Summary of Statutory and Regulatory Requirements Relevant to College Governing Bodies

September 2013
SUMMARY OF STATUTORY AND REGULATORY REQUIREMENTS RELEVANT TO COLLEGE GOVERNING BODIES

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SUMMARY OF STATUTORY AND REGULATORY REQUIREMENTS RELEVANT TO COLLEGE GOVERNING BODIES

A. SCOPE OF PAPER

The paper that follows is written as a reference document and summarises many of the key legislative and regulatory requirements that impact upon English Colleges. These provide a fairly rigid and robust framework for compliance and accountability, which have helped to shape the character and size of the College sector over the decades since incorporation. Although the provisions of the Education Act 2011 permit Colleges much greater freedoms, including modifying non-core elements of their Instrument and Articles, the greater independence and autonomy being offered by Government are intended to increase their ability to compete effectively and flexibly in a changing marketplace. However, the College sector is diverse in terms of the relative size, profile, ‘success’ and aspirations of individual Corporations and their varying levels of engagement with Government’s ‘New Challenges, New Chances’ policy agenda enabled by the Education Act 2011 will only further increase this diversity.

A feature of the marketplace in recent years has been the emergence of ‘other’ providers of Further Education, with very different models of governance compared to the College sector, and very different cultures and ethos. In some cases these providers are filling market niches and in others they are in competition with Colleges. Unlike universities, the ‘College’ title is not currently protected in law, and the use (and misuse) of the term College by other providers has blurred boundaries. Furthermore, the increasing volume of higher education qualifications being delivered in Colleges and by other providers is altering the public perception and learners’ expectations, of Further Education.

Other providers are not necessarily subject to the same legislative and regulatory controls as Colleges. For example, a statutory provider of Further Education is obliged to offer its teaching staff membership of the Teachers’ Pension Scheme, whereas a private provider cannot enter its teaching staff into the Scheme; and a ‘for profit’ provider of Further Education operating primarily for commercial gain cannot claim the charitable reliefs and treatments afforded an incorporated College.

Other legislation applies equally across Colleges and other providers, such as health and safety, and data protection requirements.

This paper is not intended to be definitive in its scope, but rather to indicate the extent and impact of legislation and regulation in their broadest sense on Colleges.
B. LEGAL AND REGULATORY REQUIREMENTS

1. Further Education specific legislation and regulations: Incorporation, powers and machinery of government

1.1 Further Education-specific legislation and regulations: Incorporation, powers and machinery of government – Synopsis:

The powers of the Further Education College Governing Bodies are set out in sections 18 and 19 of the Further and Higher Education Act (FHEA) 1992, which has been amended by the Learning and Skills Act 2000, the Further Education and Training Act 2007, the 2008 replacement of Instrument and Articles orders, the Further Education Corporations (Former Further Education Colleges) (Modification of Instrument and Articles of Government) Order 2012, the Apprenticeships, Skills, Children and Learning Act 2009 and latterly the Education Act 2011.

1.2 Further Education specific legislation and regulations: Incorporation, powers and machinery of government – Further details

1.2.1 The Education Act, 2011

The Act relates largely to schools, but as a result of the Office for National Statistics (ONS) and National Audit Office (NAO) decisions to reclassify Colleges as being ‘in the public sector’, triggered significant changes to the regulatory and governance framework for Further Education and Sixth Form Colleges in England.

Whilst the Education Act 2011 did not change the principal powers of Colleges defined in the Further and Higher Education Act (FHEA), it did remove the requirements for:

- Consent of the ‘relevant body’ to form or invest in a company being used to conduct an educational institution or to provide education which is wholly or partly funded by the ‘relevant body’.
- Obtaining the prior consent of the ‘relevant body’ to borrowing by the College.

The ‘relevant body’ is the Skills Funding Agency (SFA- which replaced the LSC on 1 April 2012) in the case of Further Education Colleges; the relevant Local Authority and/or Education Funding Agency (EFA- established on 1 April 2012 as the Department for Education’s delivery agency for funding [revenue and capital] and compliance) in the case of Sixth Form Colleges.

a) Instrument and Articles of Government
Prior to the Education Act 2011, the Instrument and Articles of Government gave the Corporation the power to amend the College’s Instrument and Articles subject to the consent of the Secretary of State (FE Colleges) or YPLA, (now replaced by the EFA) (Sixth Form Colleges). This power was only used occasionally e.g. as a temporary measure in relation to mergers. The Act removed these powers from the Secretary of State/YPLA (now replaced by the EFA) and gave each Corporation the power to modify or replace the College’s Instrument or Articles as it deems appropriate and necessary, subject to compliance with an amended Schedule 4 of FHEA. This prescribed the following items be included in the Instrument and Articles:

- Corporation: number of members, eligibility for membership, staff/student members, parent members (Sixth Form Colleges only) and appointment of members.
- Provision about the procedures of the Corporation and the College, in particular how the Corporation may resolve for its dissolution and transfer of its property, rights and liabilities.
- Provision for there to be a Chief Executive and Clerk.
- Respective responsibilities of the Corporation, Chief Executive and Clerk. The responsibilities of the Corporation must include: the determination and periodic review of the educational character and mission of the institution and the oversight of its activities; and the effective and efficient use of resources, the solvency of the institution and the Governing Body and the safeguarding of their assets.
- Requirement that the Corporation publishes arrangements for obtaining the views of staff/students on the matters for which the Corporation are responsible.
- Provision permitting the Corporation to change its name with the approval of the Secretary of State.
- Provision specifying how the Corporation may modify or replace the Instrument or Articles, with a prohibition that any such changes must not result in the College ceasing to be a charity.
- Provision for copies of the Instrument and Articles to be available to members of the public, staff and students.
- Provision for the authentication of the application of the College seal.

b) **Power of intervention under the Education Act, 2011**

Under the Act the SFA powers transfer to the Secretary of State, who will also have a new power to give a direction to a Corporation requiring it to pass a resolution to dissolve the Corporation and transfer its assets and liabilities to a third party.

Whilst the Act **does not** require Colleges to do anything, the less prescriptive Instrument and Articles have given Colleges flexibility (commonly referred to as the ‘new freedoms’) over their governance arrangements e.g.
- Over the size of the Governing Body.
- How many, if any, committees it has. (N.B. The Funding Agencies do require Governing Bodies to have an Audit Committee.)
- Permitting the appointment of some Governors by a third party (useful as part of a collaborative venture or to facilitate ‘control’ by another body).
- Decide what exactly the Governing Body is responsible for, what it may delegate and to whom.
- Enter into collaborative arrangements and new structural models (e.g. federations, joint venture companies) without the requirement for the consent of the Secretary of State.
- ‘Convert’ to become companies limited by guarantee, in order to be part of formal group structures perhaps involving a:
  - University
  - Academy
  - Studio School
  - UTC
- Adopt models giving staff, students and other stakeholders a greater say in the running of the College.

It is important for Governors and managers to consider which, if any, of the new freedoms, governance and constitutional structures will best facilitate the achievement of their unique strategic plan and to understand and accept the new accompanying responsibilities.

c) **Merger and dissolution under the Education Act, 2011**

The power to dissolve a College, transfer its assets and liabilities to another body rested with the SFA (for Further Education Colleges) or the Secretary of State in consultation with the EFA (for Sixth Form Colleges). This power was most frequently used in relation to mergers and transferring College assets to a limited company (e.g. as part of a federal structure).

Now, under the **Education Act 2011**, Governing Bodies are empowered to dissolve the Corporation and transfer its assets and liabilities to another body. To do so legally, it must first:

- Publish the proposal details (and other information required by the regulations).
- Consult on the proposal and take account of the views expressed in line with the regulations.
- Notify the Secretary of State of the resolution and the dissolution date as soon ‘as reasonably practicable’.
- Clarify in the Instrument and Articles of Government exactly how a decision to dissolve and transfer assets can be progressed. (E.G. by calling a ‘special’ meeting where a specified percentage majority must be achieved if the proposal is to proceed.)
Having first done this, the Governing Body will be able to transfer the Corporation’s property, rights and liabilities to such person or body (WITH the consent of that prescribed person or body) with effect from the date of dissolution. If the ‘person’ or ‘body’ is not a charity, established for exclusively ‘educational charitable purposes’, then Governors need to understand that any property transferred must be done so ‘on trust’ and used exclusively for educational purposes.

1.2.2 ‘New Challenges, New Chances: Further Education and Skills System Reform Plan’, (Department for Business, Innovation and Skills (BIS) 1 December 2011)

Whilst neither legislation nor regulation, this is a key piece of Government policy impacting on our sector.

Government set out its vision for skills and what reforms the Further Education (FE) and Skills System would need to undergo in order to deliver those reforms in its document entitled ‘New Challenges, New Chances’ (NCNC).

The document explains what Government will fund and describes the plan of action to implement the required reforms of the Further Education and skills system for adults aged 19 and over in England. The document builds on Skills for Sustainable Growth.

The key elements of the reform process comprise:

- Placing students at the heart of the Further Education and skills system.
- First class advice delivered by the National Careers Service. *(Provision of information, advice and guidance to inform and stimulate demand supported by the provision of Lifelong Learning Accounts.)*
- A ladder of opportunity of comprehensive Vocational Education and training programmes. *(Including community learning, basic skills, Apprenticeships, Higher Vocational Education.)*
- Excellence in Teaching and Learning. *(Including establishing an independent commission to look at adult education and vocational pedagogy leading to a ‘sector owned’ strategy and facilitating an ‘independent review of professionalism in the Further Education and skills workforce.)*
- Relevant and focused learning programmes and qualifications. *(By improving awareness of the Qualifications and Credit Framework, consulting employers on qualification development and consulting on the role of National Occupational Standards.)*
- Strategic Governance for a dynamic Further Education sector. *(The new freedoms ‘removal of restrictions and controls on College Corporations’ facilitates new roles for Governors working with other post-14 learning educational providers, Local Authorities, Local Enterprise Partnerships (LEPs) etc. in developing delivery models tailored to their community.)*
• Freedoms and flexibilities. (By working with the SFA and Colleges on the further removal of ‘bureaucratic burdens’ and by setting funding priorities through a simplified, transparent and locally responsive funding system.)
• Empowered students making informed choices. (Via empowering students with access to quality information, less Government based quality information systems, timely action – intensive support, intervention - on failing provision.)
• Global Further Education. (Building on the ‘World Class Skills’ 2011 initiative.)

1.2.3 The Apprenticeships, Skills, Children and Learning Act, 2009

The Act received Royal assent in November 2009. The Act introduced a wide range of measures covering Apprenticeships, learning and skills and educational provision. Specifically it:

• Provided for a statutory framework for apprenticeships and created a right to an apprenticeship for suitably qualified 16-18 year olds.
• Introduced a right for employees to request time away from their duties to undertake training and placed a corresponding duty on employers to consider such requests seriously and to be able to refuse them only for specified business reasons.
• Dissolved the Learning and Skills Council (LSC) from 31 March 2010.
• Transferred the responsibility for funding education and training for 16-18 year-olds to Local Authorities.
• Made provisions with respect to the education of offenders.
• Created the Young Person’s Learning Agency (YPLA), now replaced with the Education Funding Agency (EFA), the Skills Funding Agency (SFA), a new regulatory body for qualifications (Ofqual) and a new agency to carry out the non-regulatory functions currently performed by the Qualifications and Curriculum Authority.
• Provided for Sixth Form Colleges to choose (based on their proportion of 16-19 learners and the ethos and nature of the College) whether or not to apply to the Secretary of State to be designated ‘Sixth Form College Corporations’. The Secretary of State could also convert a Sixth Form College Corporation into a Further Education Corporation. Sixth form College Corporations will have a ‘single commissioning and performance management relationship’ with their Local Authority.
• Placed a statutory responsibility on FECs and Sixth Form Colleges to ‘have regard, amongst other things, to the objective of promoting the economic and social well-being of the local area’; ‘local’ refers to the ‘locality’ of the College, and no definition of ‘well-being’ was provided.

1.2.4 Changes made to Corporations’ Instrument and Articles from 1 January 2008:

• Removed the specified categories in the composition of Further Education Corporations to increase the flexibility of Colleges to recruit Governors with the skills and knowledge to respond to their needs and
those of the community and provide Colleges with an increased level of autonomy.

- Increased the minimum number of student Governors from one to two. The Orders concerned were:
  
i) Further Education Corporations (Former Further Education Colleges) (Replacement of Instrument and Articles of Government) Order 2007;
  
ii) Further Education Corporations (Former Sixth Form Colleges) (Replacement of Instrument and Articles of Government) Order 2007 and

iii) Further Education Corporations (Former Voluntary Controlled Sixth Form Colleges) (Replacement of Instrument and Articles of Government) Order 2007.

1.2.5 **The Further Education and Training Act, 2007**

The Act enabled key aspects of the Further Education reforms contained in the White Paper ‘Further Education, Raising Skills, Improving Life Chances’. The Act:

- Proposed the transfer of the Secretary of State’s power to incorporate, dissolve and intervene (in prescribed circumstances, including underperformance and mismanagement) FECs to the LSC, although this transfer was never formally implemented (and the power remained with the Secretary of State).
- Allowed the Secretary of State to require all College Principals to achieve a stipulated leadership qualification (rather than just those appointed after commencement of S.137 of the Education Act 2002) before taking up a new post.
- Allowed the Privy Council to grant FECs powers to award their own foundation degrees, subject to certain restrictions.
- Placed a duty on FECs to have regard to guidance about consulting employers and learners.
- Clarified the power of FECs to form or invest in companies, or become members of charitable incorporated organisations, for the purpose of conducting an educational institution and with the consent of the LSC.
- Although this was overtaken by subsequent legislation prior to implementation, the Act provided for the restructuring of the LSC, placed new duties on the LSC regarding increasing choice and diversity in education and training and extended the LSC’s powers to design, develop and operate support services for educational institutions.

