

Corporate and Individual Health and Safety Duties and Responsibilities

Tim Hill

Partner, Solicitor Advocate

22 May 2019



UKOPA

United Kingdom Onshore Pipeline Operators' Association

Session Aims



To understand:

- Key H&S duties for organisations and individuals
- The new H&S Sentencing Guideline
- What do managers need to know in practice
- Safety culture and leadership

The Legal Context and Current Climate

Why are we here?

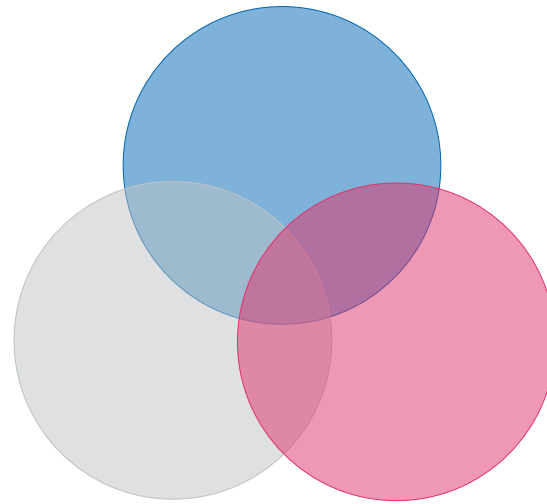
"Effective health and safety performance comes from the top; members of the board have both collective and individual responsibility for health and safety. Directors and boards need to examine their own behaviours, both individually and collectively, against the guidance given - and, where they see that they fall short of the standards it sets them, to change what they do to become more effective leaders in health and safety."

HSE website: "Why leadership is important"

The Context

Offences by Companies

Corporate Manslaughter/Homicide



HSWA* section 2

HSWA* section 3

* Health and Safety at Work etc Act 1974

The Context

Guilty until proved innocent

Section 40:

"... it shall be for the accused to prove ... that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement."

General Principles

What is 'reasonably practicable'?

- Edwards v The National Coal Board:

"a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them - the risk being insignificant in relation to the sacrifice - the defendants discharge the onus on them."

