Company Director.

Executive and Non-Executive Directors have – in relation to their conduct as “officers” of the company – the same level of duties and liabilities.<sup>3</sup>

2.16 In addition to these *formal* directors, there are also individuals, who have not been formally *registered* as directors at companies House, but who would be considered by the court to be directors:

- *Shadow Directors*: these are individuals,

“in accordance with whose instructions the [actual] directors are accustomed to act”.

These will include all those individuals who exercise a measure of regular control over the company (whether in a public or concealed manner). This may well include, for example, a major shareholder of the company;

- *De facto Directors*: these are individuals who, though not called “Directors” are effectively performing the functions of a director. One case defines a de-facto director in the following manner:

“..a person who is assumed to act as a director. He is held out as a director by the company and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook a function in relation to the company which could properly be discharged only by a director.”

It is not possible to know whether in fact a person is a “de-facto” or “shadow” director until the matter comes before a court of law. These individuals may well be considered to have the same level of responsibilities and liabilities as Executive or non-executive directors.

2.17 In relation to the drafting of a code of legal duties or a set of voluntary, the following should therefore be taken into account:

- the role of directors is to manage companies

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<sup>3</sup> It should be noted that organisations, that have been incorporated by statute, may also have directors. Whether they do or not depends upon the statute that establishes the organisation, and the practice of the organisation. For example, the HSC Annual report states that the: “HSC comprises a chairman and nine members who are all equivalent of independent non-executive directors. ... [The] HSE comprises a Director (Director General) and two other members who are all the equivalent of executive directors.”



- directors as individuals are separate legal entities from companies and therefore any duties placed upon companies do not result in duties upon the individual directors
  - that the concept of “directors” must include both executive and non-executive directors as well as shadow and de-facto directors.
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## WHAT DUTIES DO DIRECTORS HAVE UNDER CURRENT LAW

- 3.1 Most legal duties are placed upon the *company*. When duties are placed upon a company it is the company who must comply with the duty, and even though it may be the case that only a director can ensure that the company complies with this duty, such a duty upon the company does not impose any legal duty upon any of the directors. Therefore if the company fails to comply with the duty, it is the company that is liable, not the company director.
- 3.2 However, the law does impose some duties directly upon company directors. As stated in para 2.11 above, when the law imposes a duty is upon a company director, it imposes duties upon each of the individuals who are registered as a company directors. Each member of the Board has joint responsibility to ensure that the duty is complied with. A failure on the part of one director to comply with a duty can theoretically result in liability for all directors.
- 3.3 It is crucial to appreciate that currently, all those legal duties (see below) that are imposed upon company directors are:
- owed *to the company* and not to individual shareholders, employees or others. This is an important point to recognise when considering how any safety duties should be drafted.
  - are concerned with the financial management of the company.
- 3.4 Company directors have two types of duties imposed upon them:
- Those imposed by *legislation* (i.e. through the Companies Act 1985);
  - Those imposed under common law;
- 3.5 **Statutory Duties:** Breach of these duties can have either civil law or criminal law consequences. In relation to criminal law consequences, if breached, some of the duties:
- allow for prosecution in relation to negligent conduct
  - allow for imprisonment (up to seven years)