1.2.6 **S.161 of the Education and Inspections Act, 2006**

The Act amended the Education Act (2002) to extend the Secretary of State’s discretionary ‘power to innovate’ to Further Education Colleges. It enables the Secretary of State to temporarily (for up to three years) suspend or
modify education legislation that may be deemed to be holding back, or even stopping, innovative approaches to raising educational standards’.

1.2.7 **The Learning and Skills Act, 2000**

The 1992 Further and Higher Education Act was amended by the Learning and Skills Act, 2000, which removed the divisions between the responsibilities for the provision of Further Education in Colleges, work-based training and adult and community learning by establishing a new non-departmental public body responsible for all post-16 learning (other than Higher Education), the Learning and Skills Council (LSC). LSC took over functions performed by the Further Education Funding Council for England (FEFCE), the functions contracted by the Secretary of State to Training and Enterprise Corporations (TECs), and from Local Education Authorities (LEAs) their duties in respect of adult and community learning. LSC operates through a network of 47 local councils. In line with its ‘quality improvement strategy’ LSC had powers to intervene where its own visits, or inspections by the Adult Learning Inspectorate or the Office for Standards in Education, have found that LEA-maintained 16 to 19 provision was inadequate.

S.145 of the Learning and Skills Act, 2000 changed the civil liability of Governors in Further Education Colleges. Where a Governor is found liable in civil legal proceedings in respect of something which he/she did or omitted to do in the course of carrying out his/her duties as a member of a Corporation, the High Court or county court may make an order ‘extinguishing, reducing or varying the liability’ if the Governor applies to the court for an order under S.145, and the court considers that the action or omission which gives rise to the Governor’s liability was ‘honest and reasonable’.

1.2.8 **The Further and Higher Education Act, 1992**

The Act made changes in the funding and administration of Further Education, creating Further Education Corporations with principal powers to:

- Provide further and higher education.
- Supply goods or services in connection with their provision of education.

Secondary powers for Further Education Corporations enabled them to:

- Conduct an educational institution for the purpose of carrying on activities undertaken in the exercise of their powers to provide further or higher education.
- Provide facilities of any description (such as boarding accommodation and recreational facilities) appearing to the Corporation to be necessary or desirable.
for the purposes of or in connection with carrying on any activities undertaken in the exercise of their principal powers.

- Acquire and dispose of land and other property.
- Enter into contracts, including contracts for the employment of teachers and other staff.
- Borrow money and grant security, subject to the requirements of the Financial Memorandum.
- Invest any sums not immediately required for the purposes of carrying on any activities they have power to carry on.
- Accept gifts of money, land or other property and apply it, or hold and administer it on trust.
- Do anything incidental to the conduct of an educational institution providing further or higher education, including founding scholarships or exhibitions, making grants and giving prizes.

2 Charitable status

2.1 Charitable status - Synopsis

2.1.1 The Charities Act, 2011

The Charities Act (which received Royal Assent on 14 December 2011 and came into force in March 2012), brought the provisions of the Charities Act 1993 changes made by the Charities Act 2006 and other laws relating to charities (including the Recreational Charities Act 1958 and the Charities Act 1993) together under one single piece of legislation.

Whilst the 2011 Act updated the text and rationalised the structure of existing charity legislation, it did not change the law. Parliament elected to review the effectiveness of the Act after five years.

2.1.2 The Charities Act, 2006

The 2006 Act was responsible for making significant changes to the regulation of exempt charities which began being phased in 2010.

These provisions have now been subsumed into the Charities Act 2011. (See the Charity Commissions publication CC23 – Exempt Charities.)

Parliament elected to review the effectiveness of the Act after five years and Lord Hodgson was commissioned by the Cabinet Office in November 2011 to review charity related legislation, in particular in respect of the definition of a charity, the role of the Charity Commission and opportunities to deregulate the operation of charities.

2.2 Charitable status – Further details
All Further Education Colleges, whatever their legal status, are either registered or exempt charities.

Further Education Corporations are normally exempt (not registered) charities and are not under the direct supervision of the Charities Commission, because they are deemed to be adequately supervised by other bodies.

The successors to the LSC as the principal regulator for the Further Education sector, (given the LSC’s abolition from April 2010), were identified by Government as:

- The Secretary of State, for Education (DfE) – was appointed as the principal (charitable) regulator for Sixth Form Colleges with effect from 1 August 2011.
- The Secretary of State, for Business, Innovation and Skills (BIS) was appointed as the principal regulator for Further Education Corporations in England with effect from 1 September 2013.

In practice FECs are expected to follow the standards set out by the Charities Commission for the governance of their institutions.

Most specialist designated institutions are registered as charities with the Charities Commission and are subject to the provisions of the Charities Acts. The Charities Commissioners exercise direct supervision over registered charities, and have the power to act for the protection of the charity.

Governors are required to act in accordance with the charity’s powers and its charitable objectives, promote the interests of the charity, ensure that its assets are applied only for its charitable purposes and safeguard the assets of the charity.

Charitable organisations, including charitable trusts, are eligible for a valuable and complex set of reliefs and exemptions from taxation in the UK.

2.2.1 ‘Trusted and Independent: Giving charity back to charities’ Review of the Charities Act 2006 (July 2012) Lord Hodgson

Lord Hodgson completed the above for presentation to Parliament by the Minister for the Cabinet Office, pursuant to section 73 of the Charities Act 2006 (now the Charities Act 2011). The outcome of the review was a report advocating giving charities (including Colleges), greater freedoms over managing their respective organisations. Lord Hodgson’s extensive recommendations include:

- De-regulatory changes to the charities legislative framework to facilitate an improved, less bureaucratic operating environment.
- Enabling charities that have an annual turnover of £1 million plus, to pay their trustees (Board members) should they choose to do so.
- Affording charitable trustees ‘a right to know,’ (albeit within the boundaries of the Data Protection legislation) and the right to access information held by the
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- Charity that they might reasonably judge necessary in order to be able to properly discharge their duties.
- Change the rules governing investments made by charities to enable trustees to consider investment benefits in their totality that might potentially accrue to the charity.
- Requiring the Charity Commission to:
  - Work together with umbrella bodies and other stakeholder groups in order to encourage the application of best practice in the recruitment of trustees.
  - Become the ‘charity authority’.
- Raising the threshold for compulsory registration to £25,000 and making compulsory registration applicable to all ‘non-exempt charities’ that are claiming tax relief.
- Making the registration of an organisation with the Charity Commission and with the HMRC for tax relief purposes into a single process rather than separate ones as they were at the time of the review.
- Introducing more stringent rules on the management of fundraising.
- A greater emphasis on the need for transparency in operations.

**NOTE:** Government (at August 2012) has yet to respond to the Report, but when it does, it may lead to further legislation and implications for governance.

**2.2.2 Principal Regulator for General Further Education Corporations**

The Secretary of State for Education (DfE) – was appointed as the principal (charitable) regulator for Sixth Form Colleges with effect from 1 August 2011.

The Secretary of State, for Business, Innovation and Skills (BIS) was appointed as the principal regulator for Further Education Corporations in England with effect from 1 September 2013.

a) **The reclassification of Further Education Corporations and Sixth Form Colleges in England by ONS, and the subsequent reversion to the non-public sector definition**

In Autumn 2010, the Office for National Statistics (ONS) decided to reclassify Colleges from “Non-profit Institution serving households” i.e. non-public sector, to “Central Government” i.e. public sector.

The classification applied by ONS is significant in so far as it influences the judgements made by the National Audit Office (NAO) on the accounting and audit requirements that are to be applied to Colleges. The classification as ‘public sector’ brings with it greater, more onerous financial and reporting controls. Such a classification would counter Government’s intention to afford greater freedoms to Colleges.

Fortunately, following the passage of the Education Act 2011, ONS reviewed the classification of Further Education Corporations and Sixth Form College Corporations in...
England and decided to reclassify these bodies as “Non-Profit Institutions Serving Households” (NPISH) sector (i.e. non-public sector) from 1 April 2012.

2.2.3 Payment and Expenses of Governors

See Annex B entitled ‘Payment and Expenses for Governors’ of the Review of Further Education and Sixth Form College Governance: Report on Findings and Recommendations (July 2013)

The Report, commissioned by Matthew Hancock, Minister for Skills, and endorsed by AoC Governors’ Council and the Sixth Form Colleges’ Association, focussed on three areas of governance:

i) Recognising Governors’ status
ii) Recruitment and succession planning of Governors
iii) Governor remuneration.

2.2.4 Governor Liability

See Appendix 2

3. Finance, resources and audit

3.1 Finance, resources and audit - Synopsis

Considerable financial and resource management freedoms arose as a result of the Education Act 2011 and the changes to the SFA’s Financial Memorandum; these include the removal of the:

- Requirement to obtain prior consent for capital transactions.
- Requirement to seek consent for any borrowing.
- Requirement to seek consent to work with a company that is providing publicly-funded education.
- Specific references to compliance with EU procurement legislation.
- Prohibition on Colleges in respect of giving guarantees or indemnities.

Interestingly, although the Education Act 2011 no longer requires corporations to have an Audit, Search or Remuneration Committee, the Financial Memorandum (July 2013) does continue to require corporations to:

- *Establish an Audit Committee*
- Comply with the Joint Audit Code of Practice (JACOP)
- Comply with other SFA best practice guidance as a condition of funding.

* N.B. Some Colleges have either moved to or are considering the ‘Carver’ model of governance as best fit with this new freedom because it advocates dispensing with committees and instead having all decisions made by the whole Corporation.
The English Colleges Foundation Code of Governance

Members of Governing Bodies at Colleges where The English Colleges Foundation Code of Governance has been formally adopted should refer to the Audit and Accountability Annex to the Foundation Code of Governance which sets out requirements for:

- Business and Financial Reporting
- Risk Management and Internal Control
- Appointment of Audit Committee (including membership) and Auditors

Risk management

The Governing Body should approve the Risk Management Policy, ensure that its members have sufficient understanding of the area to fulfil their responsibility for maintaining strategic oversight of the risks associated with the organisation’s activities. A Governing Body may wish to consider identifying a risk management lead on the senior leadership team for day-to-day issues. In addition, it is usual for the Audit Committee to seek assurance concerning the adequacy and effectiveness of the College risk management framework.

3.2 Finance, resources and audit – Further detail

3.2.1 Financial Memorandum

The relationship between the funding bodies and Colleges is one of grant-in-aid, which is given under a Financial Memorandum. The singular term Financial Memorandum is used to cover both the Chief Executive of the Skills Funding Agency’s Financial Memorandum and the Education Funding Agency’s funding agreement.

The Financial Memorandum sets out the general conditions under which the Secretary of State for Education, acting through the Education Funding Agency (EFA), and the Chief Executive of Skills Funding (SFA) provides funding to colleges. The SFA Financial Memorandum was revised in July 2013 to align with the Education Act 2011 and is set out in one document with appendices. [N.B. Parts 1 and 2 of the Financial Memorandum have been merged into one document which sets out the general conditions of funding, the College’s annual allocation and conditions applicable to the delivery of education and training. It represents the College’s contract with the Funding Agency (SFA)]

a) The Statutory Framework

Under the Apprenticeships, Skills, Children and Learning Act 2009 (ASCLA) the Chief Executive secures facilities for education and training (within his/her remit) and has the powers to:

- Provide funding to education and training delivery organisations.
- Impose conditions in respect of the funding provided, taking account of the:
  - needs of learners;
  - needs of employers;
  - provision in terms of quantity, geographic spread, type and the way that it is equipped;
This paper is not intended to be definitive in its scope, but rather to indicate the extent and impact of legislation and regulation in their broadest sense on Colleges.

- need to secure value for public funds.

b) The responsibilities of the Governing Body under the Financial Memorandum

The Governing Body is responsible for:

- Any transactions that could jeopardise financial viability (and for informing the SFA Chief Executive of such).
- Demonstrating that all transactions achieve value for money in respect of the SFA funding received.
- Ensuring that the funds are used to discharge its responsibilities.
- Providing clear accountability and appointing an Accounting Officer**. (The expectation is that the Accounting Officer will be the Chief Executive Officer of the College.)
- Ensuring that there is an Accounting Officer in place at all times.
- Informing the SFA Chief Executive in writing, of the name and position of the Accounting Officer, and if the Accounting Officer is absent from the College for an extended period, the name of the person who will discharge the Accounting Officer’s responsibilities during the absence.

** N.B. The Accounting Officer has personal responsibility to the Governing Body to assure them that there is compliance with the Financial Memorandum and all other terms and conditions of funding.

c) Changes to the Financial Memorandum

c) i) The reclassification of Further Education Corporations and Sixth Form Colleges in England by ONS, and the subsequent reversion to the non-public sector definition

The ONS decision to reclassify Colleges from 1 April 2012, has had significant implications for the way in which College finances are managed. The SFA flagged their intention, depending on responses, to issue a revised version of the Financial Memorandum Part 1 to be effective 1 August 2012. This is currently in draft for consultation.

3.2.2. Internal Audit, External Audit and the Joint Audit Code of Practice (JACOP)

a) Joint Audit Code of Practice (JACOP)

The Secretary of State for Education, acting through the Education Funding Agency (EFA), and the Chief Executive of Skills Funding Agency (the ‘funding bodies’) have clear financial accountabilities for funding that have to be discharged. The funding bodies are committed to working together and sharing the assurance that each secures in respect of individual colleges. Therefore, they have established a Joint Audit Code of Practice (JACOP) that supersedes the Learning and Skills Council’s Audit Code of Practice.

The Code addresses the mandatory audit arrangements for Colleges as well as summarising the audit arrangements for the SFA’s principal funding of other providers and is set out in two parts.
The funding bodies will keep the JACOP under review and updated as necessary with a full formal review, carried out in conjunction with key stakeholders, to be undertaken no later than for the 2016/17 academic year.

