

Disqualification of Directors and Education

Requirements, Supporting Responsible Directorship

Rebecca Parry¹ and Neeti Shikha^{2*}

¹Nottingham Trent University and ²the University of the West of England

rebecca.parry@ntu.ac.uk and neeti.shikha@gmail.com

Rebecca Parry OrcidID: <https://orcid.org/0000-0001-8285-2191>, Web of Science ResearcherID: L-4934-2016

* We would like to thank Jane Ching, Adrian Walters and Abbas Mithani for comments on earlier drafts.

Abstract

This paper considers how education can address two persistent problems concerning directors of smaller companies. It notes that, although the role of a company director is a potentially complex one with significant impacts, virtually anyone can be appointed to or act in that role. Under this approach, director disqualification is the main filter, a key mechanism to instil market morality and improve standards among directors. Yet disqualification lacks any rehabilitative element, and doubts have been expressed as to whether it is effective in raising standards, given persistent problems, including phoenix companies and rogue traders. We consider whether, to this end, education might usefully improve the effectiveness of disqualification through a rehabilitative element.

The second problem is that smaller companies including startups have a high failure rate and the laws that apply to directors in the lead up to the insolvency of a company are complex. Rehabilitative approaches can potentially help those who have failed to try again. We also therefore consider the potential of an optional education 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 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. Both aspects are important to market integrity as well as economic opportunity.

Keywords: *directors' duties – disqualification – rehabilitative approaches – director remedial education – SDG 8*

The authors report there are no competing interests to declare.

1. INTRODUCTION

Legal gateways to the profession of company director are based on 'after the event' disqualification of those who are unfit or otherwise unsuitable to be directors, rather than the 'before the event' approach to qualification taken in other white-collar professions.¹ This pattern formed as the role of the market expanded in the 1980s and disqualification emerged as a key tool of market integrity, acting as the main filter for dishonest or reckless directors.² Through the otherwise economically liberal approach to the role of director, favour has been shown to an entrepreneurial culture and low costs of access to limited liability companies.³ Yet disqualification lacks any rehabilitative element and has been

¹ As well as during the event training such as CPD activities discussed below at 2(c).

² TC Halliday and BG Carruthers, 'The moral regulation of markets: professions, privatization and the English Insolvency Act 1986', (1996) 21 Accounting, Organizations and Society 371.

³ 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, (Transparency and Trust).

criticised as having limited impact in raising standards.⁴ In this paper we consider a potentially groundbreaking educational approach to add this element that can contribute to market integrity.

Another reason why director education is an important issue is that the role of director has been changing since the 1980s with expectations as to what we may term a ‘responsible directorial culture’, taking account of the interests of stakeholders,⁵ including environmental⁶ and modern slavery concerns,⁷ as well as an emphasis on trust and accountability.⁸ Directors of larger companies may be able to call upon advisers for guidance and updates on current developments. In contrast, directors of the micro, small and medium sized enterprises (MSMEs), which comprise the majority of UK businesses, may find the position more difficult, even knowing when to ask for help, yet MSMEs have a high failure rate.⁹ Whilst noting that information provided to these directors can be improved we look at how an optional educational approach can enable directors of companies which have failed to address underlying weaknesses and start again.

This paper will consider how far educational approaches can assist in addressing key problems. 1) The public concern that the law has developed post-*Sequana*¹⁰ in a way that makes it difficult for

⁴ R Williams, ‘Disqualifying directors: a remedy worse than the disease?’ (2007) 7 JCLS 213, 234.

⁵ See e.g. Companies Act 2006, s 172 (CA 2006).

⁶ Primarily a matter driven by the market rather than the law for MSMEs. We focus on companies but there is potential for similar issues in other MSMEs.

⁷ The Modern Slavery Act 2015, s 45 applies to businesses with turnover exceeding £36 million but also impacts on MSMEs that supply these larger businesses.

⁸ Transparency and Trust, above n 3.

⁹ See further A Kastrinou, R Parry and G Ellis, ‘Limited liability and personal liability of directors’, in J Wood, *Creditors and Directors: Law and Liability* (OUP, forthcoming).

¹⁰ *BTI 2014 LLC v Sequana SA* [2022] UKSC 25.

honest directors to understand and practicably apply, as discussed below at 2(b).¹¹ 2) The commonly stated purpose of director disqualification to raise standards among directors has been difficult to achieve, so that additional approaches with a rehabilitative element require consideration. The director disqualification system also only applies to a small proportion of failed companies where there have been sufficiently serious failings. Other directors may benefit from rehabilitative education, a point we consider further at 2(d). 3) There are also concerns that prepacks can enable businesses to start afresh without addressing underlying weaknesses, as discussed below at 2(e). 4) A further source of criticism is the manipulation of the corporate form by rogue traders,¹² potentially enabling them to repeatedly walk away from debts and start again, discussed at 2(f).

This paper is the first to consider in detail how responsible directorship 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 outlines a programme of remedial education for directors alongside the disqualification system and considers how this might be structured, including 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. It further considers how an education programme might be offered optionally where companies have failed. The paper will draw upon insights from adult educational theories and studies from other contexts in the UK and other countries as to how remedial education, including debtor education, can be developed. A suggested training approach appears in the Appendix.

