

## **Disqualification of Directors and Education Requirements, Supporting Responsible Entrepreneurship**

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### **Abstract**

*This paper notes that, although the role of a company director is a potentially complex one, involving, inter alia, being subject to various fiduciary duties to the company and others arising from being appointed to, or acting in that capacity, virtually anyone can be appointed to or act in that role. Given the problems that have arisen in the complicated laws that apply to directors in the lead up to the insolvency of a company, as well as recurring problems of phoenix companies and rogue traders, we consider whether education might usefully have an innovative role in improving the support available to directors of companies which have failed, as well as raising standards of directorship.*

*We note that one purpose of director disqualification is to improve standards among directors, but it presently lacks a rehabilitative element and we consider whether education could be a more effective way to bring about such improvements. We also consider the potential of a programme for directors who have experienced company failures and have not been disqualified. Drawing upon examples of education being used to raise standards in other contexts, as well as some educational theories in relation to adult learners, the paper casts fresh light on ways in which education might enhance the existing system, both by strengthening the disqualification system and by supporting directors who are outside the disqualification system to start again after a failure.*

## **1. Introduction**

Legal gateways to the profession of company director are notable for their emphasis on “after the event” disqualification of those who are unfit or otherwise unsuitable to be directors, rather than the greater “before the event” approach to qualification taken in other white-collar professions.<sup>2</sup> Through this economically liberal emphasis, favour has been shown to an entrepreneurial culture and keeping the costs of entry to limited liability companies low.<sup>3</sup> Suggestions that a more restrictive approach might be taken have been consistently rejected over the years, since the majority of companies are honestly and conscientiously managed.<sup>4</sup> More recently the nature of the role of director has also been changing with expectations as to what we may term a “responsible entrepreneurial culture”, taking account of the interests of stakeholders,<sup>5</sup> including environmental<sup>6</sup> and modern slavery concerns,<sup>7</sup> as well as an emphasis on trust and accountability.<sup>8</sup> Directors of larger companies may be able to call upon advisers for guidance and updates on current developments but directors of the micro, small and medium sized enterprises, “MSMEs”, which comprise the majority of UK businesses, may find the

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<sup>1</sup> We thank Jane Ching, Abbas Mithani and Adrian Walters for their reviews of earlier drafts.

<sup>2</sup> As well as during the event training such as CPD activities discussed below.

<sup>3</sup> See e.g. Department for Business, Innovation and Skills, ‘Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business’, July 2013, para 187, hereafter ‘Transparency and Trust’.

<sup>4</sup> The Report of the Company Law Amendment Committee, Chairman Wilfred Greene MR, Cmd 2657 (1925–6); European Commission, ‘Report of the Expert Group: A Second Chance for Entrepreneurs, Prevention of Bankruptcy, Simplification of Bankruptcy Procedures and Support for a Fresh Start’ (January 2011), 3, estimating that only 4-6% of bankruptcies are fraudulent. Vanessa Finch, ‘Company Directors: Who Cares about Skill and Care’ (1992) 55 Mod L Rev 179, 202.

<sup>5</sup> See e.g. Companies Act 2006, s 172.

<sup>6</sup> Primarily a matter driven by the market rather than the law for MSMEs.

<sup>7</sup> The Modern Slavery Act 2015, s 45 applies to businesses with turnover of more than £36 million but it is also an important issue for MSMEs that supply these larger businesses.

<sup>8</sup> Transparency and Trust, above note 3.

position more difficult, even knowing when to ask for help. Given the likely complexity of the regulatory aspects of the responsible entrepreneurship pattern for many entrepreneurs, this raises questions about whether market forces alone can suffice as a means for the development of a responsible entrepreneurial culture for companies and corporate structures.<sup>9</sup>

Common problems have emerged for the responsible entrepreneur culture in insolvency. 1) There has been public concern that the law has developed post-*Sequana*<sup>10</sup> in a way that makes it difficult for honest directors to understand and practicably apply, as discussed below at 2.2.<sup>11</sup> 2) There are also concerns that prepacks can enable businesses to start afresh without addressing underlying weaknesses, in some instances leading to a moral hazard as the consequences of failure fall on creditors and in others a failure for liquidation to play its role in the market in facilitating exits of unviable enterprises, as discussed below at 2.4. 3) A further source of criticism is the manipulation of the corporate form by rogue traders,<sup>12</sup> potentially enabling them to repeatedly walk away from debts and start again until such time as the disqualification system can stop them, discussed at 2.5. 4) We can add that a director disqualification system does not necessarily lead to rehabilitation and it only applies to a small proportion of failed companies where there have been sufficiently serious failings, a point we consider further at 2.6. The commonly stated purpose of director disqualification to raise standards among directors may be difficult to achieve, so that additional approaches with a rehabilitative element require consideration.

This raises the question of whether a greater role for education can be of benefit to train directors as responsible entrepreneurs, enabling them to carry out duties with care and skill, promoting the success of their companies and including taking account of the interests of creditors. Such training could be considered particularly to strengthen the disqualification system through a rehabilitative element which is presently lacking. This approach could also operate outside the disqualification, however, to enable a greater range of directors of failed enterprises to learn from mistakes and avoid the same weaknesses arising in successor businesses. This approach may be useful in some instances, which will be explored, whilst recognising that not all directors are likely to be receptive to this approach.

This paper is the first to consider in detail how responsible entrepreneurship can be promoted alongside increased public protection through a combination of director disqualification and director education, building towards a rehabilitative approach in appropriate cases. It considers whether there should be a programme of remedial education for directors alongside the disqualification system and how this might be structured, including whether it should be mandatory for disqualified directors and how it might be triggered. It further considers whether an education programme should be confined to disqualified directors or whether they should apply more broadly where companies have failed, or even whether there is a need for earlier education to provide guidance and focused training on both technical as well as ethical leadership, towards greater professionalisation of the role of director. The paper will draw upon adult educational theories, as well existing studies from other contexts in the UK and other countries as to how remedial education, including debtor education, has worked to examine whether any insights can be gained. To address problems of repeated failures, it will consider how a remedial training requirement might be structured alongside a root-cause analysis, done to address the actual problems which arose in an insolvency, as well as mentoring, in a programme designed to encourage engagement by participants. A suggested training approach appears in the Appendix.

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<sup>9</sup> Vanessa Finch, above note 4.

<sup>10</sup> *BTI 2014 LLC v Sequana SA* [2022] UKSC 25; [2022] 3 W.L.R. 709.

<sup>11</sup> HC Deb (14 June 2023) Vol. 734, col. 163. Emile Ghio & Donald Thomson, 'Is insolvency stigmatised?' (2023) 32 *International Insolvency Review*, 32(3), 397–419, 416–418, <https://doi.org/10.1002/iir.1518> noting a potential lack of education regarding possible ways in which companies in difficulties can get help.

<sup>12</sup> HC Deb (14 June 2023) Vol. 734, col 172; Julia Jennings, 'Consumers – the Unwitting Victims of Corporate Abuse: Holding Rogue Directors to Account in the Closely-held Company', 2018 University of Leicester PhD thesis, <https://hdl.handle.net/2381/43110>, accessed 4 April 2024.

## 2. Current position

### 2.1 Qualification

There are presently few legal barriers to the budding entrepreneur wishing to use the corporate form. Companies can be set up rapidly for minimal cost and the entrepreneur can be appointed as a director unless they are subject to one of the few, public policy-based exceptions. If an adult<sup>13</sup> of full capacity is to become a company director, the main restrictions, in terms of the numbers of people they apply to, arise in the context of personal insolvency. They apply to undischarged bankrupts,<sup>14</sup> persons subject to bankruptcy or debt relief restrictions, and persons subject to debt relief moratoria,<sup>15</sup> including where the effects of disqualification are extended by order or undertaking,<sup>16</sup> and those who have had county court administration orders revoked on grounds of failure to pay under its terms.<sup>17</sup> Company directors can be disqualified by an order or undertaking<sup>18</sup> on various grounds including unfitness,<sup>19</sup> influencing unfit conduct,<sup>20</sup> competition infringements,<sup>21</sup> wrongful or fraudulent trading,<sup>22</sup> and various civil and criminal grounds grouped under a heading of “general misconduct in connection with companies”.<sup>23</sup> Although the CDDA 1986 was itself a consolidating statute it has been added to significantly over the years as additional grounds for disqualification have been added from time to time.<sup>24</sup>

None of these grounds for disqualification gives rise to numerically large numbers of people being disqualified. In 2002/3 there were 932 directors who were newly disqualified under the CDDA, with a further 250 individuals having entered bankruptcy or debt relief restrictions orders and undertakings. In 2023 there were 1582 bankruptcies and 29,300 Debt Relief Orders.<sup>25</sup> The number of persons who are presently ineligible to be company directors is therefore small, particularly given the 1.1 million companies in the UK,<sup>26</sup> each of which must have at least one human director,<sup>27</sup> and around 10,000 to 25,000 insolvencies registered per year.<sup>28</sup> Therefore, virtually anyone can be a company director. Qualification is to be lost, rather than gained. The UK, in common with other countries including

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<sup>13</sup> Persons who have not yet reached the age of 16 cannot be validly appointed: Companies Act 2006, s 157.

<sup>14</sup> CDDA 1986, s 11(2)(a). This ground for disqualification was first introduced in the Companies Act 1928, s 84 in response to cases where undischarged bankrupts had obtained limited liability and their companies' creditors had suffered losses.

<sup>15</sup> CDDA 1986, s 11(2)(d).

<sup>16</sup> CDDA 1986, s 11(2)(b) and (c).

<sup>17</sup> CDDA 1986, s 12.

<sup>18</sup> CDDA 1986, s 1A, 5A, 7, 8ZC and 8ZE.