Regularity audit arrangements for Colleges also remain in place. The agencies are also revising the Regularity Audit guidance to reflect changes in the sector and will seek views from the sector separately on that guidance.

a) i) **Part 1**

Part 1 of the Joint Audit Code of Practice (JACOP) addresses the relationship between the funding bodies and describes the framework through which they place reliance on each other’s assurance work to avoid duplication.

JACOP Part 1 came into effect on 1 April 2010. It has been updated to reflect subsequent sector developments whilst maintaining the underlying principle of “one learning provider, one funding assurer”. The latest version of Part 1 came into effect from 1 August 2013.

a) ii) **Part 2**

The Joint Audit Code of Practice (JACOP) Part 2 sets out the specific requirements of the Education Funding Agency and the Chief Executive of Skills Funding for Colleges’ accountability and audit arrangements and the broad framework in which they should operate. As with revised Part 1, the provisions of Part 2 apply from 1 August 2013.

A significant change to JACOP Part 2 is the removal of the mandatory requirement to appoint internal auditors for any college from 1 August 2013. “The appointment of an independent internal audit service to carry out the evaluation ‘of internal financial and other control(s)’ is neither mandatory under the Articles of Government, nor under the Financial Memorandum.”

The EFA’s mandatory requirement on Sixth Form College Corporations to have an internal audit service was removed from 1 August 2012.

This does not remove any responsibility from the corporation, “It is for each college corporation, under advisement of its Audit Committee, to determine for itself how best to fulfill its obligations to secure the proper, economic, efficient and effective use of resources and to safeguard the college’s assets.”

JACOP Part 2 also refers to appointing one set of auditors to act as both internal and external auditors, highlighting that the auditor must establish appropriate safeguards under their professional and ethical standards.

This clearly leaves a college corporation with the requirement to assess the assurance needs in the context of the risks they face; take into account assurances that are already available, for example from management; and appoint assurance providers to assist them in fulfilling those needs.

b) **The Financial Memorandum**
For a complete picture of the funding bodies’ audit and assurance requirements for Colleges, the JACOP Parts 1 and 2 should be read alongside the Financial Memorandum. In particular, the Financial Memorandum, July 2013 requires a Corporation to:

- Appoint an Audit Committee.
- Arrange to provide for “internal and financial statements audit, including regularity audit, in accordance with the Joint Audit Code of Practice (JACOP) and any SFA best practice guidance”.

Any mandatory requirements of the JACOP will be a condition of the Financial Memorandum.

The Corporation is required to investigate and report any “significant cases of internal and external fraud or suspected fraud or Financial Memorandum irregularity as defined in the (Joint Audit Code of Practice)” to the Skills Funding Agency Chief Executive.

c) Financial Statements and external audit

It is a condition of funding through the EFA sixth form funding agreement and the SFA Financial Memorandum that college corporations must appoint external auditors to audit the financial statements in respect of each financial year.

Each year the format of the accounts and the wording of the external audit opinion are suggested in the Accounts Direction and Accounts Direction Handbook.

c) i) The Accounts Direction

The Accounts Direction and Accounts Direction Handbook are a one stop reference document which contains up-to-date, generally accepted accounting principles (as issued by the Accounting Standards Board and other guidance issued by the Department) for Colleges to use when completing their financial statements, members’ report and the accounts to the financial statements.

The Skills Funding Agency (SFA) produced the 2012/13 Accounts Direction Handbook, in conjunction with Association of Colleges (AoC); the College Financial Directors’ Group (CFDG); Education Funding Agency (EFA) and consulted with auditors, in order “to provide direction to Colleges on the preparation of Colleges’ annual financial statements”.

The 2012/13 Accounts Handbook supplements guidance contained in all the previous accounting policies guidance issued by the SFA and was applicable for the year ending on 31 July 2013.

c) ii) The Statement of Recommended Practice (SORP)

In preparing their financial statements, colleges are required to follow the Statement of Recommended Practice: Accounting for Further and Higher Education (SORP), or any successor to the SORP. The latest version of the SORP (2007) is available from the Universities UK website.
The SORP for the Higher and Further Education sectors took effect from 1 August 2003, and allows institutions to provide consistent and comparable financial information to a range of stakeholders and other interested parties. The SORP has been updated in 2007 to reflect changes in the Statement of Standard Accounting Practice (SSAPs), Financial Reporting Standards (FRS), in particular FRS 17 on retirement benefits, and in best accounting practice.

**New SORP**

From 31 July 2016 Colleges will be required to adopt Financial Reporting Standard 102 (FRS 102) and restate the comparative period figures. A draft Statement of Recommended Accounting Practice (SORP) has been developed for further and higher education in the UK to help interpret this new standard for Colleges and Universities. Information on the new SORP and details of how to respond to the consultation are on a dedicated website. The consultation deadline is 17 November 2013.

### 3.2.3 Risk Management

On the AoC website, under Policy and advice – *Finance guidance* you will find a helpful ‘Risk Management Guide. A Good practice guide to risk management within the Further Education sector’ written by PKF (UK) LLP with assistance from AoC and some member colleges which, amongst other things, covers risk policy; risk appetite and in Appendix A lists key questions for Governing Body consideration and key questions to inform Governing Body assurance.

The Financial Reporting Council provides Guidance for Boards and Board Committees intended to help Boards consider how to apply the UK Corporate Governance Code and their committees including Board effectiveness; the role of Audit Committees; risk management and internal control; going concern and financial reporting.

The risk management and internal control guidance includes Internal Control: Guidance to Directors (formerly known as the Turnbull Guidance) which offers readers best practice (for UK listed companies).

### 3.2.4 Charitable Regulation of FE Colleges

See Section 2.2 Charitable Status Further details above.

### 4 The Bribery Act 2010

#### 4.1 The Bribery Act 2010 – Synopsis

This Act came into force on 1 July 2011 making bribing another person; being bribed; bribing foreign officials and failing to prevent bribery offences. There is the potential for individual Governors and senior managers to be identified for wrong doing. Potential penalties include: unlimited fines; debarment from public contracts; damage to reputation; prison sentences.
It makes provision about offences relating to bribery and for connected purposes. It requires:

- **Proportionate policies to prevent bribery, and procedures to implement these:** A commercial organisation’s anti-bribery policies and procedures should be proportionate to the risks it faces, based on an initial assessment of risks given the nature, scale and complexity of its activities, including its relationships with “associated persons” who perform services for or on its behalf.

- **Top-level commitment:** The commitment by a Governing Body, board of directors or similar to preventing bribery by persons associated with it through a “zero tolerance” policy and supporting procedures is key and should be communicated internally and externally. Leadership in this area will take a variety of forms and should be proportionate to an organisation’s size, management structure and circumstances.

- **Risk assessment:** Informed consideration of the nature and extent of an organisation’s potential exposure to risk of bribery posed by persons associated with it, including aspects of due diligence, should be undertaken periodically and documented. The assessment should be proportionate to an organisation’s size and structure, and the scale, nature and location of its activities (overseas ventures carrying proportionately greater risk), which may change over time.

- **Due diligence:** A proportionate and risk-based approach adopted by an organisation to mitigate identified bribery risks associated with persons who perform or will perform services for or on behalf of the organisation.

- **Communication (including training):** Proportionate to the risks it faces, an organisation’s actions to communicate its anti-bribery policies and procedures internally and externally, and to embed awareness and understanding of these within the organisation, including training.

- **Monitoring and review:** The embedded process of regularly evaluating, improving and adapting an organisation’s anti-bribery policies and procedures over time.

4.2 **The Bribery Act 2010 – Further details**

The Bribery Act, 2010 received Royal Assent on 8 April 2010, came into effect from 1 July 2011.

- It applies to “relevant commercial organisations” – any organisation which is incorporated in the UK irrespective of where it carries out its business, and whether or not it pursues primarily charitable or educational aims. Colleges will definitely be covered by the Act if they engage in commercial activities, but given the scope of the Act Colleges are strongly advised to err on the side of caution and assume the Act applies across the full range of their activities.

- It contains two general offences covering “active bribery” (offering or giving a bribe) and “passive bribery” (requesting or accepting a bribe). It also introduces two further offences for commercial bribery, creating new forms of corporate liability for failing to prevent bribery on behalf of a commercial organisation, and for bribery of a foreign public official.
• An organisation covered by the Act can be liable if a person associated with it (including employees, agents, suppliers, partners in joint ventures) offers a bribe for its benefit without its knowledge.
• Guidance is based around six principles for organisations, which should demonstrate proportionate policies and procedures based on periodic risk assessment and due diligence checks on business partners, which are monitored and reviewed to ensure on-going compliance, are supported by appropriate top-level commitment, and implemented through effective communication and training.
• Corporate hospitality will be caught by the Act if it is intended by the provider or the recipient to bring about “improper performance”.
• Bribery, to secure advantage, can be committed by individuals, by Corporations, and by “associated persons” (anyone performing services for or on behalf of an organisation).
• Directors, Governors and senior officers of an organisation can be personally liable if bribery involving their organisation is committed with their “consent or connivance”.
• Bribery convictions can carry unlimited fines for Corporations and individuals, and individuals can also face up to 10 years imprisonment.

The Act came about because of criticisms of weak UK anti-bribery legislation by the Organisation for Economic Co-operation and Development (OECD) and others, and introduces what the Serious Fraud Office hopes will “bring about behavioural change within businesses themselves and create corporate cultures in which no form of corruption is tolerated” by requiring strong governance and compliance processes. However, the objective of the Act is “not to bring the full force of the law to bear on well-run commercial organisations that experience an isolated incident of bribery on their behalf”. Three of the four offences of bribery primarily involve individuals (bribing an individual, an individual being bribed, and bribing a foreign public official), but the new offence of “corporate failure to prevent bribery” requires an organisation to provide a defence (under Section 7 of the Act) that it “had in place adequate procedures designed to prevent a person associated with it from undertaking such conduct”. Following consultation by the Ministry of Justice, guidance on “adequate procedures” has been provided through six management principles for consideration by organisations:

4.2.1 **Recommended actions by Governing Bodies**

• All Governors should be made aware of the scope and impact of the Bribery Act 2010. They should assume that the provisions of the Act apply across the full range of a College’s activities.
• The Governing Body should ensure that a policy covering anti-bribery and corruption, in the context of its existing policies, is in place which should be disseminated both internally and externally, and supported by internal briefings and training as considered appropriate. Such a policy should embed a culture of zero tolerance to bribery and corruption in the College and across its activities.
• Governing Bodies should, through the Audit Committee, require an initial assessment of the level, nature and extent of risks of bribery a College is exposed to. Consideration should be given to appointing a Compliance Officer with specific responsibility alongside the Audit Committee to carry out the risk assessment in accordance with Government guidance, and to report directly to the Governing Body on the results of the risk assessment.

• The initial risk assessment should pay particular regard to the following areas:

  • College overseas activities.
  • Overseas (non-EU) full fee-paying student recruitment, including use of overseas agents.
  • “Associated persons” who undertake services for or on behalf of the College.
  • Gifts or donations received with conditions attached to them.
  • Services procured from third parties.
  • Hospitality and gifts for individuals.
  • Trading activities.
  • Joint ventures/collaborations with partners.

• The Governing Body should decide on the basis of an initial risk assessment on a level of response to the Act that it considers to be proportionate, given its College’s particular circumstances.

• The Governing Body may wish to consider reviewing the College’s processes for assessing whether its business relationships are transparent and ethical, and whether these should be strengthened.

• The Governing Body should assess and implement any changes necessary to internal audit, risk management and annual reporting processes to ensure appropriate compliance with the Act and its guidance, and whether any changes to financial control and exception reporting processes may be required.

• The Governing Body should consider the requirements of the Act in the event of any unplanned change in the College’s activities or circumstances that may affect its exposure to the risk of bribery.

• The Governing Body must ensure that, once implemented, anti-bribery procedures are monitored in terms of levels of adherence to them, and reviewed against periodic risk assessments conducted perhaps every 2-3 years.

4.2.2 AoC Policy Template: Anti-Bribery Policy Statement

See Appendix 1
5. **Quality and inspection**

5.1 **Quality and inspection – Synopsis**

5.1.1 **Ofsted Common Inspection Framework (CIF)**

The Common Inspection Framework (CIF) for Further Education and Skills was introduced in September 2012 and devised by Her Majesty’s Chief Inspector, in line with the Education and Inspections Act, 2006 and summarises the judgements inspectors will make during inspection.

5.1.2 **The Quality Assurance Agency for Higher Education (QAA)**

The QAA is an independent body that reviews the performance of universities and Colleges of higher education. Its Audit reports are available online.

5.1.3 **Workforce Development**

A review of Further Education teaching qualifications was undertaken during 2012 and new qualifications have now been developed, which take effect from September 2013. This follows the outcome of the Lingfield Review, which recommended the qualifications should be simplified and renamed. The following generic and specialist qualifications will apply:

- Level 3 Award in Education and Training
- Level 4 Certificate in Education and Training
- Level 5 Diploma in Education and Training
- Level 5 Diploma in Education and Training including a specialist pathway
- Level 5 Integrated Specialist Diplomas
- Level 5 Standalone Specialist Diplomas

More information about the findings of the review is available in the report, *Further Education and Skills in England: New Qualifications for Teachers and Trainers Phase Two - Findings Report (LSIS, 2013).*

More information about the content of the new qualifications and the teaching roles they apply to be provided in the guide, *Teaching and Training Qualifications for the Further Education and Skills Sector in England 2013: Guidance for Employers and Practitioners (Updated July 2013)*

5.1.4 **Further Education Choices**

The SFA Further Education Choices website provides information for users to compare the performance of all Further Education Colleges and other organisations that receive Government funds that offer education and training to people over the age of 16. The annually published information covers: How many learners pass the qualification that they start; the views of learners who are studying or learning at an organisation about their experience; employers’ view about the service and training they have received for their staff; and the percentage of learners and trainees who progress further in learning or their employment.
5.1.5 **Rigour and Responsiveness in Skills**

The Department for Business, Innovation and Skills (BIS) and the Department for Education (DfE) published Rigour and Responsiveness in Skills on 3 April 2013 and Chapter 2 ‘Standards’ sets out a new intervention procedure.

