

**Question:** *Do companies have to include a statement on H&S in their annual report?*

**Answer:** No, but the HSE recommends it and has published guidance on reporting standards. Statements on risk management are however required under the listing requirements of the London Stock Exchange for publicly quoted companies. You may like to look at the HSE website on the point. <http://www.hse.gov.uk/revitalising/annual.htm>

**Question:** *In a case where directors refuse to improve on the health and safety practices in an organisation, what are the options of the employees?*

**Answer:** A lot would depend on the extent of the problem and how serious the risks were but the following options may be available:

- An employee could resign and claim unfair constructive dismissal on the basis that the standards were so poor that they put the employee at serious risk and this was a fundamental breach of contract.
- An employee could withdraw themselves from the situation of danger using the provisions of Regulation 8 (2) (b) of the Management of Health and Safety at Work Regulations 1999. Any disciplinary action taken could then be resisted on the grounds of it being taken on grounds of health and safety.
- An employee could use an internal whistle blowing procedure.
- The employee could report the matter to the enforcing authority and request them to take enforcement action

In relation to professional engineers you may be interested in the attached publication from the Fellowship of Engineering, whilst only a draft it contains some interesting principles which although published nearly 20 years ago are still of relevance.

Clearly it would be important for internal procedures to be used to raise the issue with the directors first (except of course in relation avoiding imminent danger).

**Question:** *What was the incident in the picture used with the fire brigade attending a major fire/incident?*

**Answer:** It was the Buncefield fuel depot fire and explosion in December 2005 in Hemel Hempstead. You can find more pictures together with information on the incident at:

<http://www.buncefieldinvestigation.gov.uk/images/index.htm>

**Question:** *Some companies are good at implementing projects and being proactive and pushing large projects. Once success has been achieved how do you maintain the momentum of these initiatives?*

**Answer:** I think the key issue here is to put in place monitoring measures not only for the completion of the project but for its ongoing success. These could probably be agreed at the start of the project. For example if the project is to roll out a training programme to all staff then the business as usual of dealing with new staff inducted and refreshing existing staff needs to be monitored on an ongoing basis with action taken if the improvement is not maintained.

**Question:** *If your business has employees who travel to many countries as part of their job function in a high profile sports series, what are the legal implications on the directors if a fatality happens outside of the UK? Is duty of care the same?*

**Answer:** This is a complex area. In terms of civil liability the duty of care will be similar, thus if your employee is killed outside the UK then a civil action for damages could be brought against the employer in the UK. In terms of criminal legal provisions such as the Health and Safety at Work etc Act 1974 and associated Regulations and the Corporate Manslaughter and Corporate Homicide Act 2007 these will not be applicable outside UK jurisdiction. However local legislation will apply and in the event of a death local provisions on manslaughter could apply. For example manslaughter proceedings have been brought against UK citizens in France and other European countries relating to deaths that have occurred there.

You probably need a more detailed review and advice on this in terms of how policies cover these aspects and what you can do to minimise the liabilities of the organisation and the personal liabilities of the directors.

**Question:** *When reporting back on compliance shortfalls (and in some cases repeatedly due to no change) how can you bring your point across without sounding like your whinging - which is sometimes the way higher management make you feel?*

**Answer:** I think the key issue here is to get the directors to agree the compliance standards to which they want to operate and then agree targets and measures against which these will be monitored. The targets then become those of the organisation rather than your own and the directors will be more concerned about non compliance. The more you are able to put compliance measures alongside other business performance measures the easier this will be.

The other point is to draw the attention of the directors to their personal vulnerability if they are presiding over a situation where there is persistent non compliance and taking no action. Recent case law could be used to illustrate this.

**Question:** *What KPI's do you consider are required for reporting to the board?*

**Answer:** This very much depends on the size of the organisation and other KPI's it uses for its general business. It is better to have forward looking KPI's rather than reporting on failure alone. It is important that KPI's align with other KPI's used in the business. The above link also gives indications of what should be included in annual reports as performance measures.

**Question:** *Do you generally find a difference in the way senior management operate in the public as opposed to private and not-for-profit sectors?*

**Answer:** Yes a considerable difference. I often find that those in the public sector tend to use lack of resources as an excuse for non compliance rather than focussing on the key issues and prioritising actions. In the private sector there are often the same resource pressures but recognition that the problem still has to be solved. I also find a tendency in many public sector operations to have a lack of individual management accountability for delivering on key legal requirements and for monitoring compliance. In many cases I also find that resources (of management time) are often excessively spent on meetings and discussion rather than implementation. There can also be an issue with KPI's covering certain areas and not others with the result that some areas are ignored.

In the not for profit sector a key issue will be the ethos of the organisation. We have one client in this sector which is probably the most safety conscious organisation that I have ever experienced but they are an organisation which is focussed on providing safety services to high risk sectors. I know of other organisations, particularly those operated by volunteers, which are far less compliant although their ethos should suggest a higher standard.

These comments are based on my personal experience and the actual situation will vary from place to place and from organisation to organisation and there are undoubtedly good and poor performers in all sectors.