<sup>19</sup> CDDA 1986, ss 6 and 8.

<sup>20</sup> CDDA 1986, s 8ZA.

<sup>21</sup> CDDA 1986, s 9A et seq.

<sup>22</sup> CDDA 1986, s 10.

<sup>23</sup> CDDA 1986, ss 2-5A.

<sup>24</sup> With additional tax avoidance-based grounds due to come into force in ss 8ZF and 8ZG, as inserted by the Finance Act 2024, Sch 13. The Act has also been frequently amended: Westlaw UK Analytics lists 50 amending statutes and statutory instruments and further changes are due to be implemented under the Economic Crime and Corporate Transparency Act 2023, s 31 and the Digital Markets, Competition and Consumers Bill 2023-24 s 99.

<sup>25</sup> Official Statistics, ‘Commentary - Insolvency Service Enforcement Outcomes 2022/23’, 18 April 2023, available at <https://www.gov.uk/government/statistics/insolvency-service-enforcement-outcomes-monthly-data-tables-202223/commentary-insolvency-service-enforcement-outcomes-202223>, accessed 4 April 2024.

<sup>26</sup> Department for Business and Trade, ‘Business Population Estimates for the UK and Regions 2023: Statistical Release’, published 5 October 2023’, available at <https://www.gov.uk/government/statistics/business-population-estimates-2023/business-population-estimates-for-the-uk-and-regions-2023-statistical-release>, accessed 4 April 2024.

<sup>27</sup> Companies Act 2006, ss 154-155. Public companies must have at least two directors: s 154(2).

<sup>28</sup> Insolvency Service, ‘National Statistics Commentary - Company Insolvency Statistics October to December 2023’, <https://www.gov.uk/government/statistics/company-insolvency-statistics-october-to-december-2023/commentary-company-insolvency-statistics-october-to-december-2023>, published 30 January 2024, accessed 4 April 2024.

Australia,<sup>29</sup> effectively offers an open gateway to persons intending to become company directors, similar to the position in relation to trustees and bankers and in contrast to that of accountants, lawyers, architects and other highly restricted professions.<sup>30</sup> Subject to the few restrictions noted above, it is largely left to the company to decide whether a person is to become and remain as a director.<sup>31</sup> The response to the government's *Transparency and Trust* consultation exercise in 2014 did not reveal any wide public support for this position to change.<sup>32</sup> We agree that a before the event pre-qualification approach if a person is to become a director would be too costly and could potentially discourage entrepreneurship and unduly delay innovations coming to market. Rather in this paper we focus on after the event remedial training particularly as a means to strengthen the disqualification system.

## 2.2 Improved accessibility of the law

A factor which might have militated against the need for a programme of director education was the codification of directors' duties in the Companies Act 2006, a step that was intended to improve the accessibility of the law.<sup>33</sup> Admittedly, this approach is considerably more straightforward for a layman than the former system that was built on case law. The limitations of codification as a means of accessibility are still notable, however.<sup>34</sup> Whilst the Companies Act 2006 is easily located online, it is also 1300 sections long with 16 Schedules. Its length partly arises because it is a statute which applies to both the largest and the smallest companies. It also sits alongside tax, employment and other legislation as the regulatory burden that companies are subject to.

The 2006 Act codified years of case law, including the duty to promote the success of the company, based on the complex "enlightened shareholder" approach in s 172. Potential inaccessibility is particularly acute in the context of insolvency, where regard must be had to CA 2006, s 172(3), which opaquely states that "the duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company." The effect of this subsection was that duties in insolvency remained as part of the common law, an approach that was necessitated because this aspect of law was still evolving under the influence of the Australian High Court case of *Walker v Wimborne*,<sup>35</sup> and a clear position was yet to emerge in the UK. More recently the position has been clarified by the Supreme Court decision in *Sequana*,<sup>36</sup> a case which concerned whether there had been a breach of duty where a large dividend had been paid by a company to its only shareholder at a time when the company was solvent but had some long-term contingent liabilities in respect of environmental clean-up operations in the United States, the extent of which were uncertain, but which gave rise to a real risk, although not a probability, that it might become insolvent at an uncertain but not imminent date in the future.<sup>37</sup> As it turned out, the environmental liabilities were much greater than originally estimated and AWA entered into insolvent administration in 2018. The appellant, BTI 2014 LLC, sought, as assignee of AWA's claims, to recover from AWA's directors the amount of the dividends paid out on the basis that their decision for the distribution of the dividends was in breach of the duty to act in good faith in the interests of the company, as it applies in s 172(3).

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<sup>29</sup> Australian Securities and Investments Commission, 'How to Become a Company Director', available at <https://asic.gov.au/for-business/small-business/starting-a-small-business-company/small-business-company-directors/how-to-become-a-company-director>, accessed 4 April 2024.

<sup>30</sup> For example, a suggestion that directors should go through a qualification process had been rejected by the Greene Committee, above note 4, para 53.

<sup>31</sup> See e.g. Model Articles for Private Companies Limited by Shares, para. 17.

<sup>32</sup> Department for Business, Innovation and Skills, 'Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business: Government Response', April 2014, 49-50.

<sup>33</sup> The Company Law Review Steering Group, 'Modern Company Law for a Competitive Economy: Completing the Structure', (Department of Trade and Industry, 2000), at para.3.3.

<sup>34</sup> See Deirdre Ahern, 'Directors' Duties, Dry Ink and the Accessibility Agenda' (2012) 128 LQR 114-139.

<sup>35</sup> [1976] 137 C.L.R. 1 at paras 6-7.

<sup>36</sup> *BTI 2014 LLC v Sequana SA* [2022] UKSC 25; [2022] 3 W.L.R. 709.

<sup>37</sup> *Supra* at 20

The majority of the Justices of the Supreme Court in *Sequana* held that account should be taken of the interests of creditors where “the directors know, or ought to know, that the company is insolvent or bordering on insolvency or that an insolvent liquidation or administration is probable”,<sup>38</sup> rejecting some broader approaches that had been based on risks of insolvency. They ruled that there was no standalone “creditor duty” per se, even if that term has commonly been used by those who have written about the case, but rather the duty is merely the extension or an adjustment of the ordinary fiduciary duty of directors to act in the interests of the company.<sup>39</sup> Other aspects of the decision, such as the level of knowledge required of directors, will be clarified in subsequent case law, such as the recent case of *Hunt v Singh*.<sup>40</sup> Although a test based on probability, rather than mere chance, provides directors with a measure of protection, the nuanced approach can remain difficult for directors to apply. This is especially so when their companies are facing difficulties that entrepreneurial skill can avert<sup>41</sup> and concerns as to liability can potentially have a chilling effect. The point at which insolvency is probable may be difficult to determine, except possibly with the benefit of hindsight.<sup>42</sup> Paradoxically, the directors best placed to obtain guidance on this law from advisors are also the ones often most insulated by D&O insurance. The next part considers the training options presently available to directors before the event, which can help them to understand their role, but which are voluntary. We then consider how education may be of assistance to others,<sup>43</sup> effectively as a proxy for professional advice and information for those who have failed to acquire sufficient self-directed learning, and how best to direct availability of this.

### 2.3 Director education

Of course, a proactive entrepreneur who wishes to obtain training for the role can do so. The Companies House website links to a concise list of responsibilities and a short video for directors about record keeping, tax and other requirements but a clear statement of the associated directors’ duties is more difficult to locate, in particular as insolvency emerges as a threat.<sup>44</sup> There are optional educational and training resources available for those who are interested in business, from MBAs to the Young Enterprise Scheme for business education in schools, although typically focusing more on entrepreneurial skills than legal frameworks applicable to such activities.<sup>45</sup> The Institute of Directors has introduced a “chartered director” designation to allow chartered directors to distinguish themselves from others. More generally, entrepreneurship education is a growth area of higher education.<sup>46</sup> Therefore, a good range of information appears to be available for directors who are aiming to equip themselves with knowledge of the technical legal requirements associated with the role.<sup>47</sup> Such before the event training is however optional.

Those who fail to take a proactive approach can still in most instances be effective company directors. Through operating their companies they will acquire significant levels of “informal learning”,<sup>48</sup>

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<sup>38</sup> Supra at [203], [207], [231] and [247].

<sup>39</sup> See for example, the judgments of Lord Reed at [11], and Lord Hodge at [246].

<sup>40</sup> [2023] EWHC 1784 (Ch).

<sup>41</sup> Although it may also lead to risk taking

<sup>42</sup> Andrew Keay, ‘The Director’s Duty to Take into Account the Interests of Company Creditors: When is it Triggered?’ (2001) 25 Melbourne University Law Review 315, 327.

<sup>43</sup> See Deirdre Ahern, above note 34, 123.

<sup>44</sup> <https://www.gov.uk/running-a-limited-company>

<sup>45</sup> For example, Young Enterprise <https://www.young-enterprise.org.uk/>, accessed 4 April 2024; Prince’s Trust, ‘Support for Starting A Business’, <https://www.princes-trust.org.uk/how-we-can-help/support-starting-business>, accessed 4 April 2024; Advance HE, ‘Framework for Enterprise and Entrepreneurship Education’ <https://www.advance-he.ac.uk/knowledge-hub/framework-enterprise-and-entrepreneurship-education>, accessed 4 April 2024.

<sup>46</sup> Stuart Norton and Leigh Seer, ‘Embedding Enterprise and Entrepreneurship in Higher Education: An Advance HE Case Study Collection’, 2.

<sup>47</sup> For discussion of literature evaluating the success of general director education programmes outside the remedial context see ML McIntyre and SA Murphy, ‘Director Education Programs in Canada, Australia and the UK: a Comparative Study’, (2009) 4 Int. J. Business Governance and Ethics, pp.349–371, 351-353.