- 3.6 Other duties, if breached cannot result in criminal prosecution but can be used by creditors or others to take action against them in the civil court. An example of this is Section 214 of the Insolvency Act 1986. This section allows a court to order a director (which includes here a 'shadow director') to contribute to the assets of an insolvent company, if the director either knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation and he failed to take "every step with a view to minimising the potential loss to the company's creditors"
- 3.7 As one company law book states, this implicitly requires directors to be: constantly vigilant so that he can "take steps" to avoid liquidations
- must at all times keep a careful eye on the company's performance and prospects
  - remember that he is judged not only by what he knows but also what he should ascertain
  - be required to inquire and persist in inquiries if apparent cause for unease
- 3.8 This duty is particularly relevant to the question of directors and health and safety duties. Section 214 is concerned with ensuring that directors take "every step with a view to minimising" financial harm to the company's creditors by, and if the director fails to do so when he knew or ought to have known that financial harm would result, the court can take action against the director as an individual.
- 3.9 The debate about directors and health and safety is also concerned with imposing a duty upon directors to ensure that they act in such a way as to prevent the employees or others suffering physical harm from the conduct of the company.
- 3.10 It should be noted that it has been the existence of these stringent statutory financial duties that has been used by organisations like the Centre for Corporate Accountability to argue that directors should have safety duties imposed upon them.
- 3.11 **Common Law Duties:** All these duties have civil, rather than criminal, law consequences.<sup>4</sup> They indicate that it is not sufficient for directors to simply comply with statutory duties; they cannot just sit back and allow the company to operate. Directors do have a responsibility towards the way in which that company operates. The content and extent of these duties is a contentious area, but the Court of Appeal recently made the following ruling<sup>5</sup>:

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<sup>4</sup> This paper does not deal with common law, "fiduciary" duties that are imposed upon company directors since it does not appear to us that they are relevant here. "Fiduciary duties" requires directors to (a) act *in good faith* and in the best interests of the company (As long as a reasonable director could have believed that what he did was for the benefit of the company then the director under scrutiny can claim he has acted in good faith and escape liability); and (b) to exercise their powers for the proper purposes for which they were conferred and not for any improper purpose

<sup>5</sup> *Re Barings PLC*, [1999] 1 Butterworths Company Law Cases 433 – 620 at p.435-6

“Duties of directors

- **Each individual owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them.**
- Subject to the articles of association of the company, **a board of directors might delegate specific tasks and functions. ...**
- ... Having delegated a particular function **it did not mean he was no longer under any duty in relation to the discharge of that function** notwithstanding that the person to whom the function had been delegated appeared to be both trustworthy and capable for the discharging the function
- Where delegation had taken place, the board (and the individual directors) **remained responsible for the delegated function or functions and retained a residual duty of supervision and control.** The precise extent of that residual duty will depend on the facts of each particular case, as will the question of whether its had been breached
- A person who accepted the office of director of a particular company undertook the responsibilities of ensuring that he understood the nature of the duty a director was called upon to perform. That duty would vary according to the size and business of that particular company and the experience or skills that the director held himself or herself out to have in support of appointment to the office. The duty included that of acting collectively to manage the company.
- Where there was an issue as to the extent of a directors duties and responsibilities in any particular case, the level of reward which he was entitled to receive might be a relevant factor in resolving that issue. It was not that the unfitness depended on how much he was paid. The point was that the higher the level of reward, the greater the responsibilities which might be expected (prima facie, at least) to go along with it.

The court then summarised the extent of these duties:

“The following general proposition could be stated with respect to the director’s duties:

- directors had both collectively and individually, a continuing duty to acquire` and maintain a sufficient knowledge and understanding of the company’s business to enable them properly to discharge their duties as directors.
- Whilst directors were entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chair, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation did not absolve a director from the duty to supervise the discharge of the delegated functions

- No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty and the question whether it had been discharged depended on the facts of each particular case, including the directors role in the management of the company.”

3.12 It is important to keep these points in mind in the context of what sorts of obligations in relation to safety should be imposed upon directors. For it is clear , this case requires directors to:

- to control and supervise the affairs of the company;
- to ensure that s/he is informed about the company’s activities;
- to supervise those powers which s/he has delegated;

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## WHAT SAFETY RESPONSIBILITIES DO “DIRECTORS” HAVE UNDER CURRENT LAW

4.1 In order to determine whether the law does impose any duties upon company directors it is necessary to look at the Health and Safety at Work Act 1974. This imposes duties upon two main categories of person:

4.2 The first category is employers, manufacturers etc. So for example, section 2 of the Health and Safety at Work Act 1974 states that:

“It shall be the *duty of every employer* to ensure so far as is reasonably practicable the health, safety and welfare of all his employees.”