¹¹ Hansard HC Deb (14 June 2023) Vol 734, col 163. E Ghio and D Thomson, ‘Is insolvency stigmatised?’ (2023) 32 IIR 397, 416–418, noting a potential lack of education regarding ways in which struggling companies can get help.

¹² Hansard HC Deb (14 June 2023) Vol. 734, col 172; J Jennings, ‘Consumers – the Unwitting Victims of Corporate Abuse: Holding Rogue Directors to Account in the Closely-held Company’, (PhD thesis, University of Leicester 2018).

As economic conditions are difficult for companies in the wake of global conflict, Brexit and the increase in employer's National Insurance, it is timely and important to consider these issues. They can both bolster market integrity and support nascent enterprise. Primarily we consider in this regard the directors of smaller companies, as they will typically be those who are disqualified and may find the current law complex and difficult to apply. We do not consider additional measures that would tackle deeper corporate governance problems involving highly qualified or experienced directors, as these raise different complexities that are beyond this paper.¹³

2. CURRENT POSITION

(a) Disqualification as a limited tool of market integrity

There are few legal barriers to becoming a company director. The easiest way in for many is to set up a company. This can be done 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 adult¹⁴ of full capacity is to become a company director, the most common restrictions arise in the context of disqualifications. These arise under the Company Directors Disqualification Act 1986 (CDDA 1986), which was enacted to instil market morality as the state was rolled back and the private sector rose.¹⁵ The CDDA was itself a consolidating statute and it has been amended significantly over the years as additional grounds for disqualification have been added.¹⁶ Company directors can be disqualified by

¹³ J Loughrey, 'Smoke and mirrors: disqualification, accountability and market trust' (2015) 9 Law & Fin Mkt Rev 50 notes that disqualification is ineffective in bringing accountability in financial and publicly traded companies. She highlights that there are other accountability issues in these contexts.

¹⁴ Persons under the age of 16 cannot be validly appointed: CA 2006, s 157.

¹⁵ Halliday and Carruthers, above n 2.

¹⁶ The Act has been frequently amended: Westlaw UK Analytics lists 50 amending statutes and statutory instruments. Further changes are due to be implemented under the Economic Crime and Corporate Transparency Act 2023, s 31.

order or undertaking¹⁷ on various grounds including unfitness,¹⁸ influencing unfit conduct,¹⁹ competition infringements,²⁰ tax avoidance,²¹ wrongful or fraudulent trading,²² and various civil and criminal grounds grouped under a heading of ‘general misconduct in connection with companies’.²³ Disqualification applies automatically in various situations of personal insolvency.²⁴

None of these grounds for disqualification gives rise to large numbers of people being disqualified. In 2022/3 there were 932 directors who were newly disqualified under the CDDA, with the greatest additional numbers arising in the personal insolvency context.²⁵ The number of persons who are ineligible to become company directors is therefore small, particularly given the 1.1 million companies in the UK,²⁶ each of which must have at least one human director,²⁷ with around 10,000 to

¹⁷ CDDA 1986, s 1A, 5A, 7, 8ZC and 8ZE.

¹⁸ CDDA 1986, ss 6 and 8.

¹⁹ CDDA 1986, s 8ZA.

²⁰ CDDA 1986, s 9A et seq.

²¹ CDDA 1986, ss 8ZF and 8ZG.

²² CDDA 1986, s 10.

²³ CDDA 1986, ss 2-5A.

²⁴ CDDA 1986, s 11(2)(a)-(d), s 12.

²⁵ In 2023 there were 1582 bankruptcies and 29,300 Debt Relief Orders, as well as 250 individuals having entered bankruptcy or debt relief restrictions orders and undertakings. 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 10 March 2025.

²⁶ Department for Business and Trade, *Business Population Estimates for the UK and Regions 2023: Statistical Release* (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 10 March 2024.

²⁷ CA 2006, ss 154-155. Public companies must have at least two directors: s 154(2).

25,000 insolvencies registered per year.²⁸ Therefore, virtually anyone can be a company director. Qualification is to be lost, rather than gained. The UK, in common with other countries including Australia,²⁹ 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.³⁰ It is largely left to the company to decide whether a person is to become and remain as a director.³¹

Suggestions that a more restrictive approach might be taken have been consistently rejected, since the majority of companies are honestly and conscientiously managed.³² 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.³³ We agree that a pre-qualification approach if a person is to

²⁸ Insolvency Service, *National Statistics Commentary - Company Insolvency Statistics October to December 2023* (30 January 2024), available at <https://www.gov.uk/government/statistics/company-insolvency-statistics-october-to-december-2023/commentary-company-insolvency-statistics-october-to-december-2023> accessed 10 March 2024.

²⁹ 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 10 March 2025.

³⁰ For example, a suggestion that directors should qualify through investment was rejected by the *Report of the Company Law Amendment Committee, Chairman Wilfred Greene MR*, Cmd 2657 (1925–6), para 53.

³¹ See e.g. Companies House, *Model Articles for Private Companies Limited by Shares* (18 September 2018), para. 17.

³² Greene Committee, above n 30; 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. V Finch, 'Company directors: who cares about skill and care' (1992) 55 MLR 179, 202.

³³ 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

become a director could potentially discourage enterprise and unduly delay innovations coming to market. Rather in this paper we focus on after the event remedial training particularly to strengthen the disqualification system but also to support directors of failed companies who wish to try again.