<sup>48</sup> Victoria J Marsick and Karen E Watkins, ‘Informal and Incidental Learning’, in *The New Update on Adult Learning Theory: New Directions for Adult and Continuing Education* (Jossey Bass 2001); Victoria J Marsick

acquiring skills and knowledge, in unstructured and organic ways, in a process that is often subjective and personal. Much of the value in management skills can come from factors that are more difficult to articulate, “tacit knowledge”<sup>49</sup> such as insights, wisdom and motor skills. Knowledge, skills and attitudes<sup>50</sup> are acquired through experiential learning<sup>51</sup> processes, based on their experiences in running businesses as well as interaction with external stakeholders, such as customers, suppliers and lenders.<sup>52</sup> A company’s failure does not, of course, necessarily indicate weaknesses in learning through these less formal approaches. That said, the main focus of this paper is on learning in relation to directors’ duties, particularly those which apply in the context of financial difficulties. These are often technical details of company law, such as the *Sequana* case, which would not normally be acquired through informal approaches, certainly where directors do not have ready access to professional advice and information through a retained law firm, in house lawyer or other means. That said, even if directors don’t take steps to acquire knowledge of their duties they may also make use of professional advice where a proposed course of action or set of circumstances demands it. Indeed, a director who recognises the limitations of their own knowledge and seeks advice is also demonstrating a good level of competence.<sup>53</sup> For those in this position there is good information currently provided to directors at the point of insolvency under the Insolvency Service’s Information Hub, setting out what insolvency is, what the options are and recommending that the advice of an insolvency practitioner is sought.<sup>54</sup>

A broader director education requirement has previously been considered in the Department for Business, Innovation and Skills discussion paper *Transparency and Trust* in July 2013.<sup>55</sup> Under the remedial approach set out in that document disqualified directors would have been offered education or training after the event to equip them to run a successful company, operating as an add-on to disqualification, rather than as an alternative.<sup>56</sup> There was also discussion of more general communication to directors of their duties. Whilst there was support in consultation responses to greater clarity in communicating duties to directors in general, this did not go as far as supporting a requirement of training or qualifications for directors, on grounds that it would add costs and could deter entrepreneurship.<sup>57</sup> Rather, an approach of informing directors of their duties at the start of their taking up their role was preferred. More surprisingly, this approach was preferred to the proposed remedial education add-on to disqualification which had been included in the discussion paper.<sup>58</sup> Providing comprehensive guidance to *all* directors arguably does not however eliminate a need to provide more targeted training for directors who have been disqualified, or indeed for other directors of companies which have failed and might benefit from training, points which we consider in more detail later.

## 2.4 Prepacks

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and Karen E Watkins, *Informal and Incidental Learning in the Workplace* (Routledge 1990).

<sup>49</sup> Michael Polanyi, *Personal Knowledge. Towards a Post Critical Philosophy* (London: Routledge, 1958).

<sup>50</sup> A framework popularly used to assess an individual’s qualifications and potential for success in a particular field.

<sup>51</sup> David A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (1 edition, Financial Times/ Prentice Hall 1983). This approach is used in more formal educational approaches that harness reflective learning in a structured way.

<sup>52</sup> Allan A. Gibb, ‘Small Firms’ Training and Competitiveness. Building Upon the Small Business as a Learning Organisation’ (1997) 15 *International Small Business Journal* 13.

<sup>53</sup> We would argue that director who sought help would be unlikely to held liable for wrongful trading, as seeking advice would go a long way towards establishing the defence in Insolvency Act 1986, s 214(3) of taking every step to minimise losses to creditors.

<sup>54</sup> Insolvency Service, ‘Director Information Hub’, <https://www.gov.uk/guidance/director-information-hub-insolvency>, accessed 4 April 2024.

<sup>55</sup> *Transparency and Trust*, above note 3.

<sup>56</sup> In some other contexts, training is offered as an alternative to a ban e.g. in relation to driving offences.

<sup>57</sup> *Transparency and Trust*, above note 3, para 187.

<sup>58</sup> Department for Business, Innovation and Skills, “*Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business: Government Response*”, April 2014.

A second concern that education might address relates to some prepacks, specifically those where the weaknesses of the original business are inherited by successor businesses. The mischief here is not a new one. The Cork Committee had been concerned about failing companies reviving through successive undercapitalised vehicles and had considered different alternatives, including a capitalisation requirement.<sup>59</sup> Indeed one of the main objectives of the Company Directors Disqualification Act 1986 was to deal with the “phoenix” problem of people who carried on business through a number of companies, setting up a new company whenever the old company failed.”<sup>60</sup>

A general discussion of prepacks is beyond the scope of this paper.<sup>61</sup> No doubt there are many instances in which the prepack will enable a business sale in appropriate circumstances, resulting in preservation of jobs and efforts have been made to address examples of abuse and improve success rates. Particular attention has been paid to connected parties.<sup>62</sup> Sandra Frisby’s 2009 empirical study found higher rates of subsequent business failure where there had been a sale to a connected party, compared to sales to outsiders.<sup>63</sup> Safeguards where the sale is to a connected party seemed to have been strengthened through the Graham review’s recommendation of a viability report, to be voluntarily produced, outlining what the company will do to survive in the next 12 months and what will be done differently to avoid repeated failure.<sup>64</sup> A 2020 government report on Prepack Sales in Administration found however that viability statements were used in only 28% of cases and this did not enable robust statistical conclusions as to whether prospects of ongoing trading were improved, although greater use of these statements was encouraged.<sup>65</sup> Greater use of a viability statement could lead to greater identification of cases where the same problems are likely to recur and business rescue through a prepack is not viable. Education might be a further way to address these underlying problems. In particular, one way for viability of successor businesses to be enhanced could be through a root-cause analysis of the failed business, a reflective element of the proposed course which we return to below.

## 2.5 Rogue Traders

Concerns have also been expressed that the corporate form can be abused by rogue traders as a way of evading their liabilities, particularly given austerity measures which have limited the ability of local councils to pursue wrongdoers.<sup>66</sup> This again is not a new concern. At the time of the Cork Report, there was a widespread perception, bred by corporate collapses and the press that “cowboy” directors were “getting away with it”. Consumer affairs programmes and the media had at that time campaigned for action to be taken against “rogue directors”. Reforms to disqualification at that time could therefore be viewed as a response to public anxiety over the issue of owner-manager “rogue directors” which in turn may have been impacting on levels of trust in the market.<sup>67</sup> Certainly, at the time when the 1985-

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<sup>59</sup> The provisions on reuse of company names represent a comparatively weak solution to the problem that Cork identified: D Milman ‘Curbing the Phoenix Syndrome’ [1997] *Journal of Business Law* 224

<sup>60</sup> See, Caroline Bradley, ‘Enterprise and Entrepreneurship: The Impact of Director Disqualification’, (2001) *Journal of Corporate Law Studies* 53.

<sup>61</sup> For a recent review see Bolanle Adebola, ‘Transforming Perceptions: The Development of Pre-pack Regulations in England and Wales’ (2023) 43 *OJLS* 150-177.

<sup>62</sup> Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 (SI 2021/427).

<sup>63</sup> Sandra Frisby, ‘The Second-Chance Culture and Beyond: Some Observations on the Pre-Pack Contribution’, (2009) 3 *Law and Financial Markets Review* 242, 243, DOI: 10.1080/17521440.2009.11428050

<sup>64</sup> Teresa Graham, ‘Graham Review into Pre-pack Administration: Report to the Rt Hon Vince Cable’ June 2014 <https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration>, accessed 4 April 2024.

<sup>65</sup> Insolvency Service, ‘Pre-pack Sales in Administration Report’, 8 October 2020, at 5.2 <https://www.gov.uk/government/publications/pre-pack-sales-in-administration/pre-pack-sales-in-administration-report>, accessed 4 April 2024.

<sup>66</sup> HC Deb (14 June 2023) Vol. 734, col 172; Julia Jennings, above note 12. Earlier concerns were also raised in Anna Timms, ‘Exposed: the Laws that Allow Rogue Traders to Duck their Debts’ *The Observer* 23 April 2018.

<sup>67</sup> Although proposals for automatic disqualification were abandoned. On the background to the 1986 Act including concerns around rogue directors and proposals for automatic disqualification see Terence C. Halliday, Bruce G. Carruthers, ‘The Moral Regulation of Markets: Professions, Privatization and the English Insolvency Act 1986’, (1996) 21 *Accounting, Organizations and Society* 371-413.

6 reforms to insolvency law were under consideration there were concerns as to the harm that “rogue directors” were causing.<sup>68</sup> More recently the *Transparency and Trust* Discussion Paper, argued that there was a need to pursue such directors in order to provide “reassurance that we operate a level playing field, (which) creates an environment in which honest entrepreneurs are willing to invest in activities promoting growth and employment”.<sup>69</sup>

Admittedly a cultural change to the approach of rogue traders may be difficult to achieve as part of a remedial education programme. Some hopes might rest on studies which support the effectiveness of educational remedial approaches to white collar crime, which might suggest that rogue trading could be addressed in this way. Criminal justice studies have found for example that education can lower the likelihood of reoffending by those released from prison,<sup>70</sup> including those sentenced on account of white-collar crime.<sup>71</sup> There might be some overlap between the conduct of the white-collar crime offenders featured in these studies and with conduct which features in serious disqualification cases, including rogue trading. These studies might therefore suggest that even in these cases an educational intervention can be of benefit. A problem may be, however, that the prison environment provides strong incentives for compliant behaviour, which can contribute to uptake of educational opportunities, but the bulk of disqualified directors would be outside this environment and so would need different incentives, which we consider below. The rogue trader problem might therefore more effectively be resolved through greater levels of enforcement including through criminal proceedings, which is another long-standing concern but is beyond the scope of this paper.<sup>72</sup>

## 2.6 Scope of Disqualification

Disqualification is not intended to prevent a business person from earning a living in activities outside the scope of the disqualification, but it has some impact on the ease with which failed entrepreneurs may start new ventures. The main restrictions of a disqualification apply only to involvement in limited companies, public limited companies and LLPs, rather than general partnerships, although disqualification also extends to a wide variety of specialist professions<sup>73</sup> but permission may be obtained for such involvement in limited circumstances.<sup>74</sup> By its nature, disqualification can be seen to reflect the risk that past failings may be likely to be repeated in future, and that the position of a company director, although not a regulated profession (in the sense of requiring a particular before the event qualification to be obtained before a person can act in that capacity)<sup>75</sup>, in the way that medical or legal professions are, is still a fiduciary role and, therefore, one where there is potential for damage to be done to the interests of creditors and shareholders through future incompetence and/or dishonesty.<sup>76</sup>

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<sup>68</sup> Terence C. Halliday, Bruce G. Carruthers, above note 67, 378.

