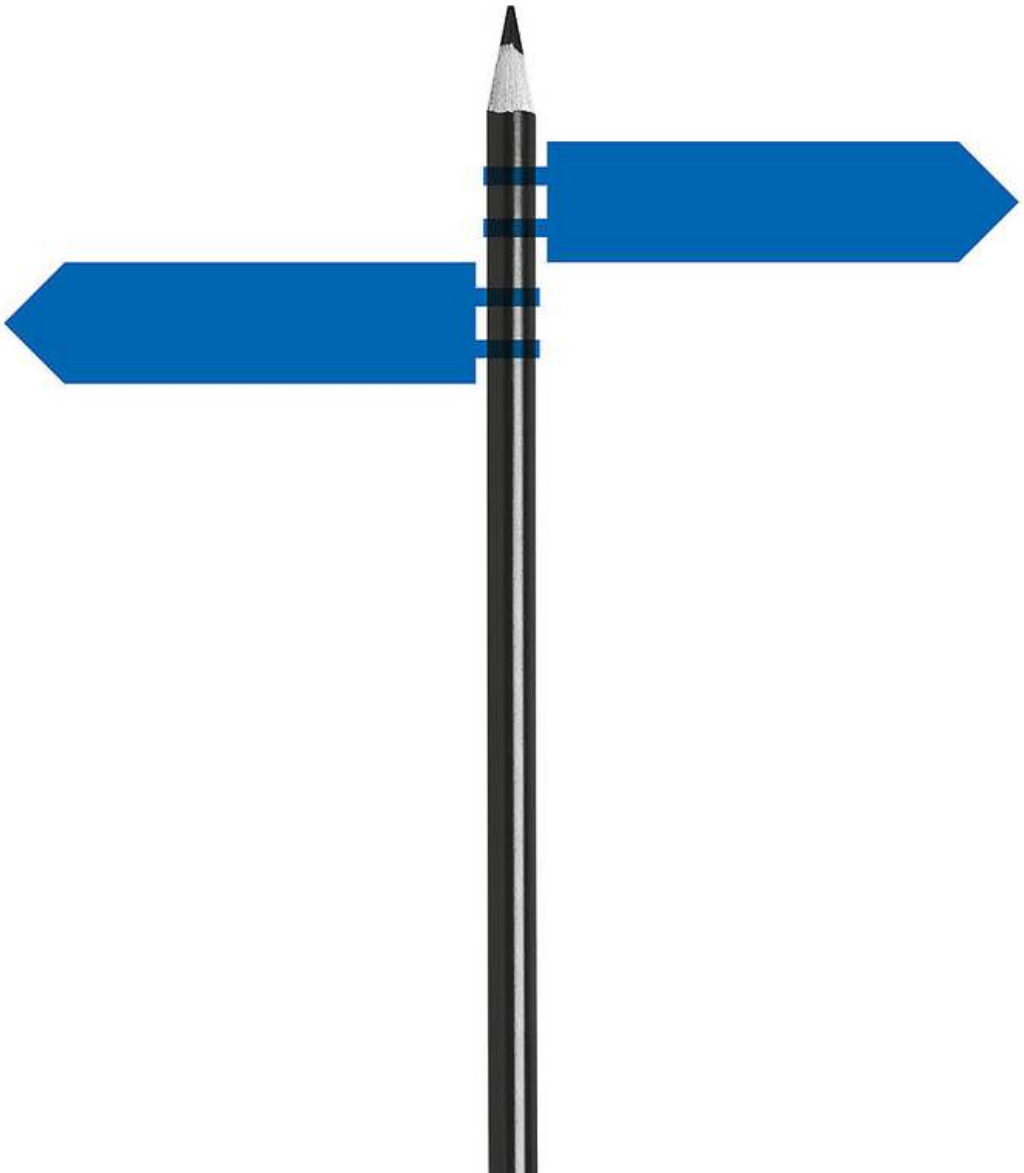
EVERSHEDS SUTHERLAND

Showing you the way

An annotated copy of the Instrument and Articles of Government of Sixth Form College Corporations