(b) Limited accessibility of the law

The codification of directors' duties in the CA 2006 was intended to improve the accessibility of the law and might have militated against a need for education.³⁴ The limitations of codification as a means of accessibility are still notable, however.³⁵ Whilst the CA 2006 is easily located online, it is also 1300 sections long with 16 Schedules and regard must still be had to case law in interpretation and application.³⁶ The Act's length partly arises because it is a statute which applies to both the largest and the smallest companies. It sits alongside tax, employment and other legislation as the regulatory burden that companies are subject to.

The 2006 Act codified the common law duty to promote the success of the company, finessed into the complex and subjective 'enlightened shareholder' approach in s 172.³⁷ Potential inaccessibility is particularly acute in the context of insolvency, where CA 2006, s 172(3), 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.' Duties in insolvency therefore remain as part of the common law, reflecting that this aspect of law was still evolving at the

(Transparency and Trust Response).

³⁴ Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Completing the Structure* (Department of Trade and Industry, 2000), para.3.3.

³⁵ See D Ahern, 'Directors' duties, dry ink and the accessibility agenda' (2012) 128 LQR 114-139.

³⁶ CA 2006, s 170(4).

³⁷ Limitations of which are discussed in the Institute of Directors IOD, *Better Business Act* (2023), available at <https://betterbusinessact.org/wp-content/uploads/2023/05/The-Better-Business-Act-Overview.pdf>, accessed 4 December 2024.

time of the 2006 Act, and still is, under the influence of the Australian High Court case of *Walker v Wimborne*,³⁸ and a clear position was yet to emerge in the UK. More recently it was confirmed by the Supreme Court in *BTI 2014 LLC v Sequana SA*,³⁹ 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’.⁴⁰ 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, particularly for inexperienced directors. Knowing when the shift to considering creditors is triggered can be difficult,⁴¹ except possibly with the benefit of hindsight.⁴² The shift can complicate decisions where companies are facing problems that skill can avert⁴³ and concerns as to liability can potentially have a chilling effect.⁴⁴ Paradoxically, the directors best placed to obtain guidance on this law from advisors are also the ones often most insulated by D&O insurance.⁴⁵

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 benefit others,⁴⁶ effectively as a proxy for professional advice and information for those who have failed

³⁸ [1976] 137 CLR 1, paras 6-7.

³⁹ [2022] UKSC 25.

⁴⁰ *Supra* at [203], [207], [231] and [247].

⁴¹ A Keay, ‘Financially distressed companies, restructuring and creditors’ interests’ [2019] LMCLQ 297, 300-301.

⁴² A 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.

⁴³ Although it may also lead to risk taking

⁴⁴ Keay, above n 41, 301.

⁴⁵ Kastrinou and others, above n 9.

⁴⁶ See Ahern, above n 35, 123.

to acquire sufficient self-directed learning.

(c) Director education

A broader director education requirement had previously been considered in the Department for Business, Innovation and Skills discussion paper *Transparency and Trust* in July 2013.⁴⁷ 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.⁴⁸ There was also discussion of more general communication to directors of their duties. Whilst there was support in consultation responses for greater clarity in communicating duties to directors, this did not extend to supporting a requirement of training or qualifications for directors, on grounds that it would add costs and could deter entrepreneurship.⁴⁹ Rather, an approach of informing directors of their duties at the start of their role was preferred. Surprisingly, this approach was preferred to the proposed remedial education add-on to disqualification which had been included in the discussion paper.⁵⁰ Providing comprehensive guidance to *all* directors arguably does not eliminate a need to provide remedial 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.

Despite the 2014 review favouring an informative approach there is limited official information for startups as to duties.⁵¹ The Companies House website links to a concise list of responsibilities and a

⁴⁷ *Transparency and Trust*, above n 3.

⁴⁸ In some other contexts, training is offered as an alternative to a ban e.g. in relation to driving offences.

⁴⁹ *Transparency and Trust*, above n 3, para 187.

⁵⁰ *Transparency and Trust Response*, above n 33, para 188.

⁵¹ There is however good information provided to directors at the point of insolvency under the Insolvency Service's Information Hub, explaining what insolvency is, what the options are and recommending that the advice of an insolvency practitioner is sought. Insolvency Service, 'Director Information Hub', (7 July 2023)

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.⁵² This is unfortunate given the high failure rate for startups.⁵³ The approach is notably more limited than, for example, that of the Australian Securities and Investment Commission (ASIC), which provides clearer information about a greater range of directors' obligations as well as clarity about education and enforcement strategies.⁵⁴

There are other training possibilities. Lady Arden JSC noted in the *Sequana* case that directors can without much difficulty obtain training as to what their responsibilities are and what the consequences will be if they disregard them.⁵⁵ There are optional educational and training resources available for those who are interested in business, from business education in schools to MBAs, although typically focusing more on entrepreneurial skills than legal frameworks applicable to such activities.⁵⁶ The

website available at <https://www.gov.uk/guidance/director-information-hub-insolvency>, accessed 25 February 2025.