<sup>69</sup> *Transparency and Trust*, above note 3, 7.

<sup>70</sup> Robert Bozick, Jennifer Steele, Lois Davis, & Susan Turner, ‘Does Providing Inmates with Education Improve Post-Release Outcomes? A Meta-Analysis of Correctional Education Programs in the United States’ (2018) 14 *Journal of Experimental Criminology* 389-428; Laura Erickson, ‘Reducing Recidivism Through Correctional Education: The Roles of Neoclassical and Behavioral Economics’ (2018) 25 *Policy Perspectives* 22.

<sup>71</sup> John Lott, ‘Do We Punish High Income Criminals Too Heavily?’ (1992) 30 *Economic Inquiry* 583-608, <https://EconPapers.repec.org/RePEc:oup:ecinqu:v:30:y:1992:i:4:p:583-608>.

<sup>72</sup> Concerns that the ‘inability to control unethical and dishonest directors represented a failure of criminal and commercial law’ were previously highlighted by Terence C. Halliday, Bruce G. Carruthers, above note 67, 382.

<sup>73</sup> Charities Act 2011, s 178 (charity trustees), some school governor positions, pension trustees, registered social landlords and health care bodies. Energy Act 2013, Sch 7, para 10. Numerous statutory instruments set out disqualifications in relation to particular activities such as in relation to schools, forestry and coastguards. See Tiran Neressian (ed), *Mithani: Directors' Disqualification* (Butterworths LexisNexis, looseleaf first published in 1998), Div V, Ch 3K for a very detailed list.

<sup>74</sup> CDDA 1986, s 17.

<sup>75</sup> Though the cases suggest that once a person is or acts as a director, he is subject to regulation through the disqualification regime under the CDDA 1986. For this purpose, the disqualification regime has been described as ‘regulatory’ in nature: see, for example, *Re Westminster Property Management Ltd (No 1)*, *Official Receiver v Stern* [2000] 2 BCLC 396, CA.

<sup>76</sup> Andrew von Hirsch and Martin Wasik, ‘Civil Disqualifications Attending Conviction: A Suggested



The primary purpose of disqualification of directors is not to punish or, presently, to rehabilitate directors. The aim of disqualification is to protect the public from the activities of errant directors,<sup>77</sup> to limit risk and to encourage higher standards<sup>78</sup> by providing an example to others.<sup>79</sup> Given this latter function, a key question is therefore how disqualification is perceived by prospective entrepreneurs. Unknown rules have limited deterrent effects and, indeed, there is concern that directors generally are not as aware of the Company Directors Disqualification Act 1986 as they should be,<sup>80</sup> in spite of registrations of existing disqualifications and undertakings and publicity efforts regarding new instances of directors who have been disqualified.<sup>81</sup> Director disqualification may not, therefore, be significant in deterring potential entrepreneurs from starting their own businesses, but equally it may not be a significant factor in raising standards,<sup>82</sup> as the long-standing rogue trader problem may illustrate.

Nor does disqualification address the underlying reasons for a finding of unfitness through a rehabilitative approach.<sup>83</sup> Even at the disqualification stage, there is no present requirement of training for directors. The system restricts involvement in company management but is only effective for a limited period of time, for up to 15 years.<sup>84</sup> A director can begin again with a limited liability company at the end of the specified period without having taken any steps to address the failings that led to the disqualification, either voluntarily or compulsorily. As we discuss below, training might have a rehabilitative purpose enabling better conduct after the disqualification ends. A key part of this would be the root cause analysis, through which the problems that arose and the factors that contributed to the insolvency could be identified and used as learning points that can be actioned to reduce the chance of the same or similar incident reoccurring in future ventures.<sup>85</sup>

A remedial educational approach which is tied closely to the disqualification system could prevent the full potential of such an approach being realised, however. As noted, the disqualification system is only attracted by sufficiently serious conduct. For example, disqualification statistics in pre-Covid years commonly featured non-payment of Crown debts as a ground for disqualification and abuse of Bounce Back Loans is a common ground more recently. The sorts of errors that can lead to business failure are not necessarily going to lead to a disqualification,<sup>86</sup> therefore the need for education is

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Conceptual Framework' (1997) 56 Cambridge Law Journal 599, 609.

<sup>77</sup> In *Re Grayan Building Services Ltd* [1995] 2 WLR 1, 15

<sup>78</sup> *Re Swift 736 Ltd* [1993] B.C.L.C. 896, 899; *Re Grayan Building Services Ltd* [1995] Ch 241, 253.

<sup>79</sup> *Re Blackspur Group Plc (No.2), Secretary of State for Trade and Industry v Davies (No.2)* [1998] BCC 11, 15.

<sup>80</sup> Richard Williams, 'Disqualifying Directors: A Remedy Worse than the Disease?' (2007) 7 Journal of Corporate Law Studies 213-242, 234 DOI: 10.1080/14735970.2007.11421514

<sup>81</sup> See e.g. Insolvency Service, 'Disqualification Outcomes: Summary of Results', available at <https://www.insolvencydirect.bis.gov.uk/IESdatabase/viewdirectorssummary-new.asp>, accessed 4 April 2024. Regular news items regarding fresh disqualifications appear under the 'News and Communications' heading at the 'Company Closure, administration, Liquidation and Insolvency' page of Gov.uk, available at <https://www.gov.uk/business-and-industry/company-closure-administration-liquidation-and-insolvency>, accessed 4 April 2024.

<sup>82</sup> Joan Loughrey, 'Smoke and Mirrors: Disqualification, Accountability and Market Trust' (2015) 9 Law & Fin Mkt Rev 50

<sup>83</sup> Adrian Walters, 'Disqualification of Those Engaged in Management' in Barry Rider (ed), *Research Handbook on International Financial Crime* (Edward Elgar, 2015), 716.

<sup>84</sup> A lengthy period but lenient in comparison with the power of the United States SEC to issue a lifetime bar. See Jayne W Barnard, 'Rule 10b-5 and the Unfitness Question' (2005) 47 Ariz L Rev 9.

<sup>85</sup> Mhairi Jhugursing, Valerie Dimmock, Haresh Mulchandani, 'Error and Root Cause Analysis', (2017) 17 BJA Education 323-333, <https://doi.org/10.1093/bjaed/mkx019>.

<sup>86</sup> John Argenti, 'Corporate Planning and Corporate Collapse' (1976) 9 Long Range Planning 12-17 notes that often in a mature company the failure will be the outcome of a long period of decline rather than a single catastrophic event. Mismanagement is also believed by UK practitioners to be a common cause of company failures: John Wood, *The Interpretation and Value of Corporate Rescue* (Elgar, 2022), 97-99. Not every instance of mismanagement will however give rise to a disqualification, either because the instance is not

possibly wider and could be expanded to be an option for all directors of failed companies, as we also consider below.

### 3. Design of education as an alternative policy approach

Educational approaches towards behavioural improvement have been drawn upon in scholarship and initiatives in various other sectors, including in some countries in the context of personal insolvencies, which we consider below. We firstly consider successful examples of educational approaches in other sectors before examining educational theories and approaches that can be built into the planned approach to improve its chances of operating successfully. Careful consideration of these factors is needed as directors would be among categories of atypical learners who have challenges not faced by e.g. school or most university students, in being financially independent, possibly in full time employment, studying the training on a part time basis, returning to formal education after a gap and potentially with dependents. These factors lead to different motivations for study which should be taken into account if designing a system of director education.<sup>87</sup> One tool which is aimed at addressing the requirements of older learners and a key feature of the suggested approach is a root-cause analysis of the reasons for business failure, which could be produced along with an evaluation of what might be done differently as part of the upskilling process.<sup>88</sup> As will be explained, this aspect forms a key part of the suggested programme in addressing underlying problems and also tailoring the programme to suit adult learners, as well as addressing the key challenge of motivating engagement with the programme.

#### 3.1 Existing examples of educational approaches to behaviour improvement

There are few instances known worldwide in using remedial education in law as an approach to bring about changes in behaviour. One well-known successful example of an approach of this type is the speed awareness course. These comparatively short rehabilitative educational interventions have been found to reduce reoffending by drivers.<sup>89</sup> Given the clear incentives for attending such courses and their focused aim we do not consider this example further. Potentially more enlightening examples for present purposes lie in debt counselling and personal insolvency contexts. In some continental European countries,<sup>90</sup> the United States and Canada, there has been debt counselling for bankrupts, on a mandatory basis in some instances. For example, the debtor education programme in the US, requires credit counselling to be obtained by individuals, including those with business debts, prior to a bankruptcy filing.<sup>91</sup> The aim of this programme is to increase fiscal responsibility and decrease bankruptcy filing rates through informing debtors as to alternatives,<sup>92</sup> implicitly presuming that either all debtors would benefit from it, or at least that none would be harmed by it.<sup>93</sup> Similarly, in Canada,

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serious enough to amount to a finding of unfitness or because there is not a strong enough case. See further *Mithani: Directors Disqualification*, above note 73, paras 431EA to 438A.