- Must be shown on the *"balance of probabilities"*

The Context

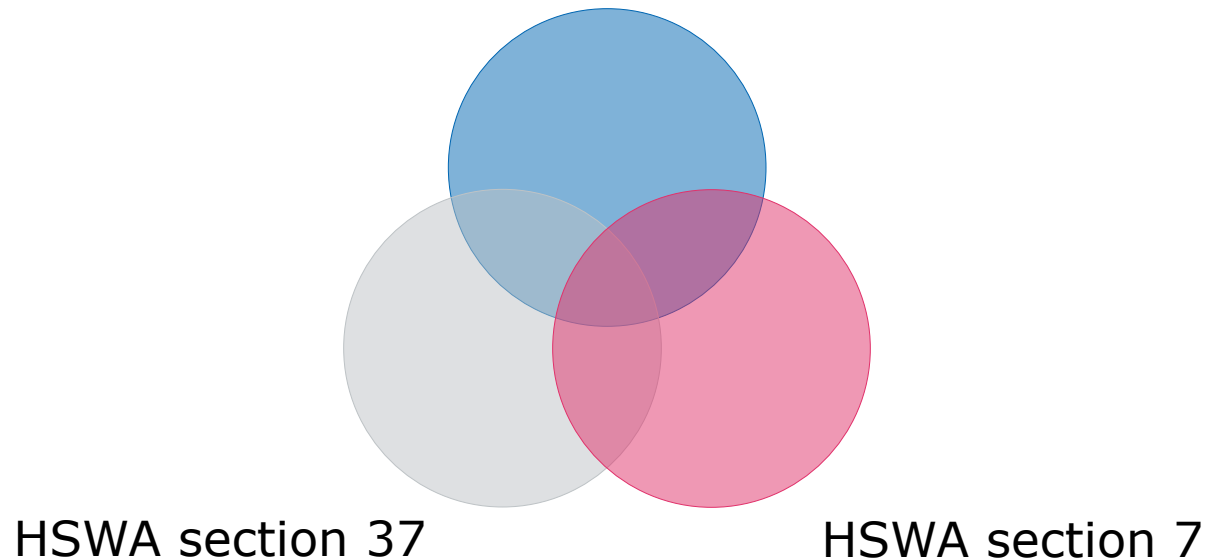
Corporate Manslaughter

- The Corporate Manslaughter and Corporate Homicide Act 2007
- *"Organisations will be guilty of the offence of corporate manslaughter if the way their senior management organises or manages their activities:*
 - 1. Causes a person's death; **and***
 - 2. This amounts to a gross breach of a relevant duty of care owed to the deceased."*

The Context

Individual Offences

Gross Negligence Manslaughter/Culpable Homicide



The Context

Section 7 HSWA

It shall be the duty
of **every** employee
while at work
to take reasonable care
for the Health & Safety of himself
and other persons who may be affected
by his acts or omissions



The Context

Section 37 HSWA

Where an offence ... 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,
- 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 ...



Gross Negligence Manslaughter

R v Adomako (1995)

- Duty of care to the deceased
- Breach of that duty
- Breach a substantial cause of death
- Breach **so** grossly negligent that the act should be deemed to be criminal

R v Misra (2004)

*"Mistakes, even very serious mistakes, errors of judgment, even very serious errors of judgment and the like are nowhere near enough for a crime as serious as manslaughter to be committed (It has to be something which was) **truly exceptionally bad** which showed such an indifference to an **obviously serious risk of life** of the deceased and such a departure from the standard to be expected as to amount to a criminal act or omission and so to be the very serious crime of manslaughter."*



Sentencing and Court Fines

Sentencing

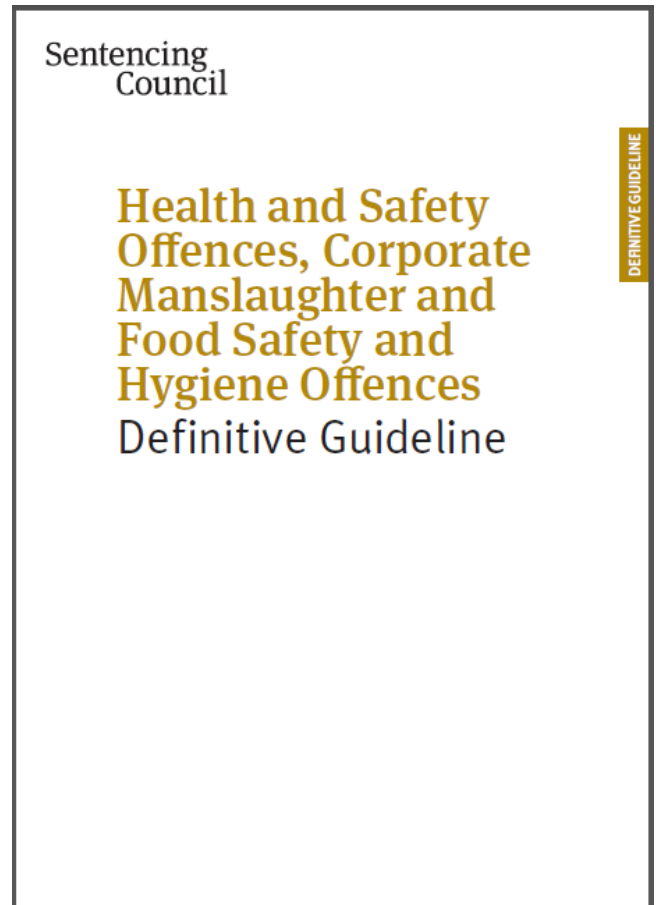
The Guideline for H&S and Corporate Manslaughter

Why now?