An “employer”, “manufacturer” etc. usually refers to “the company”. It never refers to company directors. These duties do not impose any legal obligations upon those individuals who are company directors.

4.3 The second category is “employees”. Section 7 of the Health and Safety at Work Act 1974 states that:

“It shall be the duty of every employee while at work:

- (i) 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; and
- (ii) as regards any duty or requirement imposed on his employer [i.e. company] .... to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with.

4.4 This section has generally been considered to impose duties only upon “ordinary” employees, or at least upon employees who do not have any management role. However, the wording of this section is not that

narrow, and appears to impose duties upon all “employees” whatever position they may hold within the company.

- 4.5 Section 7 would therefore appear to impose duties upon those company directors who are employees of the company, that is to say Executive Directors. They would have the duty to “take reasonable care for the health and safety ... of other persons who may be affected by his acts of omissions at work.”
- 4.6 However, it appears – and this, as far as we are aware, has never been tested in court – that this section only imposes duties upon executive directors in relation to their conduct as company employees and not in relation to their conduct as company director (i.e. as an officer of the company).
- 4.7 In addition, it may well be unclear when a company director is actually acting as an *employee* of the company rather than as a *director* of the company. The general rule appears to be that any decisions etc. that are made at a Board Meeting will definitely be made by the individuals in their capacity as directors; and that conduct undertaken outside of that meeting is likely to be undertaken in their capacity as employees. But it is a grey area. If the Board has delegated certain decisions relating to health and safety to a particular director, are those decisions made outside the Board meeting made in his capacity as a director or as an employee of the company?
- 4.8 What about section 37? This states that:

“Where an offence under any of the relevant statutory provisions committed by a body corporate 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 or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

It is often assumed that since a company director can be prosecuted under section 37, the section implies that directors have safety duties. This is however not the case, or only the case in a very limited sense.

- 4.9 Section 37 allows the HSE to prosecute a director in three different situations:
- if a corporate offence is “attributable” to any neglect on the part of a director; In order to prove “neglect” it is necessary to show that the director had a ‘duty’. It is clear from case law that courts have not actually inferred from section 37 that company directors have any safety duties. Indeed, the only reason directors have been successfully prosecuted for

'neglect' is that courts have held that section 37 does not require that a director had a *legal* duty, only that the company has imposed a *duty* upon the director – even if it is only through wording of a company safety policy.<sup>6</sup>

A successful prosecution therefore depends upon a company having set out with some clarity in its safety policy (or perhaps in its contract of employment with the director) the safety duties of the particular director which the HSE want to prosecute. If the company has not done that, then however reprehensible the director's conduct, he can not be prosecuted successfully.

- *if a director "consents" or "connives" in an offence by a company*  
It appears that this part of section 37, does implicitly impose a duty that a director should not "consent" or "connive" in an offence by the company<sup>7</sup>: that is to say the director has a duty when he is "aware of what is going on":
  - not to agree to the company committing offence, or
  - not to allow an offence to continue

This is a limited duty. It does not require the director to do anything to make the company safe; only an obligation upon him to stop an offence by the company, if he is informed about it. It does not impose any obligation upon him to find out what is happening within the company and whether any offences are committed.

It is therefore possible for a director to insulate himself from any liability by simply ensuring that he remain ignorant of safety issues within the company.

- 4.10 This duty – not to consent to, or connive in, a health and safety offence by the company – is the extent of legal duty that a director (acting in his capacity as "officer" of the company) has in relation to safety.

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<sup>6</sup> *Armour v Skeet* [1977] SLT 71

<sup>7</sup> A person consents to the commission of an offence when he is 'well aware of what is going on and agrees to it'. Agreement would need to be shown by some 'positive action ... usually no doubt in words, perhaps in writing, if gestures were absolutely clear, it would conceivably be by gesture but, in my view, careful proof of such an intention would be required.' A director connives in an offence when 'he is equally well aware of what is going on but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it.'