⁵² Gov.uk, 'Running a limited company: your responsibilities', website available at <https://www.gov.uk/running-a-limited-company>, accessed 10 March 2025. See further Kastrinou and others, above n 9

⁵³ For example, Experian estimate that half of all new businesses fail within the first three years. R Goodman, 'Half of All New Businesses Fail within Three Years of Opening' (Experian 5 October 2023) available at <https://www.experianplc.com/newsroom/press-releases/2023/half-of-all-new-businesses-fail-within-three-years-of-opening>, accessed 25 February 2025.

⁵⁴ See e.g. ASIC, 'Your Company and the Law', available at <https://asic.gov.au/for-business/running-a-company/company-officeholder-duties/your-company-and-the-law>, accessed 10 March 2025.

⁵⁵ *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, para 304.

⁵⁶ For example, Young Enterprise, website available at <https://www.young-enterprise.org.uk/>, accessed 10 March 2025; Prince's Trust, 'Support for Starting A Business', website available at <https://www.princes-trust.org.uk/how-we-can-help/support-starting-business>, accessed 10 March 2025; Advance HE, 'Framework for Enterprise and Entrepreneurship Education' available at <https://www.advance-he.ac.uk/knowledge->

Institute of Directors has introduced a ‘chartered director’ designation enabling chartered directors to distinguish themselves from others. More generally, entrepreneurship education is a growth area of higher education,⁵⁷ although there has been scepticism about the approaches which presently dominate⁵⁸ and highly educated directors can still be involved in corporate scandals.⁵⁹ Nonetheless, options are available for directors who are proactively aiming to gain knowledge of the technical legal requirements associated with the role.⁶⁰

Those who fail to take a proactive approach to training can still in most instances be effective company directors. Through operating their companies, they will acquire significant levels of ‘informal learning’,⁶¹ 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’⁶² such as insights, wisdom and motor skills.

[hub/framework-enterprise-and-entrepreneurship-education](#), accessed 10 March 2025.

⁵⁷ S Norton and L Seer, *Embedding Enterprise and Entrepreneurship in Higher Education: An Advance HE Case Study Collection* (30 March 2023), 2.

⁵⁸ M Parker, *Shut Down the Business School* (Pluto, 2018).

⁵⁹ KR Gray and GW Clark, ‘Addressing corporate scandals through business education’ (2002) 19 *Journal on World Peace* 43, 43-44.

⁶⁰ On 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* 349, 351-353.

⁶¹ VJ Marsick and KE Watkins, ‘Informal and incidental learning’, in *The New Update on Adult Learning Theory: New Directions for Adult and Continuing Education* (Jossey Bass 2001); VJ Marsick and KE Watkins, *Informal and Incidental Learning in the Workplace* (Routledge 1990).

⁶² M Polanyi, *Personal Knowledge. Towards a Post Critical Philosophy* (London: Routledge, 1958).

Knowledge, skills and attitudes⁶³ are acquired through informal experiential learning⁶⁴ processes, based on running businesses as well as interaction with external stakeholders, such as customers, suppliers and lenders.⁶⁵ A company's failure does not, of course, necessarily indicate weaknesses in learning gained through these less formal approaches. That said, the main focus of this paper is on how rehabilitative training can complement existing post event approaches. These are often technical details of company law, such as the *Sequana* case, which would not normally be acquired through informal learning, certainly where directors do not have ready access to professional advice and information through a retained law firm, in house lawyer or other means. Directors may consult professionals where a proposed course of action or set of circumstances demands it, even if they do not take otherwise steps to acquire knowledge of their duties as director. Indeed, a director who recognises the limitations of their own knowledge and seeks advice is also demonstrating a good level of competence.⁶⁶

(d) Scope of Disqualification

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

⁶³ A framework popularly used to assess an individual's qualifications and potential for success in a particular field.

⁶⁴ DA 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.

⁶⁵ AA Gibb, 'Small firms' training and competitiveness. Building upon the small business as a learning organisation' (1997) 15 *International Small Business Journal* 13.

⁶⁶ Arguably if a director sought help and considered and, if appropriate, acted on advice given this 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. See further *Re BHS Group Ltd, Wright v Chappell* [2024] EWHC 2166 (Ch), para 906.

to a wide variety of specialist professions.⁶⁷ Permission may be obtained for such involvement in limited circumstances.⁶⁸ Disqualification is not intended to prevent a businessperson from earning a living. By its nature, disqualification reflects the risk that past failings may be repeated in future, and that the position of a company director, is 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.⁶⁹

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,⁷⁰ to limit risk and to encourage higher standards⁷¹ by providing an example to others.⁷² Given this latter function, a key question is therefore how disqualification is perceived by prospective entrepreneurs. Unknown rules have no 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,⁷³ despite registrations of existing disqualifications and undertakings and publicity regarding new instances of

⁶⁷ 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. Disqualifications in relation to activities such as in relation to schools, forestry and coastguards appear in numerous statutory instruments. See Tiran Neressian (ed), *Mithani: Directors' Disqualification* (Butterworths LexisNexis, looseleaf first published in 1998), Div V, Ch 3K, hereafter '*Mithani*', for a very detailed list.

⁶⁸ CDDA 1986, s 17.

⁶⁹ A von Hirsch and M Wasik, 'Civil disqualifications attending conviction: a suggested conceptual framework' (1997) 56 CLJ 599, 609.