- Lack of Court familiarity with sentencing safety offences
- Inconsistency in fines
- Fines too low for large organisations

Specifically:

- Recent higher fines
- Publication of Environmental Guidelines
- New power of Magistrates – re. unlimited fines



Sentencing continued

Organisational Culpability

Very large organisation

Where an offending organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence.

Large

Turnover or equivalent: £50 million and over

	Starting point	Category range
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
High culpability		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
Medium culpability		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
Low culpability		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

Alton Towers

£5 million

- Accepted responsibility at earliest opportunity
- Criticism of “human error” suggestion
- Consider Executives pay:

“I am not persuaded it has had a substantial or lasting impact; it remains a prosperous company and it has not prevented the directors of the parent company being awarded generous share options.”

HHJ Chambers QC

Network Rail

£4 million

- Pleaded Guilty at the earliest opportunity
- Series of previous incidents at level crossings
- Lower speed limit proposed prior to incident

"Over the past decade, Network Rail has focused its attention and investment on improving health and safety on Britain's railways. However, despite now being ranked as the safest in Europe, there can be no room for complacency."

Chief Inspector of Railways, Ian Prosser

ConocoPhillips (UK) Limited

£3 million

- 3 breaches of the Offshore Installations Regulations
- 66 lives endangered
- 7 individuals put at extreme risk
- £1 million for each offence
- Appeal on basis of fine - Rejected

Sentencing

R v Thames Water Utilities Ltd



- “Very large organisation” sentenced according to Environmental Guidelines [2015]
- Rejected “mechanistic extrapolation”
- Courts should look at all financial circumstances:
“This may well result in a fine equal to a substantial percentage, up to 100%, of the company's pre-tax net profit for the year in question (or an average if there is more than one year involved), even if this results in fines in excess of £100 million”
- Fine of £250,000 upheld and said to be lenient
- March 2017: £20million for repeat / very bad breaches

Safety Experiences and Corporate Memory

Previous Convictions

— Sentencing Guideline:

"In particular, relevant recent convictions are likely to result in a substantial upward adjustment"

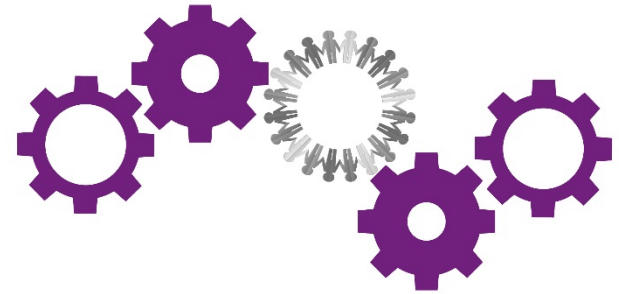
Factors increasing seriousness

Statutory aggravating factor:

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Case Law Decisions

TATA Steel – Group Structure



Normally, only information relating to the organisation before the court will be relevant, unless exceptionally it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account.

— Two matters to consider:

- linked entities will only be considered in “exceptional” circumstances; and
- the Court must also be satisfied that the resources of a linked organisation can properly be taken into account

Case Law Decisions

TATA Steel – Group Structure

- Appeal of Court decision to take into account wider group finances when sentencing loss making TATA Steel UK
- Relevant statement in accounts:

"After making enquiries, the directors have a reasonable expectation that the Company has adequate resources (including the support of its ultimate parent, Tata Steel Limited (TSL)) to continue in operational existence for the foreseeable future."
- Argument from Tata Steel UK that fine should be adjusted downwards rejected as Court recognised 'economic reality' of the corporate group
- Appeal rejected

Sentencing Guideline

What do we really learn?



- These are criminal offences
- Culpability is key
- The importance of co-operation
- Turnover is crucial; profitability is part of the picture
- Threshold for imprisonment at a low level of culpability
- Importance of early response and robust investigation
- More challenge to regulator from outset?
- Review now: getting beyond the “green lights”

Dealing with the Regulator

When might a Regulator call?