<sup>87</sup> Shani Shillingford and Nancy J Carlin, 'The role of Intrinsic Motivation in the Academic Pursuits of Nontraditional Students' (2013) 25 *New Horizons in Adult Education and Human Resource Development* 91-102, discussing motivations of adult learners to attend college, admittedly a different context from the potential programme considered in this paper.

<sup>88</sup> Mhairi Jhugursing, Valerie Dimmock, Haresh Mulchandani, above note 85.

<sup>89</sup> Ipsos MORI, George Barrett & the Institute for Transport Studies, University of Leeds, 'Impact Evaluation of the National Speed Awareness Course Final Report' (May 2018), available at: <https://assets.publishing.service.gov.uk/media/5af4614fe5274a25de49309d/national-speed-awareness-course-evaluation.pdf>, accessed 4 April 2024.

<sup>90</sup> Paul Wymenga et al, 'Bankruptcy and Second Chance for Honest Bankrupt Entrepreneurs' (European Commission, 2014), 59, available at <https://op.europa.eu/en/publication-detail/-/publication/24f281f2-9b0a-44d0-8681-af8bd7657747>, accessed 4 April 2024. See also European Consumer Debt Network, 'Debt Advice and Counselling' <https://ecdn.eu/knowledge/debt-counseling/>, accessed 4 April 2024.

<sup>91</sup> 11 USC, s 109(h). The requirement applies to filings by individuals under USC, Title 11, Chapter 7 (liquidation), Chapter 11 (reorganisation), Chapter 12 (applying to family farmers or fishermen) or Chapter 13 (adjustment of debts of a debtor with a regular income).

<sup>92</sup> David A Skeel, *Debt's Dominion: a History of Bankruptcy Law in America* (2001), 207-8.

<sup>93</sup> Jean Braucher, 'An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown' (2001) 9 *Am Bankr Inst L Rev* 557, 563.

where mandatory counselling is required prior to a discharge from bankruptcy,<sup>94</sup> the approach was established to foster rehabilitative behaviour modification and reduce bankruptcy filing rates.<sup>95</sup>

Interesting approaches in Europe offer coaching for failed entrepreneurs, normally through voluntary organisations in partnership with banks and other organisations.<sup>96</sup> A notable example is the French “60.000 Rebonds” initiative,<sup>97</sup> a voluntary organisation which takes its name from the number of liquidations in France in a typical year.<sup>98</sup> It is one of several organisations which support entrepreneurs who have suffered a failure through coaching over a period of up to two years and it gave assistance to 1020 entrepreneurs in 2023. Since it is not primarily an educational scheme and offers longer term mentoring it is not considered in detail at this stage but its reflective sessions will be discussed later as experience from those can be built upon in designing the proposed course.<sup>99</sup> A Swedish budget and debt counselling programme is another European example offered as part of welfare provision and in a qualitative study and it was found that counsellors aimed to empower those who they were advising, as well as to help resolve their financial difficulties, although impacts on debtors were not measured.<sup>100</sup> In both the French and Swedish cases the coaching or counselling is done separately from the bankruptcy process which avoids one paradox, which can be that in some systems the education is provided by a trustee of a repayment plan,<sup>101</sup> or of a bankruptcy, and there is therefore a “stick” debt enforcement element alongside, or ahead of, any possible “carrot” of empowerment through the education, directed at behaviour change.<sup>102</sup>

The Canadian mandatory debt counselling is a long-standing approach which was subject to a positive review in 2013, finding strong levels of positive changes in financial behaviour among those who had received the counselling.<sup>103</sup> That report also highlighted a need for a more nuanced approach however, given the differing circumstances of different bankruptcies, including those which were on account of a business failure stemming from poor business financial practices, as these failures were

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<sup>94</sup> Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 157, as amended by An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27, s. 58.

<sup>95</sup> Ruth E. Berry & Sue L.T. McGregor, ‘Evolution of Statutory Consumer Counseling in Canada and Europe: Counseling Consumer Debtors Under Canada’s Bankruptcy and Insolvency Act’, (1999) 37 Osgoode Hall L.J. 369, 372.

<sup>96</sup> See some examples in Paul Wymenga et al, ‘Bankruptcy and a Second Chance for Honest Bankrupt Entrepreneurs, Annex VI: Summarised Country Reports’, 16, 59, 157 available at <https://op.europa.eu/en/publication-detail/-/publication/b773253b-9a05-449f-8730-5605edb47a56/language-en>, accessed 4 April 2024. See also Paul Hackett, ‘French Business Helping Entrepreneurs Find New Opportunities’ Euronews.Business 27 November 2020, available at <https://www.euronews.com/business/2020/11/27/french-business-helping-entrepreneurs-find-new-opportunities>, accessed 4 April 2022. There is an umbrella organisation in France for organisations which support entrepreneurs who are in financial difficulties or who have gone through and insolvency. See Le Portail du Rebond des Entrepreneurs, available at <https://portaildurebond.eu/>, accessed 4 April 2024.

<sup>97</sup> <https://60000rebonds.com/>, accessed 4 April 2024.

<sup>98</sup> See further Julien Cusin, ‘The Role of the Tutor in the Resilience of the Post-Bankruptcy Entrepreneur: The Case of the 60.000 Rebonds Association’ (2017) 17 *Revue de l’Entrepreneuriat / Review of Entrepreneurship* 91-122.

<sup>99</sup> See further Julien Cusin, above note 98.

<sup>100</sup> Julia Callegari, Pernilla Liedgren, Christian Kullberg, ‘Between Self-Determination and Advice: Sense-Making and Justifications in Swedish Budget and Debt Counselling’, (2023) 53 *The British Journal of Social Work*, 882–899, <https://doi.org/10.1093/bjsw/bcac162>.

<sup>101</sup> Jean Braucher, above note 93, 579, an empirical study of Chapter 13 debt counselling. Chapter 13 plans would typically operate over three to five years and bear some similarity to UK company voluntary arrangements.

<sup>102</sup> Julia Callegari, Pernilla Liedgren, Christian Kullberg, above note 100, (showing different factors to be reconciled by debt counsellors); Jean Braucher, above note 93, (identifying weaknesses in a trustee-led approach).

<sup>103</sup> Industry Canada, *Evaluation of Mandatory Counselling Final Report*, February 2013, available at <https://ised-isde.canada.ca/site/audits-evaluations/en/evaluation-reports/evaluation-mandatory-counselling/evaluation-mandatory-counselling>, para 3.2.1 and Table 1, accessed 4 April 2024.

not addressed in the training.<sup>104</sup>

*According to trustees and counsellors, many sole proprietors and self-employed debtors need basic instruction in record keeping and bookkeeping; separating business-related expenses from personal affairs; and understanding accrual and cash accounting. Furthermore, some business failures resulted from a lack of knowledge of taxes, including how to estimate and make payments for GST, PST, and income tax instalments. For these debtors, rehabilitation could include advice and assistance that would help ensure that their business cash flows are balanced and include tax payments.*

It is likely that there are directors in the UK with similar needs who have had company failures and could also benefit from a rehabilitative education programme that goes beyond the approaches required for consumer debtors.<sup>105</sup> The approach suggested in this paper could stand to be a pioneering one in this regard.

There are however mixed views as to the success of mandatory debt counselling programmes more generally. Educational interventions are found to have helped in some instances, although there has also been scope for longer term support to bring about behaviour changes<sup>106</sup> and there is also criticism of mandatory counselling.<sup>107</sup> Similarly, an empirical study in 2001 of debtors who had received education as part of their Chapter 13 repayment plans, which was mandatory in some states at that time, found the impact of education to be inconclusive.<sup>108</sup> Although those who had training had a slightly higher rate of plan completion there were also other factors that contributed to plan completion.<sup>109</sup> For many the mandatory counselling requirement at the filing stage can come too late to be helpful.<sup>110</sup>

These examples would give support for an educational intervention that was empowering, rather than something that might seem like education as punishment. The proposed root-cause analysis feature of the proposed training would be aimed at empowerment, potentially providing an incentive for undertaking the education. For the greatest effectiveness of an approach to strengthen the disqualification system, however, we consider below that a mandatory approach could be taken, given that the disqualification would indicate problems that require a rehabilitative approach. We also consider that if the approach is to be extended to directors of failed companies more generally this should be done on an optional basis.

### **3.2 Who might benefit?**

As to the scope of a possible director education programme, we observe that there would not necessarily be a neat overlap with directors who are disqualified and those who require education. The main focus of this paper is on directors who have been disqualified to address the current lack of a rehabilitative approach. At 3.4 we consider how the programme could be brought into the

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<sup>104</sup> Industry Canada, above note 103, para 3.1.1. See also Sue LT McGregor, 'Tailoring Bankruptcy Insolvency Education to Ensure Solvency Literacy' (2020) 31 *Journal of Financial Counseling and Planning* 55-68.

<sup>105</sup> There was strong support for greater education in the UK country report provided in Paul Wymenga et al, 'Bankruptcy and a Second Chance for Honest Bankrupt Entrepreneurs, Annex VI: Summarised Country Reports', 4.8, available at <https://op.europa.eu/en/publication-detail/-/publication/b773253b-9a05-449f-8730-5605edb47a56/language-en>, accessed 4 April 2024, 4.8 and 4.9.

<sup>106</sup> Angela C Lyons, Tommye White and Shaun Howard, *The Effect of Bankruptcy Counseling and Education on Debtors' Financial Well-Being: Evidence from the Front Lines* (Houston: Money Management International), 2008.