⁷⁰ In *Re Grayan Building Services Ltd* [1995] 2 WLR 1, 15

⁷¹ *Re Swift 736 Ltd* [1993] BCLC 896, 899; *Re Grayan Building Services Ltd* [1995] Ch 241, 253.

⁷² *Re Blackspur Group Plc* (No.2), *Secretary of State for Trade and Industry v Davies* (No.2) [1998] BCC 11, 15.

⁷³ Williams, above n 4.

directors who have been disqualified.⁷⁴ Director disqualification may not, therefore, be a significant factor in raising standards,⁷⁵ 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,⁷⁶ such as the programme proposed in this paper. Disqualification restricts involvement in company management for a limited period, up to 15 years.⁷⁷ 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.⁷⁸

⁷⁴ See e.g. Insolvency Service, Disqualification Outcomes: Summary of Results, website available at <https://www.insolvencydirect.bis.gov.uk/IESdatabase/viewdirectorssummary-new.asp>, accessed 10 March 2025. Regular news items regarding fresh disqualifications appear at Gov.uk, 'Company Closure, Administration, Liquidation and Insolvency' under the 'News and Communications' heading, website available at <https://www.gov.uk/business-and-industry/company-closure-administration-liquidation-and-insolvency>, accessed 10 March 2024.

⁷⁵ Loughrey, above n 13.

⁷⁶ A Walters, 'Disqualification of those engaged in management' in Barry Rider (ed), *Research Handbook on International Financial Crime* (Edward Elgar, 2015), 716.

⁷⁷ A lengthy period but lenient in comparison with the lifetime bar power of the United States Securities and Exchange Commission. See JW Barnard, 'Rule 10b-5 and the Unfitness Question' (2005) 47 *Ariz L Rev* 9.

⁷⁸ M Jhugursing, V Dimmock and H Mulchandani, 'Error and root cause analysis', (2017) 17 *BJA Education* 323–333, <https://doi.org/10.1093/bjaed/mkx019>.

A remedial educational approach can be of benefit beyond director disqualification. As noted, only sufficiently serious conduct leads to disqualification. 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,⁷⁹ and a need for rehabilitation is possibly wider and could be expanded to be an option for all directors of failed companies, as we also consider below. Firstly, we briefly consider two long standing problems and evaluate how far an educational approach can ameliorate them.

(e) Prepacks

One concern that education might address relates to some prepacks, specifically those where the weaknesses of the original business are inherited by successor businesses.⁸⁰ 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.⁸¹ Indeed one of the main objectives of the CDDA 1986 was to deal with the ‘phoenix’ problem of people who carried on business through a succession of companies, setting

⁷⁹ J 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: J 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 serious enough to amount to a finding of unfitness or because there is not a strong enough case. See further *Mithani*, above n 67, paras 431EA to 438A.

⁸⁰ For a recent review see B Adebola, ‘Transforming perceptions: the development of pre-pack regulations in England and Wales’ (2023) 43 OJLS 150-177.

⁸¹ 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] JBL 224

up a new company whenever the old company failed.⁸²

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. Legislative attention has been paid to sales to connected parties,⁸³ which had been found to have higher failure rates than sales to outsiders.⁸⁴ The Graham Review had recommended 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.⁸⁵ A 2020 government report 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.⁸⁶ Our approach would strengthen this forensic approach by employing a root-cause analysis of the failed business, a reflective element which we return to below.

(f) Rogue Traders

A further longstanding problem is abuse of the corporate form by rogue traders as a way of evading their liabilities, particularly given austerity measures which have limited the ability of local councils to

⁸² See, C Bradley, 'Enterprise and entrepreneurship: the impact of director disqualification', (2001) 1 JCLS 53.

⁸³ Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 (SI 2021/427).

⁸⁴ S Frisby, 'The second-chance culture and beyond: some observations on the pre-pack contribution', (2009) 3 Law and Financial Markets Review 242, 243.

⁸⁵ Teresa Graham, *Graham Review into Pre-pack Administration: Report to the Rt Hon Vince Cable* (June 2014) available at <https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration>, accessed 25 February 2025.

⁸⁶ Insolvency Service, *Pre-pack Sales in Administration Report* (8 October 2020), available at <https://www.gov.uk/government/publications/pre-pack-sales-in-administration/pre-pack-sales-in-administration-report>, 5.2, accessed 25 February 2024.

pursue wrongdoers.⁸⁷ 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 were prompted by public anxiety over this issue which in turn may have been impacting on levels of trust in the market.⁸⁸ More recently the *Transparency and Trust* Discussion Paper, argued that there was a need to pursue rogue 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’.⁸⁹

Admittedly a cultural change to the behaviour of rogue traders may be difficult to achieve as part of a remedial education programme. There are some 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,⁹⁰ including those sentenced on account of white-collar crime.⁹¹ There might be some overlap between the conduct of the white-collar 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

⁸⁷ Hansard HC Deb (14 June 2023) Vol. 734, col 172; Jennings, above n 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).

⁸⁸ Although proposals for automatic disqualification were abandoned. On the background to the 1986 Act including concerns around rogue directors see Halliday and Carruthers, above n 2.

⁸⁹ Transparency and Trust, above n 3, 7.

⁹⁰ R Bozick et al, ‘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; L Erickson, ‘Reducing recidivism through correctional education: the roles of neoclassical and behavioral economics’ (2018) 25 *Policy Perspectives* 22.