- Unannounced visit
- As part of an HSE Intervention Plan
- In reaction to a report from:
 - Organisation (under RIDDOR)
 - Customer / contractor
 - Public
- Following an incident (normally involving the emergency services)



HSE and its Priorities



- HSE Functions and duties
 - Regulator
 - Investigator
 - Prosecutor
- Internal conflict of interest?
- Will they give guidance?
- Political and financial pressure

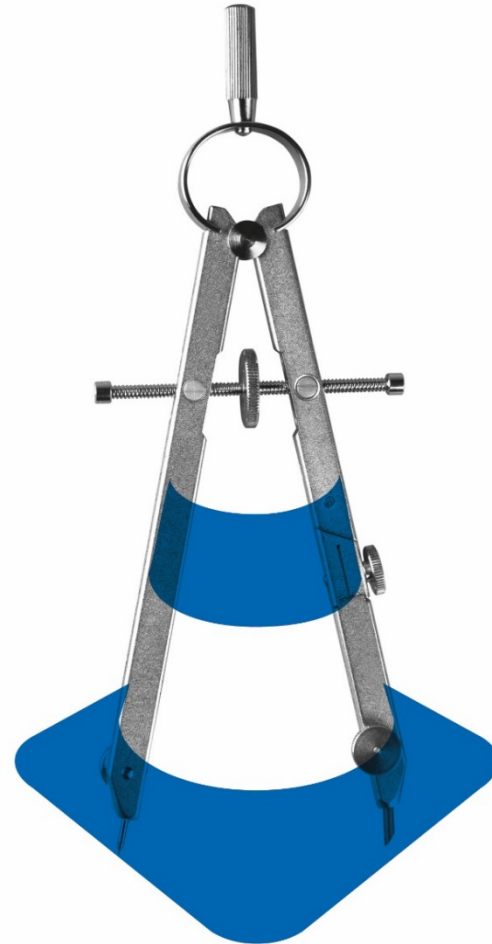
Our Clients' Experience

- Increase in number of visits?
- More formal approach
 - on site
 - written follow up
 - close out
 - FFI / Notice of Contravention
- Lack of clarity over what they want?
- Relationship has changed



Linking safety with other legal duties

- Environmental
 - Comparable Sentencing Guideline
- Road Traffic legislation:
 - driving for work
 - fleet management
- Coroner's Inquests
- Civil Claims



Managing Safety with the Regulator in Mind

'Medium Culpability'

OHSAS? BSI?

'Systems in Place'

'Significant efforts to address the risk'

'Low Likelihood of Harm'

- - - -

Evidence of steps taken voluntarily

**'Effective Health and Safety Procedures
in place'**

Audit?

'Acceptance of responsibility'



Good Safety Management

ACOP or Guidance?

- Approved Code of Practice
 - special legal status
 - practical advice on how to comply with the law
- Guidance
 - not compulsory
 - may be referred to by HSE
- Compliance with guidance or ACOP = enough to comply with the law
- Commitment aside, what can you evidence in terms compliance with your IMS?

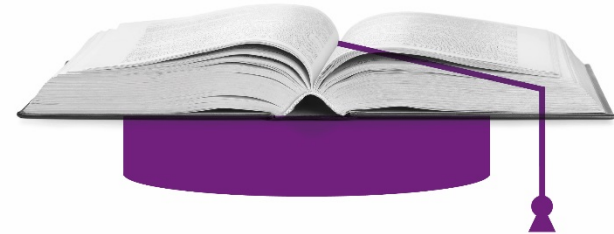
Enhancing Defensibility

Responding to Enforcement Notices

- Properly considered response
- Be wary of appeal time limits
- Consider impact on wider business
- What does acceptance look like?
 - Notices of Contravention
 - Fees for Intervention
 - 'Without Prejudice' conversations

Safety Experiences and Corporate Memory

Ensuring Continuity



- The importance of Risk Registers and Accident Books
- Building into board reporting
- Getting job descriptions right – Who owns safety issues?