‘For individual colleges the ultimate responsibility for raising standards and challenging poor performance rests with the governors. Governors are accountable for the quality of what is delivered. Effective governance and leadership are essential ingredients of a strong, institution, and weak governance and leadership are almost always at the root of poor performance’ (Rigour and Responsiveness in Skills)

5.1.6 **Education Act, 2011**

The Act requires the determination and periodic review of the educational character and mission of the institution and the oversight of its activities.

5.2 **Quality and inspection – Further details**

5.2.1 **Ofsted - Common Inspection Framework (CIF)**

a) **Overview of CIF**


b) **Within scope for inspection**

Inspection will cover learning for qualifications; apprenticeships; employability programmes; community learning; foundation learning; other work-based learning and provision for 14–16 year olds.

c) **The aim and focus of inspection**

From September 2012 Ofsted’s aim under the revised Common Inspection Framework is to streamline and simplify the existing framework by concentrating on the aspects of a provider’s work that have most impact on learners; reducing the number of judgements and grades and the impact of leadership on the learner experience.

Ofsted will continue to focus on matters impacting on improving outcomes for learners; take account of the providers’ self-assessment; work with a senior member of staff during the inspection process; listen to learners, employers, staff (and where appropriate, parents);
make recommendations for provider improvement; focus its inspection resource on weaker providers; undertake an annual risk assessment of all providers. Whilst there will be a general exemption for ‘Outstanding’ providers, 5% per annum will be inspected. Areas that will be covered include:

- Assessing ‘performance management’ and ‘governance.’
- Assess the management of safeguarding arrangements.
- Maintain a focus on equality and diversity.
- How well a provider meets local/national community needs, accountability, and responsiveness.
- A focus on employability skills and progression onto sustainable employment.
- An emphasis on English and Maths through to age 19.
- Empowerment of learners, employers and parents.
- Increased role for Governors/supervisory bodies.
- The focus is Teaching, Learning and Assessment. (N.B. No provider can achieve ‘outstanding’ for overall effectiveness unless they are ‘outstanding’ in their Teaching, Learning and Assessment.
- Viewing the outcomes as the different groups of learners’ success, rates of progress and progression; learner destination (employment, Higher Education etc).
- The extent to which provision matches local and national need.
- Scrutinising subcontracting arrangements.
- Consider the ‘capacity to improve’ within Leadership and Management.

**d) Leadership and Management**

Inspectors are required to evaluate the extent to which leaders and managers at all levels (including where relevant, Governors) make an actual impact on improving outcomes and teaching, learning and assessment for all learners. (Rather than merely have aspirations to do so.) What happens at the curriculum or delivery end is as important as what happens at the senior level.

Inspectors will therefore focus on whether an institution can:

- Demonstrate an ambitious vision, have high expectations for what all learners can achieve, and attain high standards of quality and performance.
- Improve teaching and learning through rigorous performance management and appropriate professional development.
- Evaluate the quality of all types of provision through robust self-assessment, taking account of users’ views, and use the findings to promote and develop capacity for sustainable improvement.
- Successfully plan, establish and manage the curriculum and learning programmes to meet the needs and interests of learners, employers and the local and national community.
- Actively promote equality and diversity, tackle bullying and discrimination, and narrow the achievement gap.
• Safeguard all learners.

Individual ‘strands’ of leadership and management will not be graded separately; instead inspectors are required to take a more holistic approach to grading/reporting. (Illustrative grade characteristics are provided in inspection handbook to support the grading of leadership and management using a ‘best-fit’ approach.)

e) Grading

The grade for overall effectiveness is underpinned by the grades for:

• Outcomes for learners.
• Quality of teaching, learning and assessment.
• Effectiveness of leadership and management.

The common grading scales for all organisational inspection judgements comprise:

• Grade 1 – Outstanding (No further inspections unless performance drops)
• Grade 2 – Good (Next inspection within six years of the last inspection)
• Grade 3 – Requires improvement (Next inspection within 12 – 18 months)
• Grade 4 – Inadequate (Re-inspection monitoring visit within 6 – 8 months of the last inspection, and a full re-inspection within 12 – 18 months of the last full inspection)

There will only be two days notice of inspection and information provided by learners through ‘Learner View’ will be used to inform the inspection.

f) Types of Ofsted Inspection

• Inspection to inspect the provider’s government – funded provision against all aspects of the Common Inspection Framework 2012.
• Survey report visits to explore a specific aspect of a provider’s work as part of a programme of surveys based on topics linked to national priorities. Such visits may be added to a routine inspection.
• Re-inspection.
• Risk assessment annually.
• (N.B. Interim assessment no longer carried out.)

g) Meetings

Ofsted Inspectors will want to meet with the Principal; senior managers; middle managers; Governors (including Quality and Standards Committee members and designated safeguarding Governor where there is one); safeguarding, curriculum, equality and diversity managers; learners and a mix of partners.

h) Ofsted Handbook for the inspection of Further Education and Skills
The Ofsted Handbook for the inspection of Further Education and Skills is organised into two parts:

- Part 1 is guidance for inspectors and providers on the preparation for, and conduct of, inspections.
- Part 2 is the full framework and evaluation schedule, and guidance on how inspectors will use the Common Inspection Framework to make judgements and award the main and contributory grades.

5.2.2 The Quality Assurance Agency for Higher Education (QAA)

The Quality Assurance Agency (QAA) for Higher Education “offer advice, guidance and support to help UK universities, Colleges and other institutions provide the best possible student experience of higher education”.

It conducts reviews, publishes its findings in reports, highlighting good practice and gives recommendations on how to improve quality.

The UK Quality Code for Higher Education

The ‘Quality Code’ replaces the set of national reference points known as the ‘Academic Infrastructure’ with effect from the 2012/13 academic year and gives all higher education providers a shared starting point for setting, describing and assuring the academic standards of their higher education awards and programmes and the quality of the learning opportunities they provide. Providers use it to design their respective policies for maintaining academic standards and quality.

The Code covers:

i. Academic standards
ii. Academic quality
iii. Information about higher education provision.

5.2.3 Workforce Development

Weaknesses in Initial Teacher Training (ITT) in Further Education in England were identified in 2003 by Ofsted and outlined along with proposals for reform in the document: ‘Equipping our Teachers for the Future. Reforming Initial Teacher Training for the Learning and Skills Sector, published by the Department for Education in 2004.

Commitments were also made to professionalise the Further Education workforce in the Further Education White Paper, ‘Further Education: Raising Skills, Improving Life Chances’ (published by DfE 2006).
The 2007 Qualifications Regulations were designed to take forward these reforms and introduced the following:

- A new professional status – Qualified Teacher Learning and Skills (QTLS) status and Associate Teacher Learning and Skills (ATLS) status.
- New qualifications based on new professional teaching standards, including an initial Award, a Certificate qualification for teachers in associate teaching roles and a Diploma qualification for teachers in full teaching roles.
- A new requirement to complete the process of professional formation.
- The introduction of qualification requirements determined by a teacher’s role and responsibilities, rather than the number of hours they teach (which was the case in previous legislation).
- A revised time limit of five years for Further Education teachers to obtain the appropriate qualifications and gain QTLS/ATLS status (two years in the case of those who hold QTS) and the introduction of a time limit of one year to gain the initial Award.

The qualifications currently in place include:

- The ‘Preparing to Teach in the Lifelong Learning Sector Award’ (PTLLS) - an initial award at Level 3 or 4. Those required to gain it have one year in which to do so, although ideally the Award should be gained as soon as possible after they begin teaching;
- The ‘Certificate in Teaching in the Lifelong Learning Sector’ (CTLLS) – a qualification at Level 3 or 4. It is additional to the PTLLS Award (although some Certificate courses may incorporate PTLLS Award requirements), and it meets the ITT qualification requirements for ATLS status for those in an associate teaching role. To note this is not a sufficient qualification nor is it aimed at teachers in a full teaching role, who must gain the Diploma;
- The ‘Diploma in Teaching in the Lifelong Learning Sector’ (DTLLS) - a qualification at Level 5 or above. It is additional to the PTLLS Award (although some Diploma courses may incorporate PTLLS Award requirements) and it meets the qualification requirements for QTLS status for those in a full teaching role;
- Teachers of designated subjects, currently Skills for Life subjects (literacy, numeracy and English for Speakers of Other Languages (ESOL)), are also required to hold subject specific qualifications. These can be taken as part of or in addition to a generic ITT qualification (DTLLS), (or in addition to an integral qualification if a further subject specific qualification is required, e.g. for teachers of more than one Skills for Life subject).

LSIS (now dissolved) proposals for new qualifications included:

*Key principles:*

- Single qualifications at each level that do not require prerequisite qualifications and allow direct entry onto each.
• Qualifications flexible enough to enable a focus on particular learning contexts.
• Separate, standalone qualifications that are not ‘nested’ i.e. avoid repetition of content - currently PTLLS units are found within the CTLLS and DTLLS qualifications.
• Development of new overarching professional standards that would describe the practice expected. Current standards were published in 2006 – LSIS propose that these need to be brought up to date with current expectations of teaching staff and could be simplified to better support professional practice.

The proposals:
New renamed qualifications:
• A Level 3 Award in Education and Training should be developed (12 credits) - proposed Award will provide an introduction to teaching and training. Primarily a knowledge-based qualification and will not assess competence. Aimed at those with little or no experience of teaching or training, and those considering teaching in the sector.
• A Level 4 Certificate in Education and Training should be developed (30 credits) - proposed Certificate will provide training for those with a broad range of teaching or training responsibilities. Aimed at those with some experience of teaching or training and the potential to study at this level. There will be a requirement to practice as this qualification will assess and provide evidence of competence in teaching and training.
• A Level 5 Diploma in Education and Training should be developed (60 credits) - proposed Diploma will provide training for those with an extensive range of teaching or training responsibilities, including those in more than one context. Aimed at those who are working in, or aspire to, this role and have the potential to study at this level. Significant practice requirement to assess competence at this level.
• A Level 7 Diploma in Education and Training - proposed Diploma aimed at those teachers and trainers at the Further Education/Higher Education interface.
• A Diploma qualification for Continuing Professional Development at Level 7 - a recommendation in the Lingfield interim report was to introduce this Diploma, ‘to help form the capabilities of those who aspire to the highest professional levels in Further Education’. Aims to develop advanced practice and skills in leadership of learning and teaching.
• Proposals for qualifications for teaching English, ESOL, mathematics and students with learning difficulties and disabilities.

5.2.4 Further Education Choices

The Skills Funding Agency’s (SFA) Further Education Choices is part of the Further Education Public Information framework provides an “independent and official site” for comparing the performance of Further Education Colleges and other organisations (excluding schools) that receive Government funds to offer education and training (academic subjects, vocational subjects, Apprenticeships, training on and off the job) to
people over 16 years of age. Its purpose is to provide learners and employers with clear, comparable data to inform their choice of post-16 Further Education and training provider. It also enables providers to continuously assess their performance against others in the sector.

The annually published data on the FE Choices website includes: how many people pass the qualification that they start; the views of learners who are studying at an organisation about their experience ‘learner satisfaction’; employers’ view about the service and training received for their staff ‘Employer satisfaction’ and information about the percentage of learners and trainees who take steps forward in their learning and/or employment (Learner Destinations).

5.2.5 Rigour and Responsiveness in Skills

The Department for Business, Innovation and Skills (BIS) and the Department for Education (DfE) published Rigour and Responsiveness in Skills on 3 April 2013. In the foreword the Minister for Skills explains:

“We need to put rigour and responsiveness at the heart of our skills system, to put employers and learners more directly in the driving seat, and to create incentives for all training providers to deliver excellent programmes. We need to ensure there is excellent vocational provision from age 14 into adulthood. We must also be quicker to intervene where performance falls below standards every learner should expect, and intolerant of poor quality provision”.

The Report sets out how the Government intends to accelerate its “reforms to the skills system, to ensure that our vocational training offer allows our citizens to compete with any in the World”.

Chapter 2 ‘Standards’ sets out a new intervention procedure. Although the triggers for intervention remain the same:

- An inadequate Ofsted judgement
- Failure to meet minimum standards
- Financial difficulty

Government intends to change the intervention procedure (i.e. those actions leading up to the statutory powers). To facilitate this, the post of Further Education Commissioner, (supported by Further Education Advisers) has been created to act on behalf of BIS, DfE, SFA and EFA. Within two weeks the Further Education Commissioner will recommend to Ministers one or more of the following:

- A new ‘Administered College’ status, in which it will lose freedoms and flexibilities while it is turned around, including restructuring or competition for new providers following a Structure and Prospects Appraisal; and/or
- the replacement of some or all of the Governing Body; and/or
• College dissolution.

In ‘exceptional circumstances’, i.e. where there is reason to believe that the existing governance and management can deliver improvements, the College might be allowed twelve months to improve without Government intervention. In this scenario, the College must propose a plan which will be monitored at six months and will be expected to be delivered within 12 months. Ofsted would be asked to monitor the implementation.

6. Human Resource Management

6.1 Human resource management – Synopsis

6.1.1 Employer

The Corporation is the legal employer of its staff, all appointments and contracts of employment are made in its name. The Articles specify that the Governing Body is responsible for the appointment of the head of the institution, the Clerk to the Board of Governors, and such other senior post-holders as the Governing Body may determine, and that the head of the institution is responsible for the appointment of all other staff.