## WHY THE ISSUE OF THE SAFETY DUTIES OF DIRECTORS IS IMPORTANT

- 5.1 Imposing duties upon directors will promote (a) safety and (b) accountability. It is perhaps one of the few policy issues that strides both these purposes equally.

**It is the action taken by directors that will determine the extent to which a company operates safely.**

- 5.2 Companies are “controlled” and “directed” by company directors. As long as they do not act outside the powers set out in the Company’s Articles of Association, company directors have complete control over a company’s activities and the way it functions.

- 5.3 No other individuals within a company have as much power or influence as company directors over whether a company operates safe systems of work, or pose minimum risks to its employees and the public. For example:

- it is directors who will decide the level of resources that the company puts into safety. This can affect staffing, training, instruction, safety equipment etc and the general priority given to safety within the company.
- it is directors who will determine how the company balances the objects of safety and “production” and the extent to which other managers within the company prioritise safety. They will determine, for example, whether or not there should be “no expense spared” when it comes to safety or whether “production” always come first.
- it is directors who will decide whether or not their company is subject to proper safety audits, whether or not employees are encouraged to inform the company about safety concerns, whether or not the company is proactive in identifying unsafe practices and, if so, at what speed, these practices will be changed.
- it is directors who determine the duties of senior managers involved in safety, the financial and others contexts in which they operate, the power the managers have to fix safety problems at the cost of production, etc.

- 5.4 The relationship between the conduct of directors and the safe operations of a company is well understood and, indeed, uncontentious. For example, the Health and Safety Executive states that:

“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)

And the British Standards Institute states:

"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."

- 5.5 Moreover, reports of the public inquiries into disasters have emphasised the importance of company directors to the safety failures of the companies. For example, the Sheen report into the Zeebrugge disaster stated that:

"The Board of Directors did not appreciate their responsibility for the safe management of their ships. They did not apply their minds to the question: What orders should be given for the safety of our ships? The directors did not have any proper comprehension of what their duties were. There appears to have been a lack of thought about the way in which the Herald ought to have been organised for the Dover/Zeebrugge run."

The report did criticise others levels of management within the company, but what is clear is this: ultimately, only action by the company directors could have ensured that the company operated in a safe manner. Even if every employee within the company had, on the day the disaster had taken place, done everything they should have done, the company would still have been operating a dangerous system which could only have been corrected by action on the part of the company directors.

- 5.6 In summary, it is accepted that the individual conduct of directors has a crucial role in determining whether their company will operate safely or not. The safety of a company is reliant on how company directors conduct themselves, the extent to which they, for example, prioritise safety. If a company director decides against prioritising safety, it is likely that the



company will be unsafe; where a company director decides to ensure personally that the company should operate safely, it is likely that the company will become safe.

**Company directors can escape accountability because there are no legal duties imposed upon them.**

5.7 In relation to safety, company directors – when acting as “officers” of the company - have power without responsibility. They have the power to make companies safe if they wish; but there is little that can be done to make them accountable if they do not use their power.

It is difficult to prosecute company directors for either:

- an offence under the HASAW Act 1974 (when an offence by the company is attributable to “neglect” on their part)

As noted above, to prove neglect, it is necessary to show that a company director has a duty, and unless the company has imposed a duty through its safety policy or contract of employment, a director will not be able to be prosecuted.

- an offence of manslaughter (when the director has acted with gross negligence).

Under current law, it is necessary to prove that a company director had a “duty of care” - which they almost always never have - towards the person who died.<sup>8</sup>

If the Home Office proposals become law – with the enactment of the new offences of “killing by gross carelessness” and “reckless killing” – it will no longer be necessary to prove a “duty of care”. However, it would still be necessary to show that a company director had a “duty to act” if it is alleged that it was the director’s *failure to act* that was grossly careless or reckless. This would mean that without the imposition of legal duties, company directors could escape allegations that their “failures to act” amounted to the crime of reckless killing or killing by gross carelessness. This is particular significance since it is likely that most allegations against company directors would concern alleged ‘failures to act’.