⁹¹ J Lott, ‘Do we punish high income criminals too heavily?’ (1992) 30 *Economic Inquiry* 583.

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, as has long been argued.⁹²

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. They may be 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.⁹³ One tool which is aimed at addressing the requirements of older learners and a key feature of the suggested approach is a root-

⁹² Halliday and Carruthers, above n 2, 382 highlighted concerns that the ‘inability to control unethical and dishonest directors represented a failure of criminal and commercial law’.

⁹³ S Shillingford and NJ 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, discussing motivations of adult learners to attend college, admittedly a different context from the potential programme considered here.

cause analysis of the reasons for business failure, which we propose be produced along with an evaluation of what might be done differently as part of the upskilling process.⁹⁴ 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.

(a) 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 is the speed awareness course. These comparatively short rehabilitative educational interventions have been found to reduce reoffending by drivers.⁹⁵ 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,⁹⁶ 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.⁹⁷ The

⁹⁴ Jhugursing, above n 78.

⁹⁵ Ipsos MORI, G 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 25 February 2025.

⁹⁶ P Wymenga et al, *Bankruptcy and Second Chance for Honest Bankrupt Entrepreneurs* (European Commission, 31 October 2014), 59, available at <https://op.europa.eu/en/publication-detail/-/publication/24f281f2-9b0a-44d0-8681-af8bd7657747>, accessed 24 February 2025. See also European Consumer Debt Network, 'Debt advice and counselling' website available at <https://ecdnet.eu/knowledge/debt-counseling/>, accessed 25 February 2025.

⁹⁷ 11 USC, s 109(h). The requirement applies to filings by individuals under USC, Title 11, Chapter 7

aim of this programme is to increase fiscal responsibility and decrease bankruptcy filing rates through informing debtors as to alternatives,⁹⁸ implicitly presuming that either all debtors would benefit from it, or at least that none would be harmed by it.⁹⁹ Similarly, in Canada, where mandatory counselling is required prior to a discharge from bankruptcy,¹⁰⁰ the approach was established to foster rehabilitative behaviour modification and reduce bankruptcy filing rates.¹⁰¹

Interesting approaches in Europe offer coaching for failed entrepreneurs, normally through voluntary organisations in partnership with banks and other organisations.¹⁰² A notable example is the French

(liquidation), Chapter 11 (reorganisation), Chapter 12 (family farmers or fishermen) or Chapter 13 (adjustment of debts of a debtor with a regular income).

⁹⁸ DA Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton University Press 2001), 207-8.

⁹⁹ J 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.

¹⁰⁰ 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.

¹⁰¹ RE Berry & SLT 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.

¹⁰² See some examples in P Wymenga et al, *Bankruptcy and a Second Chance for Honest Bankrupt Entrepreneurs, Annex VI: Summarised Country Reports* (European Commission, 31 July 2014) 16, 59, 157 available at <https://op.europa.eu/en/publication-detail/-/publication/b773253b-9a05-449f-8730-5605edb47a56/language-en>, accessed 25 February 2025. See also P 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 25 February 2025. See Le Portail du Rebond des Entrepreneurs, website available at <https://portaildurebond.eu/>, accessed 10 March 2025, a French umbrella group for organisations which support entrepreneurs who are in financial difficulties or who have experienced an insolvency.

‘60.000 Rebonds’ initiative,¹⁰³ a voluntary organisation which takes its name from the number of liquidations in France in a typical year.¹⁰⁴ It is one of several organisations that offer coaching for up to two years to support entrepreneurs who have suffered a failure. It assisted 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 built upon in designing the proposed course.¹⁰⁵ A Swedish budget and debt counselling programme is another European example offered as part of welfare provision and in a qualitative study 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.¹⁰⁶ In both the French and Swedish cases the coaching or counselling is separate from the bankruptcy process which avoids one paradox, evident in other systems, where the education is provided by a trustee of a repayment plan,¹⁰⁷ 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.¹⁰⁸

The Canadian mandatory debt counselling is a longstanding approach which was subject to a positive review in 2013, finding strong levels of positive changes in financial behaviour among those who had

¹⁰³ See website available at <https://60000rebonds.com/>, accessed 10 March 2025.

¹⁰⁴ See further J 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.

¹⁰⁵ See further Cusin, above n 104.

¹⁰⁶ J Callegari, P Liedgren, C Kullberg, ‘Between self-determination and advice: sense-making and justifications in Swedish budget and debt counselling’, (2023) 53 *Br J Soc Work* 882, <https://doi.org/10.1093/bjsw/bcac162>.

¹⁰⁷ Braucher, above n 99, 579, an empirical study of Chapter 13 debt counselling. Chapter 13 plans typically operate over three to five years and bear some similarity to UK company voluntary arrangements.

¹⁰⁸ Callegari, above n 106, (showing different factors to be reconciled by debt counsellors); Braucher, above n 99, (identifying weaknesses in a trustee-led approach).

received the counselling.¹⁰⁹ 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 not addressed in the training.¹¹⁰

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.... 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.¹¹¹ 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. Although helpful in some instances, some cases require longer term support to bring about

¹⁰⁹ 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 25 February 2025.