Recent Case Law – Lessons

Whirlpool



Recent Case Law – Lessons

McDonalds



Case Law Update

R(HSE) v William Hill Organisation Limited

Fatal accident in which a large metal advertising sign fell from the William Hill bookmakers on Camden Road in North London, and, tragically, struck a member of the public.

- 6 week trial
- 8 days jury deliberations
- Not guilty

Recent Case Law – Lessons

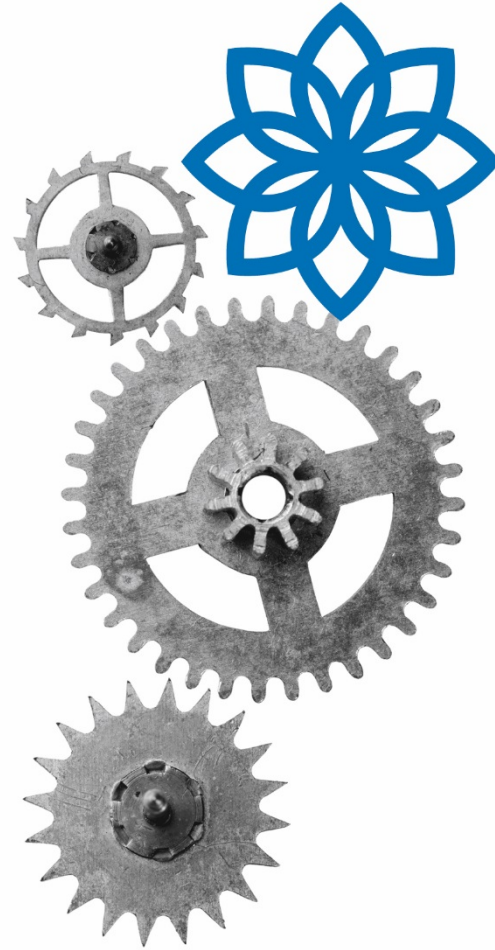
No Mega Fines? ...yet



Good Safety Management

Where does it go wrong?

- Lack of leadership and commitment
- Poor management system
 - Clarity on IMS
 - Failure to follow own policies and procedures
- Lack of understanding of legal obligations at:
 - individual level; and
 - corporate level.



Leadership and impact

What are you expected to know?



Leading health and safety at work

Actions for directors, board members, business owners and organisations of all sizes



This is a web-friendly version of leaflet INDG417(rev1), published 06/13

Introduction

This guidance sets out an agenda for the effective leadership of health and safety. It is designed for use by all directors, governors, trustees, officers and their equivalents in the private, public and third sectors. It applies to organisations of all sizes.*

Protecting the health and safety of employees or members of the public who may be affected by your activities is an essential part of risk management and must be led by the board.

Failure to include health and safety as a key business risk in board decisions can have catastrophic results. Many high-profile safety cases over the years have been rooted in failures of leadership.

Health and safety law places duties on organisations and employers, and directors can be personally liable when these duties are breached: members of the board have both collective and individual responsibility for health and safety.

By following this guidance, you will help your organisation find the best ways to lead and promote health and safety, and therefore meet its legal obligations.

The starting points are the following essential principles. These principles are intended to underpin the actions in this guidance and so lead to good health and safety performance.

Essential principles

- Strong and active leadership from the top:
 - = visible, active commitment from the board;
 - = establishing effective 'downward' communication systems and management structures;
 - = integration of good health and safety management with business decisions.
- Worker involvement:
 - = engaging the workforce in the promotion and achievement of safe and healthy conditions;
 - = effective 'upward' communication;
 - = providing high-quality training.
- Assessment and review:
 - = identifying and managing health and safety risks;
 - = accessing (and following) competent advice;
 - = monitoring, reporting and reviewing performance.