**Question:** *What is Ian's view on Directors wanting to outsource an internal HSE Team and what are the implications. Should at least one 'competent' person be retained in-house?*

**Answer:** A lot will depend on the size of the organisation and the service which the outsourced provider will give and their commitment and integrity. It will certainly be necessary to have a contract manager in the employing organisation with oversight of the service provided and enough knowledge to understand the advice given. It is very important to lay down what is provided and the respective obligations of the parties in a service level agreement. For a large organisation where the outsourced service is providing specified activities, as opposed to strategic advice, then there will either need to be an in house competent person or a source of that strategic advice appointed externally.

You should also be mindful of the requirements of Regulation 7(8) of the Management of Health and Safety at Work Regulations 1999 which provides that

*"Where there is a competent person in the employer's employment that person shall be appointed.... in preference to a competent person not in his employment"*

This does not preclude total outsourcing as, at the point of outsourcing, there is no longer a competent person in the employment of the employer. It may cause difficulty if there is competence within the organisation which is not actually used however. In practice the HSE will look to see if the arrangement is adequate and works and has sufficient engagement with the directors. The most significant danger is buying in to a nuts and bolts commoditised service with no strategic input and no duties other than fulfilling a functional contractual specification.

**Question:** *In the case of a multi-national company, there may be no directors on site, only senior managers. What is the best way for a safety advisor to make an impact in this?*

**Answer:** If the Company is a UK subsidiary (which will nearly always be the case) then there will have to be UK registered directors for that Company. It is these directors who will have ultimate responsibility for health and safety matters. The starting point is to ensure that one of these directors signs the health and safety policy and to clearly include their responsibilities in it which is a necessary part of protecting them. In addition you can discuss with your own senior management the importance of the legal directors of the Company having the right monitoring information and being seen to be clearly demonstrating their commitment to the necessary standards. If they do not do so they are likely to be personally vulnerable, this therefore can be quite correctly communicated as a director protection issue.

The IOD/HSE guidance is of particular relevance as a Court can take it into account in a Corporate Manslaughter prosecution. The checklist at the end of the guidance should therefore be used by the directors and I attach a copy.

**Question:** *Ian has mentioned using corporate language to prevent Directors being switched off from H&S - he has given 3 areas to consider. What does this mean in practice? Apologies if this is answered during the remainder of his presentation?*

**Answer:** The key issue here is to align with the language of the organisation rather than technical health and safety language. All organisations will have key management, financial and regulatory themes and it is important to attach the health and safety messages provided to senior staff to these. For example If the organisation is concerned about return on funds employed then link health and safety issues to this. If there is a common expression of mission and corporate values then again these can be used. One organisation that I am familiar with, had a message that they were conducting a “war on costs”, in these circumstances the message could be put across that the war will not be won if unnecessary liability costs, insurance costs and fines are incurred.

**Question:** *Can Corporate Manslaughter etc be extended overseas to operations of a UK based company?*

**Answer:** No in relation to an incident which occurs outside UK jurisdiction as opposed to a death which occurs overseas following an incident in the UK. (For example where a person is involved in an incident in the UK causing them serious injury and they die a result shortly afterwards in another country to which they have travelled then the Act would apply). The Ministry of Justice guidance on the Act makes this clear (page 17) and I attach a copy.

**Question:** *Is Ian able to also comment in terms of Directors /Chief Officers within Local Authorities...who obviously don't quite have to play by the same rules as those within a company and are not at the mercy of shareholders and perhaps don't have similar commercial pressures?*

**Answer:** Whilst there will not be the same issues in terms of shareholder concerns in a Local Authority, the director and officer responsibilities and the Section 37 exposure of senior managers and directors will still be the same. Elected members can also have significant responsibilities particularly if they are taking decisions in a cabinet type approach to management of the authority. From a financial and reputational point of view Local Authorities can be subject to all the same risks as a company, they can be subject to prosecution corporately and incur large civil liability costs. They can also be subject to prosecution under the Corporate Manslaughter and Corporate Homicide Act 2007. Some very high profile prosecutions against Local Authorities can be used to illustrate the point. For example Barrow in Furness District Council (legionella) where there was also a personal prosecution of a middle manager, Doncaster Metropolitan Council, and the London Borough of Barnet cases are all relevant. The six fire deaths at Lakenal flats at Camberwell also highlight the type of issues which can arise.

Whilst I recognise that there are not the same commercial pressures in local authorities there are certainly significant financial pressures, so avoiding disruption and cost will be an important driver for the organisation. Similarly public criticism and reputational damage will also be of importance.

The importance of training of Members in health and safety responsibilities cannot be understated. If Members exercise a function of management then they have similar liabilities to Directors and Officers in respect of Section 37 of the Health and Safety at Work etc Act 1974, a point which is not always appreciated.

IOSH have recently published a document with the HSE on the responsibilities within Local Authorities and I attach a link to this here.

<http://www.lge.gov.uk/lge/core/page.do?pageId=965195>

The LGE has sent a copy of this to every Local Authority Chief Executive. The IOD/HSE guidance is also applicable and I attach a copy of this also. The latter is particularly relevant as a jury in a Corporate Manslaughter case could take this guidance into account when considering the conduct of the organisation.