<sup>107</sup> Iain Ramsay, 'Mandatory Bankruptcy Counseling: The Canadian Experience' (2001) 7 *Fordham J Corp & Fin L* 525.

<sup>108</sup> Jean Braucher, above note 93, 579. These plans would typically operate over three to five years and bear some similarity to UK company voluntary arrangements.

<sup>109</sup> Jean Braucher, above note 93, 579.

<sup>110</sup> Michael Sousa, 'Just Punch My Bankruptcy Ticket: A Qualitative Study of Mandatory Debtor Financial Education', (2013) 97 *Marq. L. Rev.* 391, 398-99.

disqualification system. This is not to say that an educational intervention might be successful in all cases in rehabilitating those who have been disqualified. Some directors who have been disqualified would be unlikely to be receptive to training and much andragogy experience indicates the futility of trying to teach adults what they don't want to learn.<sup>111</sup> We consider at 3.4 how the system could be designed to create greater engagement through programme design, although in the interests of space we don't consider also classroom strategies, such as reflective learning, which can also generate good engagement among adult learners.<sup>112</sup>

There are other directors who could benefit from education, however, who will have made mistakes in running companies which have failed but not at a level that would merit disqualification, as we have noted. The period post-failure can be "fraught with psychological, social, and financial turmoil",<sup>113</sup> with financial, emotional and sometimes physiological costs, impacts on relationships and diminished risk-taking instincts.<sup>114</sup> Whilst some will emerge from this experience having learned valuable lessons, others will suffer negative emotions that hinder a new start.<sup>115</sup> Admittedly, an educational intervention is not necessarily the answer for all of those in this category. Some may have acquired a good level of knowledge through the informal learning processes discussed at 2.3 and would gain more, for example, from a longer term mentoring programme, similar to the French 60000 Rebonds, which was briefly considered above, which offers long term support for entrepreneurs to start again after failure.<sup>116</sup> There are mentoring examples in the UK, notably Mentorsme,<sup>117</sup> which we do not consider in detail here, as a supplement to, or alternative to, the proposed education programme. For others the educational intervention that is proposed could be used to reduce the likelihood of successor ventures facing the same problems through use of the root-cause analysis and reflective exercises and the educational element could also address some of the weaknesses of the type identified in the Canadian study that was quoted above in 3.1. The proposed educational intervention could potentially therefore be offered to directors of failed companies outside the disqualification system as well, although on an optional basis.

### 3.3 Design of a director education system

What might a director education system look like? The logical starting point for an education-focused approach to build a responsible director culture would be to develop desired learning outcomes, potentially leading to a competence statement being granted. Suggested learning outcomes are that those who complete the course will.

- (1). Understand how the statutory directors' duties apply to them and their business sector, and
- (2). Be able to use a reflective learning approach to evaluate challenges that arose in their own business and to plan to avoid them in the future.

A course outline that includes learning outcomes based on these points, as well as further details, appears as an appendix to this paper.

The proposed educational intervention would be aimed at rehabilitation, "renascent entrepreneurship"<sup>118</sup> and the development of a culture of responsible entrepreneurship, taking account

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<sup>111</sup> Susan Block-Lieb, Karen Gross & Richard L. Wiener, 'Lessons from the Trenches: Debtor Education in Theory and Practice' (2001) 7 *Fordham J Corp & Fin L* 503, 523,

<sup>112</sup> See e.g. Evelyn M Boyd & Ann W Fales, 'Reflective Learning: Key to Learning from Experience' (1983) 23 *Journal of Humanistic Psychology*, 99-117.

<sup>113</sup> Deniz Ucbasaran, Dean A. Shepherd, Andy Lockett, and S. John Lyon, 'Life After Business Failure' (2012) 39 *Journal of Management* 163-202, 163.

<sup>114</sup> Jason Cope, 'Entrepreneurial Learning from Failure: An Interpretative Phenomenological Analysis' (2011) 26 *Journal of Business Venturing* 604-623, 611-612; Jennifer van Kesteren, Jan Adriaanse & Jean-Pierre van der Rest, 'The Story behind Bankruptcy: When Business Gets Personal' (2017) 17 *QUT L Rev* 57 (interviews with debtors who were entrepreneurs identified emotions similar to grief in the loss of a business).

<sup>115</sup> Dean A. Shepherd, 'Learning from Business Failure: Propositions of Grief Recovery for the Self-Employed'. (2003) 28 *Academy of Management Review* 318-328.

<sup>116</sup> See further Julien Cusin, above note 98.

<sup>117</sup> Mentorsme.co.uk at, <https://www.mentorsme.co.uk/>, accessed 4 April 2024.

<sup>118</sup> Erik Stam, David Audretsch, D. & Joris Meijaard, 'Renascent Entrepreneurship' (2008) 18 *J Evol Econ* 493-

of directors' duties, including those which apply in the event of financial difficulties. Its aim would be not merely to bring about the acquisition of knowledge but also bring about improved behaviour.<sup>119</sup> A suggested "theory of change" has been developed by reference to existing educational adult education theories, discussed below, and employed to articulate how and why a programme might lead to rehabilitative outcomes. Importantly, here the starting points for different kinds of directors will be different. The proposed system would target both 1) those who have been disqualified and 2) those who have experienced corporate failure and would benefit from assistance in getting back on track. As previously discussed, it is recommended that both elements are addressed, although the initial consideration might be to the first of the strands as a way to strengthen the existing director disqualification system. A suggested theory of change for both strands appears in Table 1.

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507 <https://doi.org/10.1007/s00191-008-0095-7>

<sup>119</sup> A common concern with financial education programmes: J Michael Collins and Collin M O'Rourke, 'Financial Education and Counseling—Still Holding Promise' (2010) 44 *Journal of Consumer Affairs* 483-498, 488. <https://doi.org/10.1111/j.1745-6606.2010.01179.x>

<b>Situations</b>	<ul style="list-style-type: none"> <li>• Problems in director conduct and lack of compliance with duties and responsible director role.</li> <li>• Problem of a lack of a remedial feature for director disqualification.</li> <li>• Some non-disqualified directors of failed companies may benefit from educational intervention and support to start again.</li> </ul>	<b>Aims</b>	<ul style="list-style-type: none"> <li>• Avoiding recurrence of problems,</li> <li>• Encouraging renascent entrepreneurship</li> </ul>	
<b>Inputs and activities</b>	<b>Outputs</b>	<b>Change mechanism</b>	<b>Outcomes</b>	<b>Impacts</b>
<p><b>Inputs</b> Attendance at a minimum 11 hour remedial education course, part online and part in person.</p> <p><b>Activities</b> Instruction on directors' duties. Reflection through the root-cause analysis and discussion of vignettes.</p>	<p>1) Improving knowledge of and compliance with directors' duties. Satisfactory completion of a competence test.</p> <p>2) Equipping directors with knowledge and support to start again.</p>	<p>Instruction on directors' duties and being a responsible director (online).</p> <p>Root-cause analysis to identify what went wrong and identify how to prevent recurrence, as well as discussion of vignettes (in person).</p>	<p><b>Short term</b></p> <p>1) Improving effectiveness of the disqualification system through remedial education. Completion of a competence test.</p> <p>2) Supporting renascent entrepreneurship.</p> <p><b>Long term</b> Avoidance of repeat failures and possible reduction in phoenix company and, less likely, rogue trader conduct.</p> <p>Supporting honest but unsuccessful entrepreneurs to have another opportunity.</p>	<p>The programme would strengthen and improve the insolvency framework and contribute to the Insolvency Service's ambitions of fewer avoidable insolvencies through new guidance and education initiatives.<sup>120</sup></p>
<b>Evidence assessment</b>	Literature supports the effectiveness of educational interventions in other contexts e.g. speed awareness and financial literacy programmes, as well as the studies demonstrating a positive impact of training on business success.			
<b>Assumptions</b>	That the programme can be engaging and lead to long term positive impacts.	<b>Possible unintended consequences</b>	Completion of the programme being used as a veneer of respectability by rogue traders.	

Table 1: Theory of Change for Director Education System<sup>121</sup>

Table 1 shows a Theory of Change for the suggested director education programme. As discussed, it

<sup>120</sup> 'The Insolvency Service Strategy 2021 to 2026', <https://www.gov.uk/government/publications/the-insolvency-service-strategy-2021-to-2026/the-insolvency-service-strategy-2021-to-2026>, accessed 4 April 2024.

<sup>121</sup> The template used is from [https://assets.publishing.service.gov.uk/media/6582e6a223b70a000d234d00/Theory\\_of\\_change\\_model\\_template\\_December\\_2023.docx](https://assets.publishing.service.gov.uk/media/6582e6a223b70a000d234d00/Theory_of_change_model_template_December_2023.docx), accessed 4 April 2024.

can apply both to directors who have been disqualified and to directors who have had company failures and who would benefit from education to enable them to start again. It shows how the intended programme would address both situations, briefly identifies the evidence base, which will be discussed later in this part of the paper, and shows how the programme would fit with Insolvency Service objectives.<sup>122</sup> The inputs and activities that will bring about change are discussed below but rest upon achievement of the learning outcomes of demonstrating knowledge of directors' duties as well as reflecting on past experiences and considering how the same problems can be avoided in future. The proposed programme has structural alignment between the learning outcomes and the activities that will enable the outcomes to be achieved, as well as a competence test of whether the outcomes have been achieved.<sup>123</sup> The potential short term and longer term benefits are identified.