* The Health and Safety Executive (HSE) has further advice on leadership for small businesses and major hazard industries – see 'Key resources' section.

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Plan

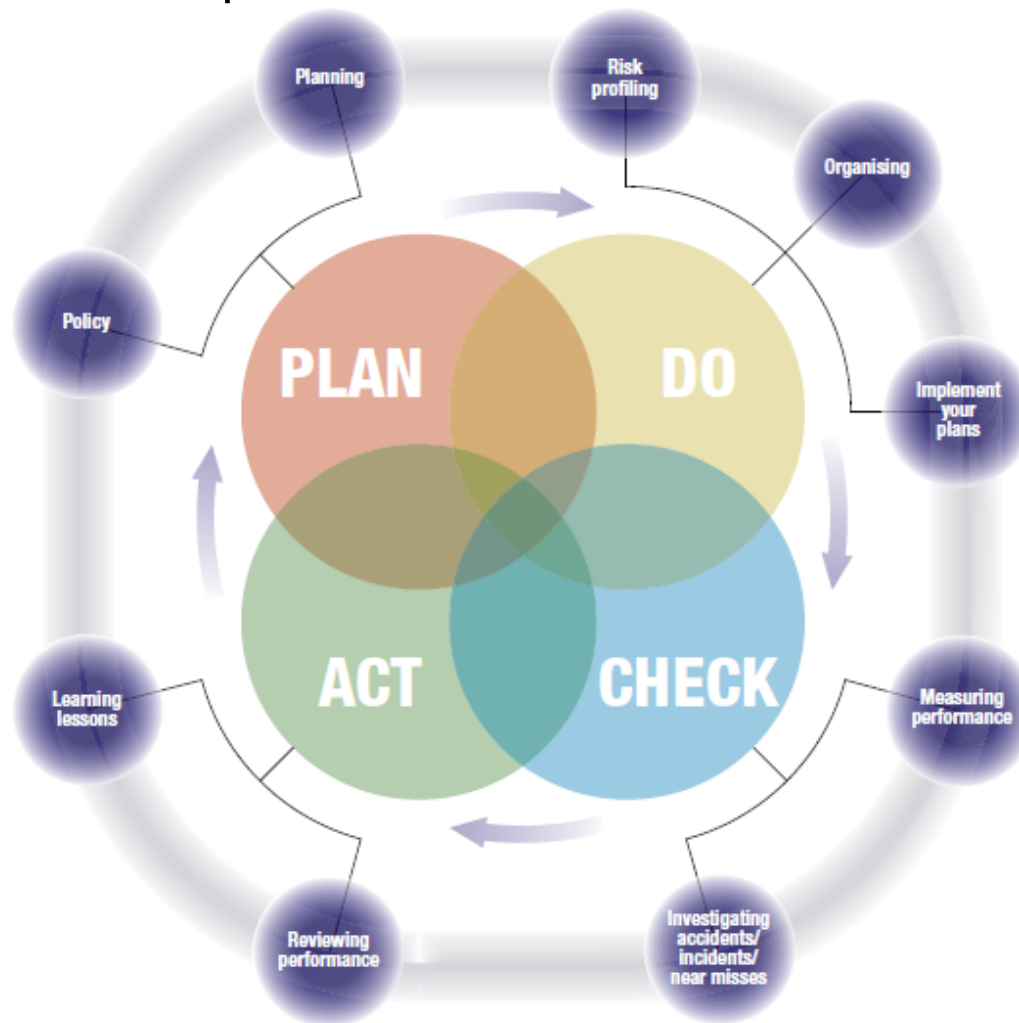
Do

Check

Act

Good Safety Management

Leading from the top



HSE's Checklist

Plan

- How do you demonstrate the board's commitment to health and safety?

www.hse.gov.uk/toolbox/managing/writing.htm

Do

- What have you done to ensure your organisation, at all levels including the board, receives competent health and safety advice?

www.hse.gov.uk/toolbox/managing/deciding.htm

- How are you ensuring all staff – including the board – are sufficiently trained and competent in their health and safety responsibilities?