5.8 On the question of “accountability”, it is also important to note the following. In consideration of:

- the extent of the control which directors have over the operations of their companies and
- the extent of the control that company directors have in ensuring that their companies operate safely,

there are grounds to argue that the focus of the criminal justice system should be less on assessing the conduct of companies and more on

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<sup>8</sup> See Centre for Corporate Accountability, “Response to Home Office Consultation Proposals”

assessing the conduct of company directors. This would serve a number of goals.

- 5.9 **It would identify the real “offenders”.** In many, if not most cases, the real offenders are company directors – because it is *their* failure to ensure that their companies have proper safe systems of work which is the reason why the company is dangerous and a person has died. It is, of course, often true that serious failures are not always at a boardroom level but are either systemic or are made at a lower management level. It is for this reason that consideration needs also to be given to the prosecution of *companies* for serious failures. But too often it is assumed that these failures are “corporate” when in fact they are due to failures or actions on the part of company directors.
- 5.10 **It would locate the blame where it really lies.** It is inappropriate for the company to take all the blame when responsibility in fact lies with the company’s directors. Public policy surely demands that directors should not use the company as a shield to protect them from personal accountability for serious offences.
- 5.11 **It furthers “individual” responsibility and accountability.** The criminal justice system places great stock on personal responsibility and this principle should not be abandoned simply because it is the conduct of company directors which is in question. Whilst there is an important place for “corporate” accountability, prosecuting the company will in many cases mean that it is simply being scape-goated for the culpable conduct of the company director.
- 5.12 **It would promote deterrence.** One of the principal goals of the criminal law is to deter offenders from recidivism as well as to deter others from committing the offences in the first place. Deterrence will only work if the offenders or potential offenders know that there will be some punitive response, which will directly impinge upon them, if in fact they do offend. Prosecuting companies – when it is the directors who are really to blame – will not achieve deterrence since company directors will often be unaffected by a prosecution of their company. The directors themselves are not being charged, they have no need to go to court and the fine itself will not affect them. In some cases a prosecution against the company will have an impact upon the directors<sup>ii</sup>; but whatever impact corporate convictions have upon company directors, it is an *indirect* one. Directors would be much more efficiently deterred from placing the lives of workers and public at risk if they knew that they themselves could face serious sanctions unless they ensured that their companies were safe.
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## BRIEF BACKGROUND TO THE “CODE”

- 6.1 The importance of the personal conduct of directors and senior managers to the safety of a company has been understood by the Health and Safety Executive and others for some time. The very fact that the Health and Safety at Work Act 1974 had a provision (section 37) to allow for the prosecution of directors and managers implies that, even then, the personal conduct of directors was seen as important.
- 6.2 However, in public statements and their own booklets, the HSE tended to consider the responsibilities of “management” (rather than that of ‘directors’) to ensure that companies complied with health and safety law. And this was also the case when they considered where fault lay in relation to particular safety failures. So when the HSE published a series of reports on workplace deaths, the blame for most of these deaths was laid on “management failure”, and did not mention the conduct of directors. This tendency to blame the amorphous concept of “management” was reflected in the limited number of prosecutions against directors under section 37.
- 6.3 It was perhaps the Public Inquiry reports into the various disasters of the late 1980’s that placed the conduct of directors into the public eye. These heavily criticised how directors had conducted themselves and raised demands for their prosecution for manslaughter.
- 6.4 The perspective of the HSE and other bodies began to change. In 1989, for example the HSE emphasised:
- “the prime requirement is a visible commitment to safety from the most senior member of the organisation so that a management culture is developed which promotes a climate of safety”<sup>9</sup>
- 6.5 In 1990, the CBI was more blunt. In its booklet on *Developing a Safety Culture* it encouraged companies to put in their safety policy that:
- “the Board is responsible for providing resources for health and safety and welfare”
- and that a director should state that that he is
- “the member of the Board responsible for Health and Safety”<sup>10</sup>
- 6.6 In 1996, the British Standards Institute published its *“Guide to Occupational Health and Safety Management Systems”*. This stated that:

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<sup>9</sup> “Human Factors in Industrial Safety”

<sup>10</sup> “Developing a Safety Culture”

“ 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...

