

**Project to Survey the Use and Effectiveness of the Company Directors
Disqualification Act 1986 (“the 1986 Act”) as a Legal Sanction Against Directors
Convicted of Health and Safety Offences**

Interim report

Prepared by the University of Warwick

Background

1 The Health and Safety Commission (HSC), in conjunction with Ministers, is responsible for proposing to Parliament measures to provide for the regulation of all the risks to health and safety arising from work activity in Britain.

2 Government and HSC/E when launching the Revitalising Health and Safety strategy (RHS) in June 2000 included a key action that all organisations (in the private, public and voluntary sectors) appoint an individual director to have responsibility for the management of health and safety and that the board collectively provide leadership to ensure risks to health and safety are properly controlled. HSC guidance published in July 2001 (INDG343) gave effect to the RHS action described above.

3 The Government and the HSC have concluded, taking account of research findings on the impact of the HSC guidance and the factors influencing director responsibility more generally, that for the moment the existing measures concerning director responsibility for health and safety, both voluntary and legislative, should continue.

4 The call from particular stakeholders, including trade unions and the Centre for Corporate Accountability (CCA), for further legislation placing new Occupational Health Support (ohs) responsibilities on directors under Company Acts provisions has been taken up by the Commons Work and Pensions Committee in its inquiry of 2004 into the work of HSC/E. The Committee recommended that the Government should introduce legislation placing new ohs responsibilities on directors at the earliest opportunity.

5 However the Government in its response to the Committee’s recommendation called on HSC/E to undertake further evaluation on the effectiveness of the current measures in place concerning director responsibility and report findings by the end of 2005. HSE is committed to further consideration of the merits of existing health and safety law concerning director’s OHS responsibilities, including the appropriateness of the sanctions they face, and to the options for further legislation.

- 6 HSC/E is committed to undertaking further analysis of the effectiveness of the current voluntary and legal arrangements in place concerning director responsibility for OHS and reporting findings ministers by the end of 2005. This work will also inform the discussion on requirements for further legislation.

Summary

The project is expected to last for a period of six months. It commenced on 1 April 2005 and will be completed on 30 September 2005. It will

- Explore the use of the sanction of director disqualification under the 1986 Act, assess the extent of its use, and address the reasons underlying the extent of that use;
- Consider the effectiveness of director disqualification under the 1986 Act as a legal sanction against directors convicted of health and safety offences;
- Examine links between prosecutions under s.37 of HSWA and disqualification under the 1986 Act;
- Assess, in the light of the evidence available, whether the disqualification provisions of the 1986 Act could, with suitable amendment, be an effective (or a more effective) sanction;
- Assess the extent to which the sanction of disqualification influences director behaviour;
- Explore stakeholder views on the merits of the disqualification sanction.

Key Objectives

The key project objectives will be:

- Successful engagement with all of the key stakeholders, including the Institute of Directors, CBI, TUC, CCA, Law Society, Bar Council, Department for Constitutional Affairs, DTI and Department for Work and Pensions, RoSPA, employers' organisations, and other stakeholders, to establish their views on the use and effectiveness of the current legal provisions concerning director disqualification and for amendment to the current law;
- Quantification of the occasions that applications have been made to the Courts for a disqualification order under the 1986 Act in the period 1986 until the end of 2004;
- An analysis of the factors contributing to the reportedly rare use of the disqualification provisions in the 1986 Act;
- Assessment of the extent to which the current law concerning director disqualification, suitably amended, could be used as an effective sanction and lever for promoting appropriate director responsibility for OHS;

- A consideration of the implications of possible changes to the Company Directors Disqualification Act 1986 for stakeholders.

Overview of Methods to be Utilised in the Course of Completing the Project

The management of the project has been organised on the same lines as previous contract work successfully undertaken by the Principal Investigators, Professor Neal and Professor Wright for the Health and Safety Executive (HSE) and the European Commission in the field of regulation concerning health and safety at work.

The overall management of the programme was placed in the hands of a Steering Committee, chaired by a nominated representative of HSE, and including Professor Neal and Professor Wright. This Steering Committee met on a regular basis, either meeting physically or communicating by telephone/video conferencing facilities. The University of Warwick provided the secretariat.