The Governing Body’s relationship with SPHs differs from that with other staff because it has direct control over appointing, appraising, determining pay and conditions of its SPHs, although in reality it is the Principal who generally supervises these individuals on a daily basis.

The Education Act 2011 no longer requires there to be senior post-holders (SPH). (However, it is likely that most Colleges will retain the title for existing post-holders unless they identify an imperative reason not to, in which case they would need to negotiate with the SPH concerned.)

6.1.2 Unions

AoC recognises six trades unions that represent the majority of staff in our sector, they are:

• UNITE
• GMB
• University and College Union (UCU)
• UNISON
• Association of Teachers and Lecturers (ATL)
• Association of Managers in Education (AMiE)

Individual Governing Bodies are likely to have their own Trades Union Recognition Agreements.

6.2.3 Workforce development
The current qualification framework is under review and LSIS have published key principles and proposals as to how the future of workforce development might look.

The Further Education Minister, Mathew Hancock, approved the progression of the Further Education Guild bid, submitted as a joint bid by the AoC and Association of Employment and Learning Providers (AELP) on behalf of a wider group of sector partners. The bid focussed on addressing issues relating to professionalism and teaching qualifications. This is also the subject of Lord Lingfield’s Review ‘Professionalism in Further Education’ launched in October 2012.

6.2. Human resource management – Further details

6.2.1 Employer

As the employer, the Governing Body has responsibility for the institution’s key employment policies. This includes matters such as ensuring:

- That the College has a well-formulated HR strategy aligned with the institutional strategy and mission, and that due attention is given to HR issues at the corporate level.
- Ensuring that pay and conditions of employment are properly determined.
- Ensuring that the institution complies with the requirements of employment and other relevant legislation affecting employment.
- Ensuring that there are policies and procedures for appointments, promotion, staff development and performance review/appraisal.

6.2.2 Unions

Trades Unions Recognition

Trades unions representing staff in the Further Education sector include UNITE, GMB, the University and College Union (UCU), UNISON, the Association of Teachers and Lecturers (ATL), and the Association of Managers in Education (AMiE). AoC recognise these Trades Unions and the National Joint Forum provide joint agreements on guidance, national working groups and conduct national pay negotiations on behalf of Colleges which it then recommends to its members.

Trades Unions may seek recognition from a statutory tribunal (the Central Arbitration Committee) for a group of workers where at least 10% of the group are members of the trades unions. Where at least 10% of staff are trades union members and a majority of the staff are likely to support recognition, then recognition is normally awarded by the CCA. However, if there is uncertainty as to whether a majority of the staff support recognition, then the CCA may call for a ballot of the group of workers; to secure recognition, at least 40% of the group must vote and a majority must vote in favour of recognition.

Pay Negotiations
Pay negotiations for Further Education Colleges are conducted in England through the National Joint Forum (NJF). The Association of Colleges (AoC) is the national body that agrees the pay recommendation on behalf of all Further Education Colleges in England. Once agreed by the trades unions, AoC provides a recommendation which intends to provide a guideline for pay awards for all English Further Education Colleges. The Sixth Form Colleges Association (SFCA) conducts national pay negotiations specifically for Sixth Form Colleges.

Colleges remain autonomous and any pay recommendation will be considered against affordability and local positions.

### 6.2.3 Pensions

Further Education sector occupational pensions available to full and part-time teaching staff are membership of the Teachers' Pension Scheme (TPS) (normally available only to teaching staff), and for non-teaching staff membership of the relevant Local Government Pension Scheme (LGPS). Both are defined benefit, final salary, government backed pension schemes.

Significant reforms of all public sector pension schemes on grounds of affordability are being phased in over five years.

The Pensions Act, 2008 introduced new auto-enrolment measures to encourage workers to consider their long term plans and prepare for retirement.

Key measures include a duty on employers to automatically enrol all eligible workers into a qualifying pension scheme (provided they are not already in such a scheme) and provide a minimum contribution. All new employees must be automatically enrolled and must opt out of the relevant occupational pension scheme, if they do not wish to join such a scheme. The Act came into effect from October 2012 although many Colleges did not need to begin auto-enrolling all workers until later in 2013.

### 6.2.4 Workforce development

a) **Initial Teacher Training**

See Section 5.2.3 above

b) **The Education and Training Foundation**

Department of Business, Innovation and Skills (BIS) issued a prospectus inviting applications to set up a new FE Guild (now known as the Education and Training Foundation) that would be an employer-led partnership and provide a focal point for all Further Education and Skills sector interests in taking forward the professionalism agenda flowing from the review of professionalism in Further Education.
In November 2012 a contract to develop the concept was awarded by BIS to a partnership led by AoC and Association of Employment and Learning Providers (AELP). The purpose was to develop a well-qualified, recognised, effective and up-to-date professional workforce, supported by good leadership, management and governance. The implementation plan was approved by the Minister for Skills on 15 April 2013. Colleges have been allocated three Foundation Board places (i.e. two Principals and one Governor). The Foundation came into being on 1 August 2013. The sector consultation identified that a significant majority wanted Leadership, Management and Governance to form a key part of the Foundation’s work and hence proposed leadership, management and governance activities include:

- Research into best practice in leadership, management, and governance.
- Development programme for those aspiring to senior leadership roles (Principal and CE, Head of Service etc).
- Provision for established leaders and directors/senior executives (e.g. master classes, seminars, networks, coaching).
- Develop professional/career framework for sector leadership and management.
- Training and development programmes for team leaders and middle managers.
- Developing leaders and managers’ understanding of the role of technology in learning.
- Training, development and professional networks for clerks of college Corporations and those with similar roles in other providers.
- Training, development, and information for governors, board members, and others with similar responsibilities.
- Bespoke resources or development for staff and student representatives or others.
- Include accredited options throughout as appropriate.

It is envisaged that most provision will be delivered through other organisations with the Foundation retaining strategic oversight, monitoring of uptake, monitoring of effectiveness and intelligent customer functions.

AoC’s Governors’ Council have a steering role in ensuring that the Foundation commissions in line with the requirements identified by the Governors’ Council. Dr Susan Pember has been commissioned by AoC for the Governors’ Council to produce a governance development and support strategy to assist it in its work.
7. **Equality**

7.1 **Equality – Synopsis**

The Equality Act 2010 combines nine separate pieces of previous equality legislation under one single Act, consolidating and extending the former's anti-discrimination law. The Act is particularly significant in terms of governance, given that they are employers, service providers and the current Ofsted approach to inspecting equality and diversity.

7.2 **Equality – Further details**

7.2.1 The Equality Act, 2010 came into force on 1 October 2010. It combines nine separate pieces of legislation into one single Act, which consolidates and extends previous anti-discrimination law. The aim is to simplify the law, remove inconsistencies, bring it altogether in one place and make it stronger. The Act introduced new measures that have direct implications for Colleges, not only as employers but also as service providers. The legislation is particularly important given Ofsted’s approach to inspecting equality and diversity in Colleges and the potential impact of any limiting grade.

a) **The Equality Duty**

The new equality duty at section 149 of the Equality Act replaces the previous duties, *(which related specifically to race, disability and gender equality)*. The new equality duty requires all public bodies, including Colleges, to consider all of the protected characteristics *(sex; pregnancy and maternity; gender reassignment; race; disability; sexual orientation; religion/belief; age and marriage/civil partnership)* in day to day work, when shaping policy, delivering services and in relation to employment. *(The Act protects employees, workers, self-employed, agency/contract staff and others e.g. partners.)*

In accordance with the general equality duty the College will, in carrying out its functions, have due regard to the need to: eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act; advance equality of opportunity between people who share a protected characteristic and those who do not; and foster good relations between people who share a protected characteristic and those who do not.

The Equality Duty does not require public bodies (including Colleges) to:

- Treat everybody in exactly the same way.
- All religions as being equal or to treat all religious festivals equally.
- Make services homogeneous.
- Take disproportionate action.
- Conduct Equality Impact Assessments (EIA) by statute.

8. **Safeguarding**

8.1 **Safeguarding – Synopsis**

The *Protection of Freedoms Act 2012* received royal assent in May 2012 and detailed the changes to the existing *Safeguarding Vulnerable Groups Act 2006* specifically abolishing controlled activity and revising the definition of regulated activity. Changes came into effect September 2012 specifically reducing the scope of regulated activity and removing controlled activity. AoC’s safeguarding pages provide Colleges with full background, context and current status.

8.2 **Safeguarding – Further details**

8.2.1 ‘A Common Sense Approach’ Sunita Mason

Colleges will be aware that the Coalition Government in 2010 stated its intention to scale back the proposed vetting and barring scheme to what it considered to be more proportionate and common sense levels. Sunita Mason, Independent Advisor for Criminality Information Management, was appointed to undertake a thorough review of the scheme and made a number of recommendations to Government which are detailed in her ‘A Common Sense Approach’. A review of the criminal records regime in England and Wales, published in February (phase 1) and December 2011 (phase 2). The vision for the new scheme is for it to be a more proportionate balance between civil liberties and safeguarding vulnerable groups. The new scheme will focus on trusting employers to make rounded decisions about which they employ and reduce the bureaucracy associated with over burdensome checks.

8.2.2 **The Protection of Freedoms Act, 2012**

The *Protection of Freedoms Act, 2012* received royal assent in May 2012 and detailed the changes to the existing *Safeguarding Vulnerable Groups Act, 2006* specifically abolishing controlled activity and revising the definition of regulated activity. Changes came into effect September 2012 specifically reducing the scope of regulated activity and removing controlled activity. AoC’s safeguarding pages provide Colleges with full background, context and current status.

The Government are currently consulting on the statutory guidance ‘Keeping Children Safe’ replacing the former ‘Safeguarding Children and Safer Recruitment in Education Guidance’. It is expected that this guidance will be available for Colleges in September 2013.

More information can be found at AoC’s Employment Policy and advice web pages.

The Governing Body responsibilities include ensuring that:

- Appropriate safeguarding policies are in place.
• A member of the Senior Management Team is designated to lead this area.
• Robust recruitment and placement procedures are in place.
• Arrangements are in place to regularly review processes (as part of the College’s risk assessment and audit processes)

9. Students

9.1 Students – Synopsis

9.1.1 The Education Act 1994
The Act regulates both student representation and associations within Colleges.

9.1.2 Non-EU students and the Home Office

In February 2010 Government announced a series of measures to make the UK visa system ‘more secure’, and address concerns about students coming to the UK and failing to leave at the agreed time. This situation is fluid and Governors are advised to check the Home Office website for current information:

9.2 Students – Further details

9.2.1 Education Act, 1994

This Act regulates student representation and associations inside Colleges. The Act’s provisions are drawn quite broadly - it places duties on the Corporation to take reasonable steps to regulate any “association of the generality of students at an establishment”, “whose principal purposes include promoting the general interests of its members as students”, or “a representative body (whether an association or not) whose principal purposes include representing … students at an establishment … in academic, disciplinary or other matters relating to the government of the establishment”. This definition is likely to include the majority of students’ unions, associations, councils or even learner feedback committees inside Colleges.

The Governing Body is required to take steps to secure that any students’ union as defined above operates in a fair and democratic manner and is accountable for its finances.

It then specifies certain requirements to that end, including:

• A written constitution.
• Approval by the Governing Body of the constitution at intervals of not more than five years.
• A student should have the right not to be a member of the union, or to signify that he does not wish to be represented by it.
• Appointment to leadership positions should be by election in a secret ballot in which all students are entitled to vote.
• The Governing Body should satisfy themselves that the elections are fairly and properly conducted.
• A person should not hold a paid elected union office, for more than two years in total.
• The financial affairs of the union should be properly conducted and appropriate arrangements should exist for the approval of the union’s budget, and the monitoring of its expenditure, by the Governing Body.
• Financial reports of the union should be published annually or more frequently.

Larger students’ unions are also required to register directly with the Charity Commission in their own right and are regulated by it. Where the union as defined above is afforded support “in kind” this should be reported in the union’s statement of account under the Charity SORP and where this means the union meets the income threshold for registration with the commission, Governing Bodies should ensure that this is done.

9.2.2 Non-EU students and the Home Office

Following an overhaul of the UK’s immigration requirements, a series of ‘statements of changes’ were made to the Immigration Act 1971, from 2009, a new points-based system for immigration applicants using five categories of tiers was introduced, including ‘Tier 4’ for international students. Students coming to the UK under a Tier 4 visa require an ‘approved UK educational provider’ to sponsor them, and also need to score enough points to be accepted as an international student in the UK. The introduction of the new system has thus far proved burdensome for both applicants and educational providers.

In February 2010 Government announced a series of additional measures with immediate effect to make the UK visa system ‘more secure’, and address concerns about students coming to the UK and failing to leave at the agreed time, as well as others abusing the system and taking university places away from genuine international students. These measures are:

• Non-EU applicants must be able to speak English to a level just below GCSE standard, treating English as a foreign language, rather than the beginner level as previously stipulated.
• To ensure applicants are coming to the UK to focus on study rather than work, students on courses below degree level will be restricted to 10 hours paid work a week instead of the former 20.
• Students on courses that last less than six months will not be permitted to bring dependents into the country, and dependents of students on below degree-level courses will not be permitted to work.
Visas for courses that include work placements will now only be granted if the institution is on the Highly Trusted Sponsors’ List, a new register for educational establishments.

Although around 2,000 applications from organisations for ‘approved educational provider’ status had been refused by the UK Border Agency by 2011, the issue of ‘bogus Colleges’ set-up to facilitate illegal immigration persists, and has a detrimental effect at home and abroad on the reputation and standing of the UK’s legitimate Colleges. Association of Colleges and partners in the UK Council of Colleges are calling for Government to restrict the activities of bogus Colleges by protecting the title ‘College’ under law, as is the case with the use of the ‘university’ title.