6.7 In 1997, the HSE published, the guidance document “*Successful Health and Safety Management*” which stated that:

Senior managers and *directors are fundamental to the success of health and safety management ... Health and safety is a boardroom issue and a board member takes direct responsibility for the co-ordination of effort.*<sup>11</sup>

In relation to health and safety policy statements, the documents states:

"Written statements of health and safety policy should at the very least:

- set the direction for the organisation by;
  - demonstrating senior management commitment;
  - setting health and safety in context with other business objectives;
  - making a commitment to continuous improvement in health and safety performance;
- Outline the details of the policy framework, showing how implementation will take place by *identifying the Director or key senior manager with overall responsibility for formulating and implementing policy*
- having the document *signed and dated by the Director or Chief Executive ...*"

6.8 During this period the question of “director responsibilities’ became tied up with the narrow problem of prosecuting companies and directors with manslaughter. This was because, one of the obstacles preventing directors (and therefore companies) from being prosecuted for manslaughter was the difficulty in identifying a director with defined safety responsibilities within the company.

6.9 It was in the context that in 1996, Michael Meacher, as Shadow Environment Spokesperson stated in Parliament that::

“I emphasise that responsibility for health and safety must be vested at the highest level of each organisation. ... .... Companies

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<sup>11</sup> p.9

should appoint an individual at board Level with overall responsibility for health and safety.”

- 6.10 In July 1999, the Department of Environment Transport and the Regions published a consultation document, “Revitalising Health and Safety”. This contained one sentence on directors:

“If businesses put health and safety on their Board agendas, ideally as a standing item, and make it a responsibility of a named Board Director, they could do much to raise awareness across the organisation and make a real difference in performance.

- 6.11 After the period of consultation, the strategy statement was published and this point was developed substantially into Action Point 11<sup>12</sup>. This was prefaced by the following paragraph:

“Many consultees considered that greater prominence for health and safety issues at board level was the key to raising standards. Responses from health and safety practitioners pointed unanimously to the perception of a low profile for their professions with little support from senior management:

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## THE LEGAL STATUS OF THE CODE

- 7.1 It is important to consider the “legal” status of this code.
- It is not part of a “statute” or a “regulation” so breaching it is not an offence.
  - It is also not an Approved Code of Practice (ACOP). ACOPs are ‘hooked’ onto particular legal statutes (like the Health and Safety at Work Act 1974) or regulations (like the Management at work Regulations). If it were an ACOP, it would have some legal status, since a failure to observe a provision of an ACOP could be the basis for a successful health and safety prosecution (for an offence in the statute or regulation from which the ACOP is linked) unless it can be shown that compliance has been achieved in some other way.

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<sup>12</sup> see Para 1.1 of this document

7.2 This Code is simply *voluntary guidance* to companies and their directors. The HSC proposed that the Code will be prefaced with the following introductory paragraph.

“This guidance is issued by the Health and Safety Commission. Following the guidance is not compulsory and you are free to take other action. But if you follow the guidance you will normally be doing enough to comply with the law. Health and safety inspectors seek to secure compliance with the law and may refer to this guidance as illustrating good practice.”

This is a common paragraph contained in all HSC guidance. To state, as this paragraph does, that if:

“you follow the guidance you will normally be doing enough to comply with the law”

gives the impression that *failing* to follow the guidance could be in breach of the law. But that is of course not the case. In effect, all this guidance illustrates is what the HSE considers to be “good practice”.

7.3 Due to the voluntary nature of the code, there are serious limitations to it:

- Companies that do not wish to abide by the Code are not obliged to do so;
- it will not assist the HSE or the CPS in prosecuting directors who have acted negligently or with gross negligence or recklessness.