There would be two main groups of activities on the programme, the instructional, as to directors' duties, and the reflective element based on the experiences of those participating and discussion of vignettes based on real-life examples. As to duration, the suggestion is that the training could take place over a minimum of 11 hours, spread over two days. The instruction on directors' duties would be the first part and we would suggest (based on our teaching experiences) that this could be done online in a minimum of 5 hours and the reflective elements on the second day to be done in person over 6 hours. The directors' duties element is of a similar duration to commercially-available director training on directors' duties<sup>124</sup> and the reflective element is designed to take place over the second day and would allow discussion of the root-cause analysis and any vignettes by a small or medium sized group of 10-15 participants. The minimum total of 11 hours is a much longer period than some other examples we looked at, such as the Canadian counselling discussed above, which would typically take 30 minutes to 1 hour,<sup>125</sup> but the Canadian programme caters for both personal insolvents with simple finances and those who are insolvent as result of business failures and has been noted as not being designed to adequately address the business shortcomings of the latter. It is also much longer than the driver awareness courses, which tend to be of around 3-5 hours duration, depending on the supplier, but it would deal with a much broader range of issues. A Belgian scheme offered by some organisations for second chance coaching for entrepreneurs offered a minimum of 8 hours of coaching but this included the closing of the insolvency proceedings and discharge processes.<sup>126</sup> The French 60000 Rebonds programme includes several two hour Exchange and Development Group sessions which are closest in nature to the reflective approach in the proposed course but it operates as part of a longer term approach, alongside coaching and mentoring.<sup>127</sup> The structure of these sessions and the approach taken to them is however of interest and will be drawn upon below.

It would be important for the approach to take account of principles of andragogy<sup>128</sup> adult education, which highlight assumed differences between adult and child learners. There are principles have been well-developed in literature but this is a field in which there is considerable debate and there is recognition that not all adult learners will be the same. The proposed director education programme takes into account:

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<sup>122</sup> Insolvency Service Strategy, above note 120.

<sup>123</sup> See e.g. Daniel L Reinholz and Tessa C Andrews, 'Change Theory and Theory of Change: What's the Difference Anyway?' (2020) 7 IJ STEM Ed 2. <https://doi.org/10.1186/s40594-020-0202-3>

<sup>124</sup> For example, The Chartered Governance Institute UK and Ireland has 6 CPD hours <https://www.cgi.org.uk/professional-development/training/virtual-training-courses/directors-and-their-duties>, accessed 4 April 2024; BPP has 3 CPD hours for <https://www.bpp.com/courses/professional-development/directors-duties-liabilities-what-you-need-to-know>, accessed 4 April 2024, both of which discuss directors' duties without a reflective element. The Institute of Directors has a programme covering the role of a director more broadly for 14 CPD hours: <https://www.iod.com/professional-development/open-courses/role-of-the-director-and-the-board/>, accessed 4 April 2024.

<sup>125</sup> Industry Canada, above note 103, para 3.2.1 and Table 3.

<sup>126</sup> Paul Wymenga et al, above note 96, 4.8.

<sup>127</sup> Julien Cusin, above note 98, para 31.

<sup>128</sup> Malcolm S Knowles, *The Modern Practice of Adult Education: From Andragogy to Pedagogy* (Englewood Cliffs, NJ: Cambridge Adult Education, 1980).



1) *That adults bring life experiences and knowledge to their educational experiences.* Part of the proposed educational intervention would be the root-cause analysis, designed to identify what went wrong in the failure of the company which led to the disqualification or the insolvency. Through the root-cause analysis the proposed programme could build on the director's life experience and knowledge and sharing this could improve the knowledge of others doing the training. Each individual on a director education programme could potentially be from a different business sector and can offer different existing skills and experience.<sup>129</sup>

The root-cause analysis would involve taking interest in the director's previous experience and working with the director to reflect on the experience to identify what went wrong and if/how the same problems can be avoided in future.<sup>130</sup> Preferably each participant could present insights in relation to the root-cause analysis of others. Participation through sharing of experiences would not be compulsory however given that not all will want to share their experiences of failure. Insights based on the directors' experiences can also be encouraged through discussion of vignettes based on existing cases not involving the participants. The vignettes can ensure that a good range of examples are covered in the reflective sessions and they would also enable suitable reflective discussions even if there are participants who don't want to share their experiences in the discussions of the root-cause analyses.

Importantly, experience from the 60000 Rebonds reflective sessions would indicate that it is necessary to emphasise that the sessions are primarily to be helpful and respectful rather than overly critical to avoid limits of aggressive confrontation.<sup>131</sup> Since reflective exercises can open old wounds it would be also advisable for an option of longer term support to be available and consideration might be given to partnerships with other organisations that can offer this support if needed.<sup>132</sup>

Through these approaches the proposed programme would reflect the different circumstances that each case will have and build upon the director's existing skills and knowledge. For example, the content could provide a stronger grounding in financing options and marketing principles. Content regarding directors' duties can be made more relevant to the director's experience through the root-cause analysis, to address a potential mismatch between what directors want to learn and what the programme will require them to learn to satisfy the competence test.

2) *That adults are goal orientated* and a programme will therefore be most effective if the director feels that they need to know the content of the programme in order to succeed in future ventures. As noted, many of those who run businesses will have significant skills and knowledge acquired through experience, through informal rather than formal learning but many could also benefit from additional training. Training might therefore be presented as offering prospects of success for directors in existing or new businesses once their disqualifications have expired. Reference could be made to the development of "intellectual capital"<sup>133</sup> as a resource to improve the knowledge, skill and abilities of individuals, which can thereby lead to improved performance by firms,<sup>134</sup> including knowledge giving new starts

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<sup>129</sup> Julien Cusin, above note 98, para 38.

<sup>130</sup> Mhairi Jhugursing, Valerie Dimmock, Haresh Mulchandani, above note 85.

<sup>131</sup> Based on the experience of those who have participated in a French Exchange and Development Groups as part of the 60000 Julien Cusin, above note 98, paras 39-44.

<sup>132</sup> Julien Cusin, above note 98, para 37.

<sup>133</sup> Gary Becker, *Crime and Punishment: an Economic Approach* (Chicago: University of Chicago Press, 1968); Yoram Ben-Porath, "The Production of Human Capital and the Life Cycle of Earnings." (1967) 75 *Journal of Political Economy*, 352-65.

<sup>134</sup> Gary Becker, *Human Capital: a Theoretical and Empirical Analysis with Special Reference to Education* (Chicago: University of Chicago Press, 1993); Michael A. Hitt, Leonard Bierman, Katsuhiko Shimizu, and Rahul Kochhar. 'Direct and Moderating Effects of Human Capital on Strategy and Performance in Professional

an increased chance of success<sup>135</sup> and improving the ability of enterprises to survive a general financial crisis.<sup>136</sup>

3) *That adults are relevancy orientated*, therefore there should be linkages between the content of the training and what directors are aiming to achieve in future, as well as the content relating to directors' duties.

4) *That adult learners are practical*, therefore it will be important to identify how any content of the training is applicable to future ventures and the root-cause analysis and discussion of vignettes can help in this regard as participants can learn from each other's experiences and perspectives. Start-ups face notable survival challenges<sup>137</sup> and the contribution of the programme could, as noted, be to improve intellectual capital resources which can improve survival prospects for new ventures.<sup>138</sup>

5) *That adult learners like to be respected*, which would also be addressed through the root-cause analysis enabling the participant to share their own experiences. In discussing the root-cause analyses of others, as well as vignette discussions, the participant would be drawn upon as an expert, as well as going through the reflective processes themselves as a participant. Certainly, the aim would not be for the educational programme to be in any way punitive or to stigmatise failure as this could inhibit future entrepreneurship.<sup>139</sup> The 60000 Rebonds reflective exercises effectively operate on an egalitarian basis between facilitators and participants, which encourages a climate of trust and free speaking,<sup>140</sup> but also necessitates the helpful and respectful mandate mentioned above.

There are also some who believe that adults are internally motivated and self-directed,<sup>141</sup> so that a programme could also offer for example projects or tasks designed around the individual's relevant interests, rather than fixed content being imposed. Such an approach is, however, unlikely to be suitable for the proposed educational intervention for directors. A potential difficulty if this type of learner is to be accommodated according to their preferences is that there may be a mismatch between the required content that is based around responsible directorship and directors' duties and the information that the directors want to learn. Therefore, if course participants are allowed to select their own learning objectives it will be difficult to achieve standardised outcomes and their course will not be constructively aligned with the pre-determined learning outcomes. The course will also be more difficult for staff to operate and it would add additional costs. There is still some limited scope for personalisation as participants can bring with them and share their own challenges and questions, particularly in the reflective exercises. This point, however, leads to the key question of how students can be kept engaged.

### 3.4 Challenges of gaining engagement

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Service Firms: A Resource-Based Perspective.' (2001) 44 *The Academy of Management Journal* 13–28. <https://doi.org/10.2307/3069334>; Nile W. Hatch and Jeffrey H. Dyer. 'Human Capital and Learning as a Source of Sustainable Competitive Advantage' (2004) 25 *Strategic Management Journal* 1155–78; Yasemin Y. Kor and Joseph T. Mahoney. 'How Dynamics, Management, and Governance of Resource Deployments Influence Firm-Level Performance' (2005) 26 *Strategic Management Journal* 489–96.

<sup>135</sup> P.A. Geroski, J. Mata & P. Portugal, 'Founding Conditions and the Survival of New Firms' (2010) 31 *Strategic Management Journal* 510, 515-516.

<sup>136</sup> Marian Garcia Martinez, Ferdaous Zouaghi, Teresa Garcia Marco, Catherine Robinson, 'What Drives Business Failure? Exploring the Role of Internal and External Knowledge Capabilities During the Global Financial Crisis' (2019) 98 *Journal of Business Research* 441-449,

<sup>137</sup> John Freeman, Glenn R. Carroll, and Michael T. Hannan. 'The Liability of Newness: Age Dependence in Organizational Death Rates' (1983) 48 *American Sociological Review* 692–710.