Having been duly constituted and having met for an initial discussion to confirm the project objectives, and to approve the proposed Work Programme and delivery targets, the Steering Committee provided HSE with a light-touch “hands-on” supervisory mechanism exercised in conjunction with the Principal Investigators working on the project.

A primary, and urgent, task for the Steering Committee was to approve the profiles identified by the Principal Investigators as constituting the project reference groups representative of the views and experience of key stakeholders in relation to the regulatory provisions under consideration. Initial pre-start-date consideration of this issue suggested that these groups should include (i) policy-makers; (ii) representatives of members of the Solicitors’ profession active in the field; and (iii) representatives of the membership of the CBI, TUC, IoD and the CCA, together with two or more “specialist groups” representing key sectors (provisionally, covering the energy industry and transport).

Initial contact was made with the members of these reference groups by way of postal and E-mail communication. This initial contact was followed-up by a detailed study of the successful prosecutions to date. Finally, a selected group of respondents was interviewed with a view to evaluating proposed changes to the law.

With data compilation and initial assessment completed by the fourth month of the project, the Principal Investigators then drew up a draft report for consideration and discussion by the Steering Committee, after which it finalised these reports containing the results of the project for presentation to HSE.

A Note on Analysis of Key Stakeholders Surveyed and Rationale for that Choice

The Company Directors Disqualification Act 1986 s.2(1) empowers a court to make a disqualification order against a person convicted of an indictable offence in connection with the promotion, formation or management of a company. Disqualified persons must not, without leave of the court, be director, liquidator or administrator of a company, or receiver and manager of a company's property, or in any way, directly or indirectly, be concerned or take part in the promotion, formation or management of a company for a specified period. The maximum period of disqualification is five years when an order is made by a Magistrates Court, or fifteen years by the Crown Court or any other court. The Government and HSC/E, when launching the Revitalising Health and Safety Strategy in June 2000, included a key action that all organisations appoint an individual director to have responsibility for the management of health and safety, and that the board collectively provide leadership to ensure risks to health and safety are properly controlled. HSC Guidance Note INDG343, published in July 2001, gives effect to these actions.

The Government and the Health and Safety Commission have concluded that the existing measures concerning director responsibility, both voluntary and legislative, should continue.

In 2004, the House of Commons Work and Pensions Committee recommended that the Government should introduce, at the earliest opportunity, legislation placing new occupational safety and health responsibilities on directors. However, the Government in its response to the Committee's recommendation called on HSC/E to undertake further evaluation on the effectiveness of the current measures in place concerning directors' occupational safety and health responsibilities, including the appropriateness of the sanctions they face, and the options for further legislation.

Some of the stakeholders have drawn attention to the need to:

- note that the trend in workplace deaths was generally downwards in the 1990s – however, there have been two rises since then, in 2000/01 and in 2003/04;
- note that the Health and Safety Executive (HSE) has estimated that in 2001/02 health and safety failures cost society as a whole between £20 - £31.8 billion;
- note that 70% of accidents are due to management failure;
- note that one in 6 organisations fails to appoint an individual director to have responsibility for the management of health and safety, and that many boards do not collectively provide the necessary leadership to ensure that risks to health and safety are properly controlled;
- recognise the Government's view that it is essential that boards of directors, in all sectors and in organisations of all sizes, play their part by providing the necessary leadership and direction to ensure the health and safety of their employees and of people affected by their activities;
- target sanctions to circumstances where persuasive measures have been ineffective;
- recognise that, when framing new laws, the Government must be in a position to properly advise on their costs and benefits.

- **The use of the sanction of director disqualification under the 1986 Act, an assessment of the extent of its use, and the reasons underlying the extent of that use.**

The sanction of disqualification of company directors is available to the courts under the Company Directors Disqualification Act 1986. The maximum period for disqualification under Section 2 is five years where the order is made by a court of summary jurisdiction, and 15 years in any other case.

By Section 2 (1), Company Directors Disqualification Act 1986 the court may make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management, liquidation or striking off of a company, or with the receivership or management of a company's property.

Most offences listed in Section 33 Health and Safety at Work etc., Act 1974 are “indictable offences.”