7.4 There are also some potential pitfalls to a voluntary code. It could result in a situation where directors of those companies that comply with the code become more vulnerable to prosecution under section 37 of the HASAW Act than directors of companies that ignore the code. This is because, company directors can only be prosecuted for “neglect” if their company has imposed duties upon them – something more likely in a company that has complied with the voluntary code<sup>13</sup>.

7.5 This is an important reason why legal duties need to be imposed – since they create a level playing field for all company directors and do not give any undue advantage to those who ignore good practice.

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<sup>13</sup> See para 4.9 above

## RE-WORKING THE VOLUNTARY CODE

- 8.1 In our view, had the HSC taken into account section 2 and 3 of this response, the voluntary code would have been drafted in a different manner. In our view, the current draft indicates that the HSC has failed to think through what is the relationship between the “company” on the one hand and “company directors” on the other.
- 8.2 The following factors, should have determined the substance of the voluntary code:
- the Law imposes safety obligations upon companies;
  - it is directors that control companies;
  - the purpose of imposing duties upon directors (or the purpose of trying to get company directors to take their safety obligations more seriously) would be to ensure that company directors *act* in such a way as to *ensure that the company* operates safely.
  - at a minimum, this would mean that directors would be required to act in such a way that ensures that the company complies with health and safety law;
  - it is therefore necessary to consider how companies need to act in order to ensure that they comply with the law. The HSC and others have provided guidance to companies on how to manage safety (i.e. *Successful Health and Safety Management* and the British Standard Institute’s document on Occupational Health and Safety). This guidance indicates that companies must *establish, implement and monitor systems of management relating to safety*.
  - It is also important to consider the nature of duties that company and common law impose upon directors in relation to the financial management of their company. Two particularly important aspects of this are:
    - the Court of Appeal’s 1999 decision, set out above, on Directors Duties. This makes it clear that directors have (a) a duty to keep informed of the activities of their companies and (b) a duty to supervise activities that they have delegated to others.
    - section 214 of the insolvency act that imposes duties upon director to ensure that they (a) monitor how solvent the company is to ensure that financial harm does not occur to creditors (b) take all steps possible to avoid insolvency
- 8.3 In our view therefore, the code should have stated *inter alia*:

- It is the Board's responsibility to establish systems of management that ensure the activities of the company do not pose unreasonable risks to employees and members of the public
- In considering whether the company has proper systems of management, it is important that that the Board considers whether proper arrangements exist within the company to ensure that:
  - appropriate information, training and instruction and supervision is provided to employees and others
  - appropriate safe systems of work are in place;
  - the machinery is safe and adequately maintained;
  - employees and others are not exposed to unreasonable risk in connection with the use, handling, storage and transport o articles and substance;
  - risk assessments are undertaken and acted upon etc.
- It is the Board's responsibility to monitor the effectiveness of company's systems of management relating to safety. It should do this by ensuring that the company has effective information routes within the company by which:
  - any safety concerns that are made by employees to line managers about safety are brought regularly to the attention of the Board along with a record of action that the company's managers have taken;
  - any correspondence between the HSE/Local Council Environment Health Departments in which the regulatory authority raises concerns about safety are brought to the attention of the Board, along with a record of the action taken by managers to rectify any failures;
  - any enforcement notice imposed upon the company is brought to the immediate attention of the Board, along with any information on the action that may have been taken by managers.
  - details of any reportable deaths, injuries or diseases along with any information on the action that may have been taken by managers;
  - details of any criminal charges laid by regulatory agencies relating to alleged offences committed by the company, along with a record of action that has been taken by managers to ensure that the offence is not committed again.

8.4 It is our view, as stated at the top of this response, that it would have been preferable for a guidance note to be drafted subsequent to the imposition of legal duties. This would have ensured that the guidance note would have reflected the legal duty.

8.5 It is also important that the voluntary guidance clearly states that it applies not only to company directors registered at company house but also shadow directors and de-facto directors.