¹¹⁰ Industry Canada, above n 110, para 3.1.1. See also Sue LT McGregor, 'Tailoring bankruptcy insolvency education to ensure solvency literacy' (2020) 31 JFCP 55-68.

¹¹¹ There was strong support for greater education in the UK country report provided in Wymenga, above n 102, 4.8 and 4.9.

behaviour changes¹¹² and there is also criticism of mandatory counselling.¹¹³ 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.¹¹⁴ Although those who had training had a slightly higher rate of plan completion there were also other factors that contributed to plan completion.¹¹⁵ For many, the mandatory counselling requirement at the filing stage can come too late to be helpful.¹¹⁶

These examples would give support for an educational intervention that was empowering, rather than something that might resemble education as punishment. The 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.

(b) Who might benefit?

There would not necessarily be a neat overlap between directors who are disqualified and those who

¹¹² AC Lyons, T White and S Howard, *The Effect of Bankruptcy Counseling and Education on Debtors' Financial Well-Being: Evidence from the Front Lines* (Houston: Money Management International), 2008.

¹¹³ I Ramsay, 'Mandatory bankruptcy counseling: the Canadian experience' (2001) 7 *Fordham J Corp & Fin L* 525.

¹¹⁴ Braucher, above n 99, 579. Plans would typically operate over three to five years and bear some similarity to UK company voluntary arrangements.

¹¹⁵ Braucher, above n 99, 579.

¹¹⁶ M Sousa, 'Just punch my bankruptcy ticket: a qualitative study of mandatory debtor financial education' (2013) 97 *Marq L Rev* 391, 398-99.

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(d) we consider how the programme could be brought into the 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 experience indicates the futility of trying to teach adults what they don't want to learn.¹¹⁷ We consider at 3(d) how the system could be designed to create greater engagement through programme design.¹¹⁸

As we have noted 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. The period post-failure can be 'fraught with psychological, social, and financial turmoil',¹¹⁹ with impacts on relationships and diminished risk-taking instincts.¹²⁰ Whilst some will emerge from this experience having learned valuable lessons, others will suffer negative emotions that hinder a new start.¹²¹ 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

¹¹⁷ S Block-Lieb, K Gross & RL Wiener, 'Lessons from the trenches: debtor education in theory and practice' (2001) 7 *Fordham J Corp & Fin L* 503, 523,

¹¹⁸ In the interests of space we do not consider classroom strategies, such as reflective learning, which can also generate good engagement among adult learners. See e.g. EM Boyd & AW Fales, 'Reflective learning: key to learning from experience' (1983) 23 *Journal of Humanistic Psychology*, 99-117.

¹¹⁹ D Ucbasaran et al, 'Life After business failure' (2012) 39 *Journal of Management* 163, 163.

¹²⁰ J Cope, 'Entrepreneurial learning from failure: an interpretative phenomenological analysis' (2011) 26 *Journal of Business Venturing* 604-623, 611-612; J van Kesteren, J Adriaanse & J-P van der Rest, 'The story behind bankruptcy: when business gets personal' (2017) 17 *QUT L Rev* 57 (interviews with entrepreneurs identified emotions similar to grief in the loss of a business).

¹²¹ DA Shepherd, 'Learning from business failure: propositions of grief recovery for the self-employed'. (2003) 28 *Academy of Management Review* 318-328.

learning processes discussed at 2(c) 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 structured support for entrepreneurs to start again after failure.¹²² There are mentoring examples in the UK, notably Mentorsme,¹²³ which we could be a supplement to, or alternative to, the proposed education programme. For others the programme 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 the text accompanying footnote 110. 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.

(c) Design of a director education system

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'¹²⁴ and the development of a culture of responsible directorship, taking account of

¹²² See further Cusin, above n 104.

¹²³ See website available at <https://www.mentorsme.co.uk/>, accessed 10 March 2025.

¹²⁴ E Stam, D Audretsch & J Meijaard, 'Renascent entrepreneurship' (2008) 18 J Evol Econ 493, <https://doi.org/10.1007/s00191-008-0095-7>

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.¹²⁵ A suggested 'theory of change' has been developed by reference to existing educational adult education theories, discussed below, to articulate how and why a programme might lead to rehabilitative outcomes. Importantly, here there would be different starting points for different kinds of directors. 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 focus might be on 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 1.¹²⁶

<INSERT TABLE 1 NEAR HERE>

¹²⁵ A common concern with financial education programmes: JM Collins and CM O'Rourke, 'Financial education and counseling—still holding promise' (2010) 44 *Journal of Consumer Affairs* 483, 488. <https://doi.org/10.1111/j.1745-6606.2010.01179.x>

¹²⁶ The impact column refers to Insolvency Service, *The Insolvency Service Strategy 2021 to 2026* (Corporate Report, 10 September 2021), available at <https://www.gov.uk/government/publications/the-insolvency-service-strategy-2021-to-2026/the-insolvency-service-strategy-2021-to-2026>, accessed 10 March 2025. The table is based on the template available at https://assets.publishing.service.gov.uk/media/6582e6a223b70a000d234d00/Theory_of_change_model_template_December_2023.docx, accessed 10 March 2025.

Field Code Changed

Table 1 shows a Theory of Change for the suggested programme. As discussed, it 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 serve Insolvency Service objectives.¹²⁷ 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.¹²⁸ 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 could be done in person over 6 hours. The directors' duties element is of a similar duration to commercially-available training on directors' duties¹²⁹ and the reflective element is designed to take place over the second day and

¹²⁷ Insolvency Service Strategy, above n 126.