Speaking in the House of Lords in 1991, Viscount Ullswater, Under Secretary of State for Employment, said

“In our view Section 2 of the Company Directors Disqualification Act 1986 is capable of applying to health and safety matters. We believe that the potential scope of section 2 (1) of that Act is very broad and that “management” includes management of health and safety.”¹

Whilst in March 2005 The Right Hon. Jane Kennedy M.P., Minister for Work and Pensions said:

“A sanction of disqualification of company directors is also available to the courts under the Company Directors Disqualification Act 1986 and I assure the House that the power has been and will continue to be used.”²

Under the Company Director's Disqualification Act 1986, eight directors have been disqualified for health and safety reasons. For example, on June 26th 1992 The Crown Court at Lewes (Beryl Cooper Q.C., Recorder) fined Rodney James Chapman £5,000 for breach of Section 37 (1) Health and Safety at Work etc., Act 1974 and disqualified him from holding office as a company director for a period of two years for contravening the terms of a prohibition notice.

The use of this sanction has not enjoyed a high priority by prosecutors. The reason (s) for this is unclear and is still being investigated.

¹ Hansard, 22 November 1991, col.1429-30

² Hansard, 4 March 2005, col.1234

- **The effectiveness of director disqualification under the 1986 Act as a legal sanction against directors convicted of health and safety offences.**

It is clearly viewed as effective by the Department of Trade and Industry. The number of directors disqualified by UK courts rose from 399 in 1993-1994 to 1,267 in 1997-1998. Over the past five years, the number of UK company directors that have faced disqualification orders has remained fairly consistent at over 1,700, however, between 2003 and 2004, over 1,500 UK company directors have been disqualified from management for between two and fifteen years.

"Since the introduction of the Insolvency Act 2000 (on 1 April 2001), the disqualification of company directors by undertaking, rather than by court order, is continuing to grow in popularity, delivering a massive boost to making the disqualification of directors a more straightforward, quicker and cost effective process. Between 2003 and 2004, 84% of all disqualification orders were implemented out of court, an 11% rise on the previous year and a huge step forward compared to the time before April 2001 when the disqualification of company directors was a serious burden on the legal system both in terms of cost and court time".

An examination of links between prosecutions under Section 37 Health and Safety at Work etc., Act 1974 and disqualification under the 1986 Act.

By Section 2 (1) Company Directors Disqualification Act 1986 the court may make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management, liquidation or striking off of a company, or with the receivership or management of a company's property. Breach (es) of Section 37 Health and Safety at Work etc., Act 1974 may a reason for proceedings leading to disqualification but other reasons could include the contravention of an improvement or prohibition notices.

Ministers have advised Parliament that the Government, the Health and Safety Commission and the Health and Safety Executive expect company directors to be fully aware of the criminal liability that they face and to ensure that they and their companies discharge their duties seriously. The Health and Safety Commission's enforcement policy statement, published in February 2002, states that

"when the enforcing authorities are investigating possible health and safety offences, they should consider the management chain and the role played by individual directors and managers. Enforcing authorities should take action against them where the inspection or investigation reveals that the offence was committed with their consent or connivance or have been attributable to neglect on their part."

- **An Assessment, in the light of the evidence available, whether the disqualification provisions of the 1986 Act could, with suitable amendment, might be an effective (or a more effective) sanction.**

It is apparent that a growing number of directors have taken responsibility both for the health and safety of their company's workforce and for the health and safety of those who might be affected by their company's activities. Business as well as welfare benefits flow from sound health and safety practice. The Combined Code on Corporate Governance requires the board of directors of all listed companies to maintain and review a system of internal controls which covers areas such as health and safety management. Other companies should adopt this standard.

Particular issues are

- * the consideration of 'the health and safety concerns' when new plant and products are being acquired or when new processes are being put in place,
- * the extent to which directors inform themselves of health and safety affairs within the company and
- * the 'collective responsibility' for health and safety management to avoid the possibility that one director might be 'put up' as a scapegoat.

An Assessment of the extent to which the sanction of disqualification influences director behaviour;

In health and safety it is used too infrequently to have had this effect.

Stakeholder views on the merits of the disqualification sanction.

Work is ongoing to engage with the key stakeholders, including the Institute of Directors, CBI, TUC, CCA, Law Society, Bar Council, Department for Constitutional Affairs, DTI and Department for Work and Pensions, RoSPA, employers' organisations, and other stakeholders, to establish their views on the use and effectiveness of the current legal provisions concerning director disqualification and for amendment to the current law.

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