- 8.6 **The question of a nominated safety director:** There are various arguments about whether or not there should be a so called “nominated director” and who that nominated director should be. The Code tries to strike a balance in imposing duties on:
- each individual director
  - the Board collectively
  - a “Health and Safety Champion” who may be a “chairman” or “chief Executive”
- 8.7 The idea of a ‘nominated director’ has come under criticism for facilitating the possibility of scape-goating. The Board for example could ‘promote’ a health and safety officer to be a director allowing the remaining directors to washed their hands off any interest in safety. If all responsibilities were placed upon a “nominated director” in this fashion, this of course would be a real danger.
- 8.8 This is not being suggested by the Code, and the manner in which the Code – since it is a voluntary code – deals with this question seems to be reasonably sensible.

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## IMPOSING LEGAL DUTIES

- 9.1 It is the Centre’s view that there are very strong arguments for imposing by law safety duties upon directors. There may well be two ways by which this could be done:
- Legislation – which is apparently what the Government is committed to through its “safety bill”
  - Regulation – the Government could avoid the need to pass primary legislation through secondary legislation. Under Section 15 of the HASAW Act, a government Minister has the power to make any regulations that:
    - (a) may repeal or modify any of the existing statutory provisions;
    - (b) may exclude or modify any provision of section 2 to 9 ....

Section 6 (1) of Schedule 3 of the Act states that, inter alia, regulations can be imposed:

"requiring, in specified circumstances, the appointment (whether in a specified capacity or not) of person or persons with specified qualifications or experience, or both) to perform specified functions, and imposing duties or conferring powers on persons appointed (whether in pursuance of the regulations or not) to perform specified functions"

The Minister by section 50 cannot do this independently of the Commission “unless he has consulted the Commission and such other bodies as appear to him appropriate”.

9.2 It would therefore appear that, the Minister could instruct the Commission to draft regulations on the issue of directors duties, and after consultation, these regulations could become law. Subsequent to that there could be an Approved Code of Practice which sets out in more detail what is expected of directors, and then voluntary guidance.

9.3 There is however some question whether or not health and safety regulations could achieve what primary legislation could achieve. If this is indeed the case, then regulations should not be used as a means to impose duties. However, if it is the case that regulations could achieve exactly what primary legislation could achieve, there would be many advantages going down this path

9.4 **Drafting Legal Duties:** This response is not intended to set out the Centre’s proposed draft on directors duties relating to health and safety. However, the following issues need to be taken into account in this task:

- *To whom should the duties be owed:* Our view is that the duties should be owed to the company, not to the company’s employees or others affected by the Company’s activities. The reason for this is that this would ensure that these duties reflect rather than conflict with established company law principles that directors’ duties are owed only to the company. Also it would mean that it would not impact upon civil law liability for compensation by creating a whole new category of possible legal action by injured or bereaved persons against the director.
- *On whom should the duty be imposed:* In our view, the duty should be imposed upon all directors. One could leave it at that and allow the directors to decide how they should ensure that the duty placed upon them individually and collectively should be carried out, or there could in addition to that be a second duty upon the Board, to delegate this duty to one or more directors. It is important to note that this “delegation” would not remove the duty upon the other directors.
- *What should be the substance of the duty:* In our response to the Home Office proposals on reform to the law of manslaughter, the CCA suggested something the following general duty. Directors would have a duty:

“to define, implement and monitor safety and other policies of the company, so as to ensure, to the standard set down by law, that the company's activities are managed and organised to ensure the health and safety of persons employed in or affected by those activities.”

This could then be developed in more detail along the lines above (see para 8.3) in an Approved Code of Practice.  
*Action Point 5*

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<sup>i</sup> Para 68 “Revitalising Health and Safety: A Strategy Statement” (June 2000)

<sup>ii</sup> It is, of course, our view that the Government should allow courts to impose new sentences upon companies which would have greater impact upon company directors. See Section 10 below.