N.B. Following the dissolution of the UK Border Agency, the Home Office has taken over the management of this function.

Introduction of Credibility Interviews

From 7 May 2013, individuals who apply for a Tier 4 student visa may have to sit an interview when they attend the visa application centre to submit their application and biometric information. The interview will focus on the applicant’s reasons for coming to the UK; this is known as a credibility interview. A report of the interview will be sent to the visa officer who will consider it alongside the visa application and supporting documents. The applicant may be called for a further interview if the visa officer needs more information.

Support provided by AoC

AoC’s International Team provides the following support to Colleges interested in recruiting international students:

- Guidance on Home Office regulations, including liaison with Home Office on behalf of Colleges in order to deal with specific issues of concern.
- Advice about formulating an international strategy.
- Market-entry support, including the organisation of College missions to specific countries.
- Representing and promoting the Further Education College sector’s offer to key domestic and international partners and stakeholders.

Recruiting international students can benefit Colleges educationally, culturally and commercially. The opportunity to study with international students increases the cultural awareness of students who are UK citizens. Furthermore, the income generated through international student recruitment can help to increase Colleges’ financial investment in facilities, provision and staff which benefit the entire student body. However, there are a number of risks involved in international student recruitment and AoC recommends that Colleges interested in this area of work carefully consider the risks involved. The risks include:
• Reputation. Home Office will remove HTS (Highly Trusted Sponsor) if it feels that the College does not meet its requirements. Colleges need to ensure that they have the resources to meet international partners’ expectations.
• Potentially low return on investment in the initial years. International student recruitment requires a medium to long-term investment (in terms of time, staff and money) in order to generate income.
• Over-diversification. Diversifying the College’s offer to include international student recruitment can be highly beneficial. However, AoC recommends that Colleges interested in international student recruitment consider how to diversify without diverting resource from core College business.

10. Estates, infrastructure management and planning

10.1 Estates, infrastructure management and planning – Synopsis

10.1.1 Governors responsibilities for estate and infrastructure management

A College’s Governing Body is responsible for oversight of the strategic management of an institution’s land, buildings and associated infrastructure, with the aim of providing a sustainable, environmentally-sensitive, high quality learning environment that enhances the student experience. See the LSIS Executive Leadership and Development Programme: Self-study Unit: Estates.

10.1.2 Planning legislation

The Planning and Compulsory Purchase Act (2004) introduced new arrangements for local planning by replacing the traditional approach to development planning of structure plans and local plans by local development frameworks, which are a suite of planning documents providing guidance at a range of different levels.

10.2 Estates, infrastructure management and planning – Further details

10.2.1 Governors’ responsibility for estates, infrastructure management

A College’s Governing Body is responsible for oversight of the strategic management of an institution’s land, buildings, and associated infrastructure, with the aim of providing a sustainable, environmentally-sensitive, high quality learning environment that enhances the student experience. Governors should receive management information relevant to enable them to have oversight of the needs of a College’s estate, development and maintenance requirements, in pursuit of the aims and objectives of a College’s corporate plan.

This information should include details of the:
• Value of the estate (asset) – for insurance and accounting purposes.
• The demarcation of College owned land to include any public rights of ways.
• A detailed site plan showing buildings, their age, condition, functionality and total gross internal floor space in square meters for each building.
• Estates budget required to sustain asset values – planned maintenance programme information based upon a detailed condition survey to establish on-going liabilities.
• Space utilisation.
• Benchmarking data provided through use of eMandate (sector benchmarking data).

10.2.2 Planning legislation

a) Governors’ responsibilities

All Further Education Colleges have a responsibility to adhere to current Town and Country Planning legislation. Colleges are not exempt from the various Acts but must apply as independent Corporations for relevant planning permissions for development on their sites. These include:


The main website for the Royal Town Planning Institute can provide Governors with more background information on the planning process.

iii) The Planning and Compulsory Purchase Act 2004

The Act introduced new arrangements for local planning by replacing the traditional approach to development planning of structure plans and local plans by local development frameworks, which are a suite of planning documents providing guidance at a range of different levels. Government sets out its expectations for the planning system in England and Wales in a series of Planning Policy Statements (PPS) which deal with particular aspects of planning such as housing and transport (there is not a specific PPS for education). Further regional policies are established in ‘regional spatial strategies’, and by local planning authorities responsible for determining planning applications.

11. Health, safety and environment

11.1 Health, safety and environment – Synopsis
As the employer, the Governing Body will be required to produce evidence of establishing, operating and reviewing its health and safety management systems. Only those employed directly on a contract of employment with the Governing Body are its employees, but nevertheless it has legal responsibilities for all other types of workers.

Colleges are required by law to manage health and safety at work effectively by ensuring that they:
Provide a written health and safety policy; assess risks to employees, students, partners and others affected by their operations; arrange for the effective planning, organisation, control, monitoring and review of preventive and protective measures; ensure they have access to competent health and safety advice; consult employees about their risks at work and current preventive and protective measures. Failure to comply may lead to serious consequences for the College, relevant individuals and organisational reputation (e.g. fines, imprisonment and disqualification).

Leading health and safety at work. (Actions for directors, board members, business owners and organisations of all sizes) was published by the IoD and HSE to help governors, manage their Health and Safety responsibilities and provides a useful four-point agenda to embed Health and Safety core actions (legal duties) and good practice guidelines on how to meet them by 1. Planning, 2. Delivering, 3. Monitoring and 4. Reviewing.

Whilst Governing Bodies will delegate many health tasks to others (health and safety professional employees/consultants, staff etc.), it retains ultimate responsibility for this important area.

Key legislation, regulation and codes of practice include:

- Control of Substances Hazardous to Health Regulations (CoSHH), 2002 and the Control of Substances Hazardous to Health (Amendment) Regulations 2004.
- Health and Safety (Consultation with Employees) Regulations, 1996.
- Control of Asbestos Regulations 2012.

* RIDDOR changes with effect from 1 October 2013 simplify the mandatory reporting of workplace injuries for businesses, while ensuring that the data collected gives an accurate representation of workplace incidents.

The HSE and IoD’s Leading Health and Safety at Work provides a helpful guide for board members.

11.2 Health, safety and environment – Further details
11.2.1 The Health and Safety at Work Act, 1974

The Act is the key piece of enabling legislation in the area of health and safety. It places a general duty on employers and those responsible for places of work to ensure the safety, health and welfare at work of their employees, visiting staff and other individuals. In the case of Further Education, those other individuals would include students, members of the public and contractors.

The Act places specific responsibilities on the Governing Body as the employer to manage health and safety at work effectively including the management of:

- Resources.
- Communication.
- Documentation of procedures and systems to ensure the implementation of effective planning, organisation, control, monitoring and review of preventative and protective measures.

Also:

- Production of a health and safety policy.
- Implementing systems for improving knowledge by providing adequate health and safety training to staff.
- *Demonstrating a commitment to achieving a safety culture.
- Appointment of one or more ‘competent persons’ to help it comply with its statutory obligations.
- Undertaking suitable and sufficient assessment of risk.

* Examples of demonstrating a commitment to achieving a safety culture might include the Governing Body receiving an Annual Health and Safety Report (the contents of which might reasonably be expected to summarise significant matters/actions raised at Safety Committee; provide a Health and Safety Policy implementation and suggested changes statement; list current Health and Safety resources and identify future Health and Safety expenditure needs; summarise accidents, incidents and matters reported to the relevant authorities; refer to monitoring activities such as safety inspections, external audits etc.; summarise contact with enforcement agencies, e.g. HSE, Fire etc., including any enforcement notices received; list major Health and Safety initiatives for the coming year - the Health and Safety Plan; summarise outstanding Health and Safety matters from previous report), appointing a Link Health and Safety Governor (although this is not a legal requirement) etc.

a) The Health and Safety Executive (HSE)

The 1974 Act established the Health and Safety Commission and the Health and Safety Executive. The two have now merged together as the Health and Safety Executive. The HSE advises Government on the issue of regulations which have statutory force. It also issues
codes of practice and guidance with which employers should comply. The Health and Safety Executive and its inspectorate enforce statutory duties and can investigate serious accidents in the workplace.

b) Regulations

The 1974 Act resulted in a wide range of regulations relating to specific areas of risk, including:

- Control of Substances Hazardous to Health Regulations (CoSHH) 2002.
- The Ionising Radiations Regulations 1999

These regulations set minimum safety requirements: for example, the CoSHH Regulations require employers to make an assessment of the hazard to health from substances used within their particular organisation and to act upon the assessment.

11.2.2 The Corporate Manslaughter and Corporate Homicide Act, 2007

This piece of legislation made it possible for organisations to be found guilty of corporate manslaughter as a result of serious management failures resulting in a gross breach of a duty of care. In addition, it clarified criminal liabilities of companies where a serious failure in the management of health and safety results in a fatality.

Whilst prosecutions will be against the ‘corporate body’ (as opposed to individuals), the liability of the directors, board members and others under health and safety legislation and criminal law remains unchanged, so the ‘corporate body’ (Governing Body) and individuals may still be prosecuted in respect of separate health and safety offences.

Section 37 of the Health and Safety at Work Act, continues to allow for the prosecution of individual directors and other senior officers following an offence by the ‘body corporate’.

11.2.3 The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations, 1995 (RIDDOR)

It is good practice for Governors to receive regular summaries of all accidents, incidents, near-misses, investigation findings and follow-up actions with specific reference to items that had to be reported under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations, 1995 (RIDDOR), in order to monitor their performance in meeting their responsibilities.

11.2.4 Health and Safety Regulations, 1992

In 1992, six Health and Safety Regulations came into force which implemented directives made under the Single European Act 1987. Some have been extensively revised since being published. Since 1992, a range of new regulations has come into force expanding on the general requirements of the Health and Safety at Work Act 1974.
11.2.5 **The Safety Representatives and Safety Committees Regulations, 1977 and the Health and Safety (Consultation with Employees) Regulations, 1996**

Governors must ensure that there are adequate health and safety communications, safety representatives and a safety committee. [Consulting employees on health and safety: A brief guide to the law](#) provides further information on this area.

As the employing authority, the Governing Body carries ultimate responsibility for health and safety, and could be held liable for offences under the 1974 Act (as could individuals who have failed to discharge their duties). Among the duties placed on the Governing Body are:

- The preparation of a written statement of policy on health and safety, including details of the organisation and arrangements for implementing that policy and bringing this policy, and any revisions, to the attention of all employees.
- The provision for consultation with employees about health and safety arrangements.
- The provision for the appointment by recognised trades unions of safety representatives.

11.2.6 **Student accommodation**

The Department of Health’s National Minimum Standards (NMS) are intended to safeguard and promote the welfare of young people under 18 for whom accommodation is provided, or arranged by, a Further Education College. The standards are not applicable as such to the welfare of students aged 18 or over, although they may affect provision for those over 18 sharing the same accommodation or facilities as students aged under 18. These standards apply to all Colleges within the Further Education sector, unless they are care homes. They do not apply to specialist Colleges outside the Further Education sector accommodating students with disabilities. The standards, rather than the boarding school standards, will also apply to any schools where all the students accommodated are aged 16 or over. A ‘mainstream’ Further Education College accommodating students with disabilities will not be a care home unless more than 10% of its students who are accommodated are provided with personal or nursing care. Similarly, the standards do not apply to students who are not provided with accommodation by the College, but since they relate to wider welfare issues for accommodated students than residential provision alone, they may incidentally affect the College’s provision for non-residential students. The welfare standards are minimum standards, in the sense that they provide minimum standards below which no Further Education College accommodating under-18s is expected to fall in safeguarding and promoting the welfare of boarders.

11.2.7 **The Control of Asbestos Regulations 2012**

These Regulations addressed the European Commission’s view that the UK had failed to fully implement the EU Directive on exposure to asbestos (Directive 2009/148/EC). The
changes that came into force on 6 April 2012 mean that some types of non-licensed work with asbestos now have additional requirements, i.e. notification of work, medical surveillance and record keeping.

12. **Communications, data, ICT security and ‘Whistleblowing’**

12.1 **Communications, data, ICT security and ‘Whistleblowing’ – Synopsis**

12.1.1 **The Digital Economy 2010**

*The Digital Economy Act, 2010* received Royal Assent on 8 April 2010.

12.1.2 **The Freedom of Information Act, 2000**

The Information Commissioner’s Office issued guidance documents in August 2013 to assist Colleges by giving examples of the kinds of information that are expected to be provided in order to meet commitments under the Freedom of Information Act (FOIA) model publication scheme. *Guidance on Freedom of Information*

Main changes made to schools and Further Education Colleges definition document

12.1.3 **The Data Protection Act 1998**

The Act replaced and consolidated earlier legislation including the *Data Protection Act (1984)* and the *Access to Personal Files Act (1987)*, and served to implement the European Data Protection Directive. It has been refined by subsequent legislation, notably electronic communication and marketing.

A College, as a ‘body corporate’ is the Data Controller under the 1998 Act, hence Governors carry ultimate responsibility for implementation. The ICO’s ‘Data Protection Principles Guide to Data Protection’ lists the eight data principles as:

1. **Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless:**

   (a) at least one of the conditions in Schedule 2 is met, and
   (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2. **Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.**

3. **Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.**
4. Personal data shall be accurate and, where necessary, kept up to date.

5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6. Personal data shall be processed in accordance with the rights of data subjects under this Act.

7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Governing Bodies should ensure that they manage key risks and their obligations by having appropriate systems and identify personnel (who are responsible for ensuring compliance and dealing with subject access requests) in place. Common areas of non-compliance to be avoided by Governors include:

1) **Subject access requests (SAR)**

   It is essential to recognise what constitutes a request, to deal with it promptly and in line with the Freedom of Information Act (FOIA)

2) **Notification requirements**

   Ensure the timely provision of all statutory information to the ICO.