¹²⁸ See e.g. DL Reinholz and TC Andrews, 'Change theory and theory of change: what's the difference anyway?' (2020) 7 IJ STEM Ed 2.

¹²⁹ For example, The Chartered Governance Institute UK and Ireland has 6 CPD hours for the course 'Directors and their duties', see website available at <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 the course

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,¹³⁰ 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.¹³¹ The 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.¹³² 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 approaches suitable for adult learners to be adopted, recognising that not all adult learners will be the same. The proposed director education programme considers:¹³³

'Directors' duties & liabilities: what you need to know', see website available at <https://www.bpp.com/courses/professional-development/directors-duties-liabilities-what-you-need-to-know>, accessed 10 March 2025. Both presently discuss directors' duties without a reflective element. The Institute of Directors has a programme 'Role of the director and the board' covering the role of a director more broadly for 14 CPD hours, see website available at <https://www.iod.com/professional-development/open-courses/role-of-the-director-and-the-board/>, accessed 10 March 2025

¹³⁰ Industry Canada, above n 110, para 3.2.1 and Table 3.

¹³¹ Wymenga, above n 102, 4.8.

¹³² Cusin, above n 104, para 31.

¹³³ Adapting the approach in MS Knowles, *The Modern Practice of Adult Education: From Andragogy to*

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. This analysis would 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.¹³⁴

The root-cause analysis would involve consideration of 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.¹³⁵ 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 own experiences in the root-cause analyses.

Experience from the 60000 Rebonds reflective exercises suggests that sessions should primarily be helpful and respectful rather than overly critical to avoid limits of aggressive

Pedagogy (Cambridge: Adult Education, 1980).

¹³⁴ Cusin, above n 104, para 38.

¹³⁵ Jhugursing, Dimmock and Mulchandani, above n 78.

confrontation.¹³⁶ 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.¹³⁷

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.

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.

¹³⁶ Based on the experiences of participants in a French Exchange and Development Groups under 60000 Rebonds: Cusin, above n 104, paras 39-44.

¹³⁷ Cusin, above n 104, para 37.

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 challenges¹³⁸ and completion of the programme could improve survival prospects for new ventures.¹³⁹

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 punitive or to stigmatise failure as this could inhibit future entrepreneurship.¹⁴⁰ The 60000 Rebonds reflective exercises effectively operate on an egalitarian basis between facilitators and participants, which encourages a climate of trust and free speaking,¹⁴¹ but also necessitates the helpfulness and respectfulness mandate mentioned above.

There are also some who believe that adults are internally motivated and self-directed,¹⁴² 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

¹³⁸ J Freeman, GR Carroll and MT Hannan. 'The liability of newness: age dependence in organizational death rates' (1983) 48 American Sociological Review 692–710.

¹³⁹ PA Geroski, J Mata and P Portugal, 'Founding conditions and the survival of new firms' (2010) 31 Strategic Management Journal 510, 515-516.

¹⁴⁰ Stam, above n 124.

¹⁴¹ Cusin, above n 104, paras 39-42.

¹⁴² Based on Knowles, above n 133.

suitable for the proposed educational intervention for directors. 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 would 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 participants can be kept engaged.

(d) Challenges of gaining engagement

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 pinpoint past mistakes to be avoided in future. Another 'carrot' to encourage engagement could be the award of responsible director 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,¹⁴³

¹⁴³ The 60000 Rebonds programme offers financing support through partnerships with other organisations. Cusin, above n 104, paras 49-50.

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 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,¹⁴⁴ 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)¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷

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,

¹⁴⁴ M Welsh and H Anderson, ‘Director restriction: an alternative to disqualification for corporate insolvency’ (2019) 37 Company and Securities Law Journal 23.

¹⁴⁵ *Re Grayan Building Services Ltd* [1995] 2 WLR 1.

¹⁴⁶ See eg *Re Manlon Trading Ltd* [1996] Ch 136, CA.

¹⁴⁷ See further *Mithani*, above n 67, at VI[145]-[146] suggesting that there is no known case where a training condition has been imposed by the court.

as some directors of failed companies will have good levels of existing knowledge. 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.¹⁴⁸ Such directors may have doubts about their business skills and examples of successful entrepreneurs who have had previous failures can be used as illustrations,¹⁴⁹ alongside the programme's 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 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.

¹⁴⁸ Welsh and Anderson, above n 144.

¹⁴⁹ Building on the findings of X Lin-Siegler, et al, '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, regarding an educational model that modelled how scientists achieve through success and failure, albeit used for 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: DJ Smith, 'Bankruptcy can be a means to economic justice and equality' (2022) 41 *American Bankruptcy Institute Journal* 36, 36.

Disqualification is one public policy response to failings of directors but applies only in a time-bound way, nor does it 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 disqualification, contributing to the raising of standards of director conduct. 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. Our proposals also do not consider larger company failures where there are different corporate governance issues to be addressed.

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 rehabilitative 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 elements in the following outline are discussed in more detail above.

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 enabling participants to reflect on their own experiences, as 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 be 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.

ASSESSMENT:

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 personal plan 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.