<sup>138</sup> P.A. Geroski, J. Mata & P. Portugal, above note 135, 515-516.

<sup>139</sup> Erik Stam, David Audretsch, D. & Joris Meijaard, above note 118.

<sup>140</sup> Julien Cusin, above note 116, paras 39-42.

<sup>141</sup> Based on Malcolm S Knowles, above note 128.

Perhaps the greatest challenge for the proposed system arises from the last point above, bringing motivation to learn, as adult education, as with any type of education, can fail to have impact otherwise. It can be emphasised that the programme will enhance the prospects of success for future ventures and that completion.

- could make the participant more attractive to future employers/business associates/lenders; or
- could reduce the risk and cost of their experiencing problems in the future.

The root-cause analysis could be an incentive in that it would enable for each participant some reflection on past experiences, enabling gaps in knowledge or skills to be identified, hopefully to enable past mistakes to be pinpointed and avoided in future. Another “carrot” in the context of director education to encourage engagement could be the award of responsible entrepreneur certification upon completion of the course assessment, although there would be potential for such an award to become tarnished if used as a badge of respectability by the dishonest. A further incentive that might be built into the course could be, for example, that participants could be selected to pitch their next venture to an angel investor or venture capitalist,<sup>142</sup> although the training might also consider what the advantages and disadvantages of these forms of financing are.

#### Incorporation into the disqualification system

The educational requirement could be built in to the existing approaches under the disqualification system, either automatically under the CDDA 1986 or included in an undertaking or court ordered disqualification as a condition of the period of disqualification ending. A possible incentive for participants in this group might be if the education is a mitigating factor in assessing the period of disqualification,<sup>143</sup> although this would require a change of approach, given the present “tunnel vision” approach the court needs to take (in the context of mandatory disqualification under section 6 at any rate,)<sup>144</sup> requiring a director to be disqualified even if his conduct since the date of the events which form the subject of the charges of misconduct made against him has improved. Also, even if such an approach meets with the favour of the court, it likely to be feasible in only the least serious cases and may not be possible even in those cases if the court is obliged to impose a minimum period of disqualification.<sup>145</sup> Training could alternatively, for example, be attached as a condition of leave being granted where an application has been made under CDDA 1986, s 17 to do some act that would otherwise fall under the scope of the disqualification, in cases where the training had not yet been undertaken.<sup>146</sup>

#### Other directors of companies which have failed

As suggested, the director education programme could be optionally offered more broadly to directors of failed companies. Training would not seem appropriate in all cases where companies have failed, as some directors of failed companies will have good levels of existing knowledge. As noted, in some

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<sup>142</sup> The 60000 Rebonds programme offers financing support through partnerships with other organisations. Julien Cusin, above note 97, paras 49-50.

<sup>143</sup> Michelle Welsh and Helen Anderson, ‘Director Restriction: An Alternative to Disqualification for Corporate Insolvency’ (2019) 37 Company and Securities Law Journal 23.

<sup>144</sup> *Re Grayan Building Services Ltd* [1995] 2 WLR 1.

<sup>145</sup> See eg *Re Manlon Trading Ltd* [1996] Ch 136, CA.

<sup>146</sup> Although the editors of *Mithani: Directors Disqualification*, above note 73, suggest, at VI[145]-[146] that, in the case of a young or inexperienced applicant who seeks permission under s 17 to act as a director, the court may, in an appropriate case, make it a condition of the grant of permission that the applicant attend a programme of education and training in order to familiarise himself with the duties and responsibilities of being a director or being involved in the management of a company, there is no known case where such a condition has been imposed by the court. In *Re Four Oaks Building Services Ltd, Ruff v Secretary of State for Trade and Industry* (22 September 2004, unreported), the applicant had offered to attend a training course as a condition of the grant of permission. However, the court was not persuaded that attendance at a training course would have any real prospect of enhancing sufficiently apparently fundamental inability to understand and put into effect the basic requirements of responsible financial management and control. This approach to the grant of permission may be thought to be unhelpful. At the very least, in an appropriate case, attendance at such a course may provide a small degree of comfort to the court that a young or inexperienced applicant should be granted permission, if it forms part of a package of conditions for the grant of permission.

instances there may be difficulties regarding receptiveness and this is another reason why it would be better for education to be optional. The programme might be best aimed at directors whose businesses have failed due to a lack of knowledge and where there is a genuine will to start again successfully.<sup>147</sup> An entrepreneur may have doubts about their entrepreneurial skills and examples of successful entrepreneurs how have had previous failures can be used as illustrations<sup>148</sup> as well as the approach of the programme using a root-cause analysis and discussion of vignettes, building on the director's own experiences. As discussed above, approaches of these types have been found to be effective with adult learners.

#### 4. Conclusion

We have discussed the changing nature of directors' duties and the complexities that this presents for directors, particularly those of MSMEs. We have also noted that the present approach relies heavily on the market to shape the future of successor businesses and has been shown to have weaknesses, including where the same business repeatedly fails without addressing underlying problems. In the absence of a pre-qualification process (which we do not consider necessary) directors can gain considerable skills and knowledge through business experience yet many would not gain a strong understanding of the complexities of directors' duties, including those that arise in insolvencies, in this way, nor would all directors have means to have ready legal advice and information at their disposal as a proxy for training in directors' duties.

Disqualification is one public policy response to failings of directors but applies only in a time bound way, nor does it in itself contribute significantly to a raising of standards among directors as it lacks an intrinsic rehabilitative element. A rehabilitative educational approach could therefore offer a useful supplement to strengthen the raising of standards of director conduct as part of the disqualification system. We have considered ways in which the programme could be required as part of a disqualification order or undertaking, or grant of leave, to strengthen the disqualification system through a rehabilitative element, although it may not be sufficient to address all types of problem behaviour, including those of rogue traders and other serious cases, which are best addressed through other channels.

Only a small proportion of directors will ever be disqualified. An educational system should also preferably therefore be made more widely available on an optional basis to any director who has suffered a failure and could potentially benefit from education. The recommended approach is therefore a two track one for those who have been disqualified and those who have not. The paper has also considered how engagement can be built through relevant and practical approaches based on a root-cause analysis and other incentives. The course outline which appears in the Appendix summarises our recommendations.

##### **Appendix: Suggested course outline**

The following outline is a suggestion of what a course might look like and includes elements that are discussed in more detail above.

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<sup>147</sup> Michelle Welsh and Helen Anderson, above note 143.

<sup>148</sup> Building on the findings of Xiaodong Lin-Siegler, Janet N. Ahn, Jondou Chen, Fu-Fen Anny Fang, and Myra Luna-Lucero, 'Even Einstein Struggled: Effects of Learning About Great Scientists' Struggles on High School Students' Motivation to Learn Science' (2016) 108 *Journal of Educational Psychology* 314-328, regarding an educational model that modelled how scientists achieve through success and failure, albeit used in school aged education, rather than adult education. Those who have suffered failures in business prior to success include Henry Ford, HJ Heinz and Walt Disney: Daryl J Smith, 'Bankruptcy Can be a Means to Economic Justice and Equality' (2022) 41 *American Bankruptcy Institute Journal* 36, 36.

Aim:

To reduce the occurrence of failures in directors' duties (possibly leading to disqualification) through an after the event educational intervention.

Learning outcomes:

By the end of this course you should:

1. Understand how the statutory directors' duties apply to you and your business sector
2. Be able to use a reflective learning approach to evaluate challenges that arose in your own business and to plan to avoid them in the future

Delivery method:

A minimum of 11 hours made up of 5 hours online on directors' duties (the duty to promote the success of the company, how this relates to stakeholders and how it alters in insolvencies; duty of care and skill; other directors' duties; signs of financial difficulties and when to seek help; insolvency procedures; voidable transactions; insolvency liabilities and disqualification) and 6 hours in person on the reflective exercises.

Notes:

- The material on directors' duties could potentially be delivered through an online platform with multiple choice tests at the end of each unit, which participants would complete at their own pace.
- The reflective sessions will employ fictional vignettes as well as offering the opportunity for participants to reflect on their own experiences, taking into account that not all will be willing to discuss their own cases in a group and highlight their own failures.
- The reflective sessions would best be done in person on one day, we suggest in groups of 10-15, but could also be done online. The root-cause analysis would be done at this reflective stage.

Successful completion of the course:

- Will make you more attractive to future employers/business associates/lenders; or
- Will reduce the risk and cost of your experiencing problems in the future; or
- Can result in opportunities to bid for finance for your next venture.

Notes:

There would be the following possibilities attached to the disqualification that could either apply automatically or ordered by the court or agreed as part of disqualification undertakings:

- Reduction of the period of disqualification; or
- A condition attached to the disqualification order or undertaking which must be complied with or the disqualification would continue for a further fixed period; or
- A condition of the grant of permission under CDDA 1986, s 17 if the training has not already been done.

Teaching approach:

- 1 Using real world examples, vignettes and signposting to sources of further support and information, learn about directors' duties and statutory responsibilities.
- 2 Using a simulation of a fictional company, explore what went wrong, which duties were engaged, and how those problems could have been prevented or resolved.
- 3 Reflecting on your own experience, identify what went wrong in your own case, whether those issues could have been prevented or resolved and how you can prevent them arising in the future.
- 4 Make a personal plan for the future.

Assessment:

Assessment would consist of a multiple-choice examination of directors' duties (assessed at each stage of the online education) and as a 500 word reflective exercise based on either the director's own experience and plan for the future or an analysis of a case study (to be completed during and submitted after the reflective sessions). Through these elements candidates would demonstrate achievement of the learning outcomes.