Health and safety training: A brief guide
www.hse.gov.uk/pubns/indg345.htm

- How confident are you that your workforce, particularly safety representatives, are consulted properly on health and safety matters, and that their concerns are reaching the appropriate level including, as necessary, the board?

www.hse.gov.uk/involvement

- What systems are in place to ensure your organisation's risks are assessed, and that sensible control measures are established and maintained?

www.hse.gov.uk/toolbox/managing/managingtherisks.htm

Check

- How well do you know what is happening on the ground, and what audits or assessments are undertaken to inform you about what your organisation and contractors actually do?
- What information does the board receive regularly about health and safety, eg performance data and reports on injuries and work-related ill health?

www.hse.gov.uk/leadership/auditing.htm

- Do you compare your performance with others in your sector or beyond?
- Where changes in working arrangements have significant implications for health and safety, how are these brought to the attention of the board?

Act

- What do you do to ensure appropriate board-level review of health and safety?

Successful health and safety management HSG65
www.hse.gov.uk/pubns/books/HSG65.htm

Assessing Safety Performance

Lagging vs Leading Indicators

Lagging Indicators	Leading Indicators
Reactive	Proactive
Measure effectiveness after the event:	Prevent adverse events before they happen:
<ul style="list-style-type: none">• RIDDOR Reports• Number of Lost Time Injuries ("LTI")• Accident Frequency Rates ("AFR")	<ul style="list-style-type: none">• Safety audits• Behavioural audits• Site inspections• Near miss reporting• Behavioural observations

Good Safety Culture?

"A good safety culture is the embodiment of effective programs, decision making and accountability at all levels.

When we talk about safety culture, we are talking first and foremost about how managerial decisions are made, about the incentives and disincentives within an organization for promoting safety.

One thing I have observed is that there is a great gap between what executives believe to be the safety culture of an organization and what it actually is on the ground. Almost every executive believes he or she is conveying a message that safety is number one. But it is not always so in reality."

Carolyn W Merritt – US Chemical Safety and Hazard Investigation Board, Report into Texas City, November 2005

What do you want to be known for?

Generative

Safety is how we do business around here

Proactive

We work on problems that we still find

Calculative

We have systems in place to manage all known hazards

Reactive

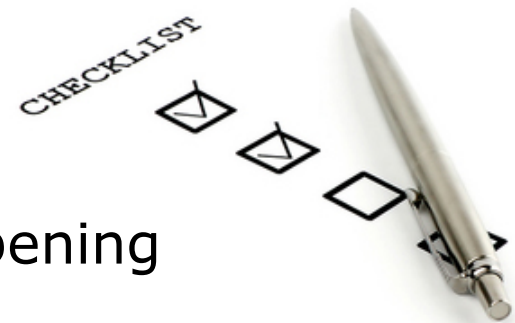
Safety is important, we do a lot every time we have an accident

Pathological

Safety? Who cares as long as we're not caught

Promoting positive health and safety culture in a practical manner

- Demonstrate leadership and commitment
- Conduct a process review / site tour / inspection – be seen
- Challenge local management
- Ensure competency of staff
- Ensure effective consultation is happening
- Providing interventions to support teams
- Investigate incident/accidents – do it yourself
- Embodying safety culture: How do you lead?



Questions?



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This information pack is intended as a guide only. Whilst the information it contains is believed to be correct, it is not a substitute for appropriate legal advice. Eversheds Sutherland (International) LLP can take no responsibility for actions taken based on the information contained in this pack.

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Tim Hill

Partner

Tel: +44 (0)7740 157 416

**timhill@eversheds-
sutherland.com**