3) **Security breach notification**

   Ensure that an appropriate response is made when something has gone wrong. For example, report any loss of data to the ICO, have policies and procedures in place governing the correct use of IT by staff and students and how that will be monitored.

4) **Working with third parties**

   When contracting with third parties (contractors, payroll providers etc. that adequate safeguards are inserted into their contracts, perhaps based on a college data processing data template)

12.1.4 **The Public Interest Disclosure Act 1998 (‘Whistleblowing’) and the Enterprise and Regulatory Reform Act, 2013**

The Public Interest Disclosure Act 2008 is ‘An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.’
The Enterprise and Regulatory Reform Act (2013) heralded changes to the protection for ‘whistleblowers’, which Governing Bodies should ensure are reflected in their whistleblowing policies.

The AoC Employment Team have written Whistleblowing: Guidance for Colleges which provides Colleges with an overview of the current whistleblowing legislation and covers: Definitions and legislative framework; qualifying disclosures and disclosure of information; the ‘public interest’ test; scope of legal protection for whistleblowers; taking steps to encourage disclosures being made internally; implementation of policies and procedures.

12.1.5 ‘Freedom of Speech’

The Education (No 2) Act (1986) and the Human Rights Act (1998) (Article 10 – the right to freedom of speech), the College’s Governing Body must take ‘reasonably practicable’ steps to ensure freedom of speech within the law exists for students, staff and visiting speakers and that its premises are not denied to people on the grounds of their beliefs, views, policies or objectives.

12.1.6 Managing Social Media Issues

Social media can benefit individuals and Colleges provided that Governing Bodies ensure that adequate mechanisms are in place for the management of its use.

‘Social media’ is the term used to describe the online tools, websites and interactive media that enable users to interact with each other in various ways, through sharing information, opinions, knowledge and interests. Social media involves building online communities or networks, which encourage participation, dialogue and involvement.

Colleges use social media to raise their public profile, to enhance the learning experience and engage with students, and as a useful marketing and information resource. Employees use social media in their personal lives and often professionally, either as part of their job or for professional development and networking. Colleges should make clear to employees what is and what is not acceptable when using social media. If an employee’s online activity poses a risk to damage or destroy the relationship of trust and confidence between employer and employee, discipline and dismissal will be a legitimate course of action.

AoC have produced ‘Managing Social Media Issues in the Workplace: Guidance for Colleges and created an AoC social media web page for its members.

12.2 Communications, data, ICT security and ‘Whistleblowing’ – Further details

There is very little legislation that deals specifically with electronic or digital technology as a distinct category. The Data Protection Act and Safeguarding legislation cover most of the related issues that arise in Colleges. In addition, Colleges are affected by the Digital Economy Act 2010, against which AoC has lobbied.

Individual Learner Record
Governors should be aware of the importance of the Individual Learner Record (ILR) as it is the single most important source of data collection for Colleges. Colleges are required to submit five returns each academic year in order to secure funding, provide for audit and for departmental statistical purposes.

12.2.1 **The Digital Economy Act, 2010**

The Digital Economy Act 2010 which received Royal Assent on 8 April 2010, increases the penalty for online copyright infringement to a maximum of £50,000; gives the Secretary of State the power to order ISPs to impose technical measures on users who meet certain level of infringements e.g. bandwidth capping or shaping, temporary suspension of an account.

12.2.2 **The Terrorism Act, 2006**

The Act aimed to outlaw incitement to terrorist activities and will include incitement through websites and email communications and is of relevance to the educational sector.

12.2.3 **The Privacy and Electronic Communications (EC Directive) Regulations (2003)**

The Regulations made it necessary for Colleges to inform web site users of how cookies and other tracking devices are used on websites. They also extended controls on unsolicited direct marketing to all forms of electronic communications. They are of most relevance from a data protection stance.

12.2.4 **Anti-Terrorism, Crime and Security Act, 2001**

The Act introduced legislation purporting to enforce retention of communications data. It was brought in after the 9/11 terrorist attack in the US and already part of the Act has been repealed as it was incompatible with the Human Rights Act 1998 (and has been replaced with the Prevention of Terrorism Act, 2005).

12.2.5 **The Regulation of Investigatory Powers Act, 2000**

The Act and The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 deal with the interception of communications. An area of the law of concern to Further Education is (i) unlawful and authorised interception of a communication, and (ii) acquisition and disclosure of communications data.

12.2.6 **The Freedom of Information Act, 2000**

The Act provides for the disclosure of information held by public authorities or by persons providing services for them and to amend the Data Protection Act 1998 and the Public Records Act 1958 and for connected purposes.

The Freedom of Information Act gives you the right to ask any public body for all the information they have on any subject you choose. Unless there is a good reason, the
organisation must provide the information within 20 working days. You can also ask for all the personal information they hold on you.

Anyone can make a request for information – there are no restrictions on age, nationality, or where you live.

You can ask for any information at all - but some information might be withheld to protect various interests which are allowed for by the Act. If this is case, the public authority must tell you why they have withheld information.

If you ask for information about yourself, then your request will be handled under the Data Protection Act, 1998 (see the Government Data Protection Act Guide and the Information Commissioner’s Office website).

The Information Commissioner’s Office has an education page on which you will find a Definition document for Colleges of Further Education which covers 'further education Colleges in England, Wales and Northern Ireland that are subject to the Freedom of Information Act 2000 (FOIA). Sixth Form Colleges may opt to use either this definition document or the one for schools (there are separate documents for England, Wales or Northern Ireland) as appropriate to their constitution. They must make clear which document they are using.

The guidance is intended to assist Colleges of Further Education (FE) and relevant Sixth Form Colleges (together referred to here as Colleges) by giving examples of the kinds of information that ICO would expect them to provide in order to meet their commitments under the FOIA model publication scheme. Colleges should note that they are not expected to routinely publish all information; for example, where they do not hold it or where it is publicly available elsewhere or is exempt.

This guidance gives examples of the kinds of information that the ICO expects Colleges of Further Education to provide in order to meet their commitments under the model publication scheme. The expectation of the ICO is that Colleges will make the information listed in this ‘definition document’ available unless:

- They do not hold the information.
- The information is exempt under one of the FOIA exemptions or Environmental Information Regulations (EIRs) 2004 exceptions, or its release is prohibited under another statute.
- The information is readily and publicly available from an external website; such information may have been provided either by the College or on its behalf. The College must provide a direct link to that information.
- The information is archived, out of date or otherwise inaccessible.
- It would be impractical or resource intensive to prepare the material for routine release.
It is important to note that this ICO guidance is not meant to give a definitive list and that the legal commitment is to the model publication scheme, and for the need to authorities to provide as much information as possible on a routine basis.

**Publishing datasets for re-use**

The Definition document for Colleges of Further Education explains that:

‘Public authorities must publish under their publication scheme any dataset they hold that has been requested, together with any updated versions, unless they are satisfied that it is not appropriate to do so. So far as reasonably practicable, they must publish it in an electronic form that is capable of re-use.’

If the dataset or any part of it is a relevant copyright work and the public authority is the only owner, the public authority must make it available for re-use under the terms of a specified licence. Datasets in which the Crown owns the copyright or the database rights are not relevant copyright works.

The Datasets Code of Practice recommends that public authorities make datasets available for re-use under the Open Government Licence.

The term ‘dataset’ is defined in section 11(5) of FOIA. The terms ‘relevant copyright work’ and ‘specified licence’ are defined in section 19(8) of FOIA. The ICO has published guidance on the dataset provisions in FOIA. This explains what is meant by “not appropriate” and “capable of re-use”.

12.2.7 **The Data Protection Act, 1998**

The Act covers any data about a living and identifiable individual (irreversibly anonymised or aggregated data is not regulated by the Act), and applies only to data which is held, or intended to be held, on computers, or in a 'relevant filing system' (which includes paper files and records).

The Act defined UK law on the processing of data on identifiable living people by specifying eight data protection principles. It is the main piece of legislation that governs the protection of personal data in the UK, and provides a way in which individuals can control information about themselves. Anyone holding personal data for non-domestic purposes is legally obliged to comply with the Act, subject to some exemptions. It placed obligations on how a College handles and stores personal data, and gave an individual some rights over how their personal data is handled, as well as subject access rights.

12.2.8 **The Human Rights Act, 1998**

The Act included the right of an individual to privacy of communications. The provisions of every subsequent UK law should be compatible with this Act.
12.2.9 The Public Interest Disclosure Act, 1998 (‘Whistleblowing’) and The Enterprise and Regulatory Reform Act, 2013

The Act protects individuals who make certain disclosures of information in the public interest, to allow such individuals to bring action in respect of victimisation and for connected purposes. This is known colloquially as Whistleblowing.

The Enterprise and Regulatory Reform Act (2013) (effective from 25 June 2013) heralded changes to the law on whistleblowing around the protection of whistleblowers and which Governing Bodies should ensure are reflected in their whistleblowing policies.

- Protected disclosures made in ‘the public interest’: Amend the section that explains what constitutes a protected disclosure. (N.B. A "qualifying disclosure" means any disclosure of information that, in the reasonable belief of the worker, is made in the public interest.
- Remove the requirement that disclosures must be made ‘in good faith’.
- Clarify that complaints concerning breaches of employees ‘own employment contracts must be raised as a grievance.
- Ensure that whistleblowers are not mistreated (bullied, harassed etc.) by fellow employees.

See "Government moves to re-balance protection for whistleblowers" (epost briefing March 2013)

12.2.10 The Computer Misuse Act, 1990

The Act prohibited unauthorised access by both internal and external people to the organisation and as interception might involve unauthorised access, an offence could be committed under this Act.

12.2.11 Freedom of Speech

Under Education (No. 2) Act 1986 and in accordance with the more recent Human Rights Act, 1998 (Article 10 - the right to freedom of speech), a College’s Governing Body has a duty to take such steps as are reasonably practicable to ensure freedom of speech within the law for students and members of staff of the institution and for visiting speakers. Governing bodies must also ensure that use of the institution’s premises is not denied to any individual or body of people on the grounds of their beliefs, views, policies or objectives.

The 1986 Act requires Governing Bodies to maintain a code of practice setting out procedures for meetings held on the premises, the conduct expected of those attending meetings, rights to refuse permission to attend or close an event in lawful circumstances, the responsibilities of event organisers and members of the College.

12.2.12 Managing Social Media Issues
a) **Risks to Colleges**

i) **Defamation**

There is no single comprehensive definition of what is defamatory however generally ‘defamatory’ comments will have the intention of impacting the reputation of an individual. A statement is considered defamatory when it is proven to lower the standing or damage the reputation of a person in the eyes of their peers and right-thinking members of society generally either socially, professionally or by reputation. Simple abuse is unlikely to be considered defamation as it is unlikely to cause real damage to a reputation. Section 5 of the Defamation Act 1996 the Defamation Act 1996 provides that an employer has one year from the date of publication of a comment to bring action, although in the case of online publication, each new occasion of publication will give rise to a new claim.

ii) **Libel**

To be considered libellous, information must be in permanent form and must clearly identify the employer (whether directly or by inference) and the meaning of the statement must be such that, in their natural and ordinary sense, the words are capable of damaging the employer’s reputation.

iii) **Vicarious Liability**

An employer will be vicariously liable for any defamatory statement made by an employee in the course of his or her employment. In these circumstances, the employer should act quickly to limit the damage caused. Where a defamatory statement is made by an employee about a competitor, this may result in legal action against the employer; for example damages for malicious falsehood if the statement is false and published maliciously with a view to causing financial loss to the competitor. An employer is generally held liable for the acts of its employees where those acts are committed in the course of employment even if the acts were carried out without the employer’s knowledge or approval.

iv) **Breaches of confidentiality**

Due to the nature of social media being wide reaching, there is a greater potential for damages to have a greater financial impact if information is obtained by competitors.

b) **The importance of policies and procedures**

Governing Bodies are recommended to ensure that:

- There is a clear policy in place setting out what use of social media is permitted and the boundaries of expected behaviours. (A model policy is available in

- The policy is clearly communicated to new starters and that existing staff receive regular briefings and updates as well. It is important for Colleges to make their expectations clear to ensure that decisions made to discipline and/or dismiss are considered reasonable.
- Other policies and procedures are reviewed and where relevant amended to incorporate social media issues. (This might include - bullying and harassment; code of professional conduct; data protection and confidentiality; disciplinary; equality and diversity; induction, training and development; information technology, email and internet use; intellectual property; probation periods; recruitment and retention; safeguarding; whistleblowing.

c) Monitoring employees’ online activity

Clear justification should be established by the College prior to any formal or informal monitoring of employees’ social media profiles. The following legislation provides employers with the ability to monitor and collate information about employees when there is a genuine suspicion of wrong doing:


An employer undertaking e-mail monitoring has a general defence, under section 3 of RIPA to any charge of unlawful interception if it reasonably believes that both sender and recipient consented to the interception. This defence has not been tested before the courts so it is uncertain what the employer will have to demonstrate for the belief to be considered reasonable.

ii) Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000

Regulation 3(1) (a) (iv), allows monitoring without consent to investigate or detect unauthorised use of a private telecommunications system. This would include, for example, monitoring to ensure employees do not breach company rules or policies regarding the use of email or the internet when sending and receiving data to a website.

iii) Data Protection Act 1998

Guidance to employers on how to comply with their obligations under the Data Protection Act 1998 has been issued by the Information Commissioner. Part 3 of the Employment Practices Data Protection Code sets out good practice designed to be compliant with employers’ obligations.

Inappropriate use: Reputational damage
d) **Inappropriate use: Reputational damage**

Social media activities and comments made in a public forum may have a wider reaching audience than comments made privately and hence inappropriate use of social media has the potential to be far more damaging to a Governing Body’s reputation.

e) **Inappropriate use: ‘Harassment’**

Unlawful harassment is unwanted conduct relating to a protected characteristic, which has the effect of violating an employee’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that employee and can originate from staff and students alike. Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse and includes publication of material online and remarks sent electronically both in and outside of the workplace. The same applies for attachments and photographs which do not need to be directly targeted at a person for harassment to occur. An example of harassment in a social media context might be a student who makes racist remarks about a television personality online which are viewed by an employee who is offended.

Harassment is not limited to conduct between those working and studying in the College. Section 40 of the Equality Act 2010 extends the liability of the Governing Body as the employer for persistent harassment of their employees by third parties. This liability will arise if a third party harasses an employee in the course of their employment; the employer knows that the employee ‘has been harassed in the course of employment on at least two other occasions by a third party (whether or not the same third party) and the employer has not taken reasonably practicable steps to prevent the harassment’.

The Governing Body can establish a defence against liability for harassment if they can show that they took reasonable steps to prevent harassment. This is likely to require the Governing Body to show that:

- They have a robust policy and procedure on harassment, which has been implemented.
- Employees have been made aware of their obligations under the anti-harassment policy and procedure.
- Its managers have been trained in how to enforce the harassment policy and procedure.
- They have dealt with complaints of harassment and taken disciplinary and formal legal action where appropriate.

f) **Inappropriate use: ‘Cyberbullying’**

Bullying is also something which is not limited to the workplace and does extend into the social media arena. Cyber-bullying is the term used when information and communication technologies are used to support deliberate, repeated and hostile behaviour by an individual
or group, that is intended to harm others; it is the movement of traditional bullying involving personal contact to an online platform.

The AoC Joint Agreement on Guidance for Harassment and Bullying in Employment in Further Education and the AoC Guide: Discrimination and the Equality Act 2010: Guidance for Colleges provide further support.

The Department for Education has also produced comprehensive advice on cyberbullying as part of the Safe to Learn guidance, which can be accessed online along with support materials from http://www.digizen.org/.
APPENDIX 1

AoC POLICY TEMPLATE: ANTI-BRIBERY POLICY STATEMENT

SAMPLE Anti-bribery Policy Statement

Introduction

The College has a zero-tolerance for bribery and corruption. The College’s reputation with the community it serves and other stakeholders is underpinned by ethical behaviour, financial probity and honesty. The College aims to limit its exposure to bribery by:

- Setting out a clear anti-bribery policy, which is proportionate to the risks that the College is exposed to;
- Embedding awareness and understanding of the College’s anti-bribery policy amongst all staff, “associated persons” (any person performing services for or on behalf of the College), and external persons/organisations with whom the College has commercial relations;
- Training staff as appropriate so that they can recognise and avoid the use of bribery by themselves and others;
- Encouraging staff to be vigilant and to report any suspicion of bribery, providing them with suitable channels of communication (NOTE TO COLLEGES - INSERT LINK TO YOUR COLLEGE’S WHISTLEBLOWING/PUBLIC INTEREST DISCLOSURE PROCEDURES) and ensuring sensitive information is treated appropriately;
- Rigorously investigating instances of alleged bribery in accordance with the College disciplinary procedure; and assisting the Police and other appropriate authorities in any resultant prosecution;
- Taking firm and vigorous action against any individual(s) involved in bribery.

The Policy

This policy applies to all employees and anyone acting for, or on behalf of, the College (“associated persons”), including Governors, other volunteers, temporary workers, consultants and contractors.

All employees and associated persons are responsible for maintaining the highest standards of business conduct and are expected to behave honestly and with integrity. Any breach of this policy will constitute a serious disciplinary offence, which may lead to dismissal and may become a criminal matter for the individual.

The College prohibits employees and associated persons from offering, giving, soliciting or accepting any bribe. The bribe might include cash, a gift or other inducement, to or from any person or organisation, wherever they are situated, and irrespective of whether or not they are a public official/body or private person or company, by any individual Governor, employee, agent or other person or body acting on the College’s behalf. The bribe might be made in order to:
• Gain any commercial, contractual or regulatory advantage for the College in a way which is unethical;
• Gain any personal advantage, pecuniary, or otherwise, for the individual or anyone connected with the individual.

This policy is not intended to prohibit appropriate corporate entertainment and/or hospitality undertaken in connection with the College’s business activities, provided the activity is customary under the circumstances, is proportionate, and is properly recorded/disclosed to the College in accordance with its procedures (NOTE TO COLLEGES - INSERT LINK TO YOUR COLLEGE’S GIFTS AND HOSPITALITY POLICY.)

Employees and associated persons are requested to remain vigilant in preventing, detecting and reporting bribery. Employees and associated persons are expected to report any concerns regarding any suspected bribery in accordance with the College’s procedures (NOTE TO COLLEGES - INSERT LINK TO YOUR COLLEGE’S RELEVANT PROCEDURE E.G. WHISTLEBLOWING PROCEDURE.)
APPENDIX 2

Note on Governor Liability

An occasional question from Governors is whether they are personally or collectively liable for debts owed by an insolvent College.

There has never been an occasion in the 20 years since Colleges were incorporated where any case has been taken to law or decided by the courts but this issue has attracted more interest for two reasons:

- The growing financial pressure on Colleges.
- The changes brought about in the 2011 Education Act and announced in the “New Challenges, New Chances” strategy published by the Department of Business, Innovation and Skills which emphasise the self-governing nature of Colleges and the limits on government intervention in their affairs.

Because the issue has never been decided in law, this note can only summarise some of the current issues and considerations for Further Education Colleges and is provided for information. It does not constitute legal advice. College corporations or individual Governors who want more detailed guidance on their own circumstances need to contact their lawyers.

1. The law as it applies to companies and charities

Further Education Colleges had their charitable status confirmed at their incorporation in 1993 but are exempt from registration with the Charities Commission because the intention is to confirm the Secretary of State as their Principal Regulator under the 2006 Charities Act. This is due to happen in 2013. The Secretary of State for Education is the Principal Regulator for Sixth Form Colleges.

The inter-relationship between charity regulation and College-specific regulation is complicated but there is nevertheless some useful guidance from the Charity Commission in its note on “Managing Financial Difficulties and Insolvency in Charities” (CC12) which makes the following points:

- There are two separate tests for insolvency: the Cash Flow test (i.e. whether the charity can pay its debts as they fall due), and the Balance Sheet test (i.e. whether the value of the liabilities exceeds the value of the assets). Governors are encouraged to apply both tests. There may well be cases where a college fails the balance sheet test, for example because of net pension liabilities based on their share of the multi-employer Local Government Pension Scheme (LGPS) but, if so, Governors need to look also at whether the accounting valuation carried out under the FRS17 standard is reflected in the contributions required by the fund managers as a result of the triennial fund valuation. Many LGPS fund managers recover pensions deficits from Colleges over a period of 20 years which suggests an implied confidence that they will be able to recover
the money in future. Possibly a more important issue for Colleges is to understand the nature, extent and requirements of any bank loans they hold.

- Insolvency law suggests that the directors of a company should aim to reduce debts or restructure a business in preference to liquidation. This also applies to Charities. Trustees of a charity which fails standard insolvency tests will therefore be expected to explore reducing or eliminating cash negative activities, downsizing, merging, refinancing or restructuring debt repayments on a more sustainable basis, etc.

- Insolvency law also seeks to protect the interests of creditors and the public by including provisions about wrongful trading. Charity Commission guidance is that a charity may continue to trade, but only if great care is taken. It is important that a charity does not continue to trade if they know or ought to have concluded that there will be no reasonable prospect that the charity would avoid insolvent liquidation. That would be "wrongful trading"; and if proved in the courts for the organisation as a whole could entail personal liability for individual trustees which may not be covered by the College's professional indemnity insurance.

- The Charity Commission notes in CC12 that in an investigation of wrongful trading a trustee "would be judged by the standard of a reasonable Director as well as by reference to his or her individual qualifications and capacities". The reference to individual capacities therefore suggests a higher financial as well as reputational risk for trustees who are lawyers, accountants and company directors.

One complexity in assessing the implication of charity law for Colleges is the fact that there is no specific administration or insolvency procedure applying to them and the fact that, over the last 20 years, the Skills Funding Agency (and its predecessors) has avoided a situation where this would be necessary by providing a short-term advance of funds or by delaying the recovery of overpaid grant. As these have been arranged on a case-by-case basis, it is not certain that a College could rely on support in future.

2. **Legal relief for governors in certain circumstances**

Although there have never been cases alleging wrongful trading or negligence by individual College governors, concerns about their liability have been raised before, for example in the late 1990s when several Colleges overstretched themselves and claimed large amounts of public funding which they then had to pay back. This prompted the inclusion of the following clause in the [*2000 Learning and Skills Act to protect, Section 145*](https://www.legislation.gov.uk/ukpga/2000/35/section/145) says:

1) Subsection (2) applies where a member of a body listed in subsection (3) is found liable in civil legal proceedings in respect of something which he did or omitted to do in the course of carrying out his duties as a member of the body.

2) If— (a) the member of the body applies to a court for an order under this subsection, and (b) the court considers that the action or omission which gives rise to the member's liability was honest and reasonable, the court may make an order extinguishing, reducing or varying the liability.
3) The bodies referred to in subsection (1) are— (a) a Further Education corporation established by virtue of section 15, 16 or 47 of the M1Further and Higher Education Act 1992, and (b) a body corporate established by virtue of section 143(4) or (5) of this Act.

4) Where a member of a body listed in subsection (3) applies to a court for an order under this subsection, the court may make any order which— (a) relates to liability in civil legal proceedings which may come to be incurred by the member in respect of a specified course of action, and (b) is of a kind which the court could have made if the liability had already been incurred.

5) In subsections (2) (a) and (4) “a court” means the High Court or a county court; but this subsection is subject to any order under section 1 of the M2Courts and Legal Services Act 1990 (allocation of business between High Court and county courts).

The scope and protection provided by this clause has never been tested.

3. Dissolution of a College (and merger with another organisation)

The Department for Business, Innovation and Skills (BIS) has issued an ‘information sheet’ that focuses on the transfer of property, rights and liabilities upon the dissolution specifically of a Further Education College Corporation, following the new provisions of the Further and Higher Education Act 1992, as amended by the Education Act 2011 and Statutory Instruments 2012/1157 and 2012/1167. The information sheet emphasises that each dissolution will be different, complicated, and will require a College to seek its own legal advice. These rules apply to Further Education Colleges specifically.

The information from BIS covers:

- The duties and responsibilities of Corporation members as Charitable Trustees
- Interest in assets
- Asset transfer
- Asset sale

With respect to the financial management of the Further Education Corporation, the BIS note makes clear that Governing Body members as trustees are expected to take steps to ensure the continued viability of the charity and its activities. Trustees have and must accept ultimate responsibility for directing the affairs (including the solvency) of the charity. Should a Further Education Corporation become insolvent (i.e. its assets are not sufficient to cover its liabilities) it is the responsibility of the individual Corporation to secure its own legal advice.

4. Skills Funding Agency intervention strategy

Following the publication of New Challenges, New Chances in 2011, the Skills Funding Agency published a new Intervention strategy on 1 July 2012 which explains its powers over Colleges. This document explains that deregulation means that the SFA has only two main powers left: withdrawal of funding and conditions of funding. There is a three stage process
outlined, in which the SFA uses the threat of funding withdrawal to secure different levels of action from a College. This is a new process and it is not been fully tested. There is an important promise in the last page of the Strategy that there would be a "notice period to ensure orderly transition for learners" were the SFA to take the final step.
APPENDIX 3

ADDITIONAL SOURCES OF INFORMATION

1. **AoC Governance Resource Library**

2. **DfE Governors’ Handbook (May 2013)**
   - Intended audience: For Governors in maintained schools, academies and free schools.
   - Comment: A useful reference source when dealing with issues relating to those under 19.

3. **LSIS Governance Training Materials Module 3 the main statutory framework.**

4. **Leading Health and Safety at Work**
   - Published by the IoD and HSE to help Governors manage health and safety responsibilities. Provides a useful four-point agenda to embed Health and Safety core actions (legal duties) and good practice guidelines on how to meet them by 1. Planning; 2. Delivering; 3. Monitoring and 4. Reviewing. The intended audience includes directors, board members, business owners and organisations of all sizes.

5. Useful social media related links:
   - i) **Managing Social Media Issues in the Workplace: Guidance for Colleges May 2012.**
   - ii) ACAS have a variety of resources available for both employers and managers: social networking and bullying; social networking and managing performance; social networking and discipline and grievances; social networking and recruitment; social networking and defamation, data protection and privacy; social networking and how to develop a policy; ACAS code of practice on disciplinary and grievances; ACAS employment relations comment: Social media and its impact on employers and trades unions is a useful discussion paper which raises interesting legal and ethical questions in relation to social media; ACAS Research Paper: Workplaces and Social Networking - The Implications for Employment Relations. This report sets out the results of a small scale research project commissioned by ACAS examining the implications of social networking and mobile information and communications technologies (ICT) for employment relations. It is interesting for Colleges as it provides a good foundation to understanding employment relations issues.
with regards to social media.

iii) BBC Guide: Twitter and the law provide some practical advice on what you can and cannot say on Twitter.

iv) Facebook for Educators is an information resource written by Facebook providing educators with clear explanations on how Facebook can be used in education.

v) Facing up to Facebook: A Guide for Further Education and Higher Education is a guide created by JISC Legal specifically for Further Education and Higher Education. In this guide, Colleges will find summaries of the key legal considerations of using Facebook in a sector specific context.

vi) Information Commissioner’s Office: Data Protection Code provides information on pre-employment vetting, monitoring, and information used in disciplinary investigations to ensure compliance with the Data Protection Act 1998.


7. Queries to the Department of Business, Innovation and Skills (BIS) FE Governance team can now be made by emailing fegovernance@bis.gsi.gov.uk.