18th edition



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Glossary of terms

In this annotated office copy the following expressions are used in the general notes and commentary:

the FHEA 1992	the Further and Higher Education Act 1992 (as amended by the Learning and Skills Act 2000, the Further Education and Training Act 2007, the Apprenticeships, Skills, Children and Learning Act 2009 and the Education Act 2011)
the 1992 Regulations	the Instrument and Articles of Government prescribed by The Education (Government of Further Education Corporations) (Former Sixth Form Colleges) Regulations 1992 (SI 1992/1957)
the 1999 Direction	the modifications to the Articles of Government set out in the Direction of the Secretary of State known as The Further Education Corporations (Former Further Education Colleges) (Articles of Government) (Modification) Direction
the 1999 Order	the modifications to the Instrument of Government set out in the Order of the Secretary of State known as the Further Education Corporations (Former Further Education Colleges) (Instrument of Government) (Modification No 2) Order 1999
the 2001 Order	the Instrument and Articles of Government prescribed by the Further Education Corporations (Former Further Education Colleges) (Replacement of Instruments and Articles of Government) Order 2001
the 2006 Order	the Instrument and Articles of Government prescribed by The Further Education Corporations (Former Further Education Colleges) (Replacement of Instruments and Articles of Government) Order 2006: The Further Education Corporations (Former Voluntary Controlled Sixth Form Colleges) (Replacement of Instruments and Articles of Government) Order 2006
the 2006 Direction	the modifications to the Articles of Government set out in the Direction of the Secretary of State known as The Further Education Corporations (Former Further Education Colleges) (Articles of Government) (Modification) Direction 2006
the 2007 Order	the new Instrument and Articles of Government prescribed by The Further Education Corporations (Former Further Education Colleges) (Replacement of Instruments and Articles of Government) Order 2007; The Further Education Corporations (Former Sixth Form Colleges) (Replacement of Instruments and Articles of Government) Order 2007; and The Further Education Corporations (Former Voluntary Controlled Sixth Form Colleges) (Replacement of Instruments and Articles of Government) Order 2007
the original 2008 Instrument/Articles	the Instrument/Articles as made by the 2007 Order
the updated 2008 Instrument/Articles	the 2008 Instrument/Articles as amended by the 2010 and 2012 Modification Orders
the 2010 Modification Order	the modifications to the Instruments and Articles of Government set out in the Direction of the Secretary of State known as The Further Education Corporations (Former Further Education Colleges) (Modification of Instruments and Articles of Government) Order 2010

the 2012 Modification Orders	the modifications to the Instruments and Articles of Government set out in the Orders of the Young People's Learning Agency known as The Sixth Form College Corporations (Modification of Instruments and Articles of Government) Orders Numbers 1,3,4 and 5 2012
ACAS	the Advisory, Conciliation and Arbitration Service
ACAS Code	the Code of Practice on Disciplinary and Grievance Procedures issued by ACAS in 2015
ACOP	the Post-16 Audit Code of Practice is applicable for periods commencing on or after 1 August 2016 and which updated JACOP to reflect the Machinery of Government changes, including the transfer of the SFA into the DfE and the creation of the ESFA
AoC	the Association of Colleges
BEIS	the Department for Business, Energy and Industrial Strategy
Code of Good Governance	the governance code (as updated) issued by the AoC Governors' Council in March 2015 as a successor to the Foundation Code
DBIS	the Department for Business, Innovation and Skills (now replaced from July 2016 by the BEIS with DBIS's educational functions transferring to the DfE)
DCFS	the Department for Children, Schools and Families (2007 – 2010)
DfE	the Department for Education
DfEE	the Department for Education and Employment (1995 – 2001)
DfES	the Department for Education and Skills (2001 – 2007)
DfES Guidance	the DfES Guidance to the Statutory Instrument and Articles of Government (2002)
DIUS	the Department for Innovation, Universities and Skills (now part of DBIS)
DPA	the Data Protection Act 2018
EFA	the Education Funding Agency, an executive agency within the DfE. Part of ESFA from April 2017
ESFA	the Education and Skills Funding Agency. Created by the combination of the SFA and EFA from April 2017
ETF	the Education and Training Foundation, which took over some functions of LSIS
FEFC	the Further Education Council for England (replaced by the LSC)
Foundation Code	the English Colleges' Foundation Code of Governance now succeeded by the Code of Good Governance for English Colleges (March 2015)
FOIA	the Freedom of Information Act 2000
HEFCE	the Higher Education Funding Council for England
HMSO	Her Majesty's Stationery Office
IAS	the Internal Audit Service
JACOP	Joint Audit Code of Practice issued by SFA and EFA. Replaced from March 2017 by the ACOP
JISC	the Joint Information Systems Committee

Learning and Skills Act 2000	Learning and Skills Act 2000 (as amended by the Apprenticeships, Skills, Children and Learning Act 2009)
LSC	the Learning and Skills Council for England (formerly the FEFC and now dissolved under the Apprenticeships, Skills, Children and Learning Act 2009)
LSDA	the Learning and Skills Development Agency (subsequently split into QIA – which later merged with CEL to form LSIS – and LSN)
LSIS	the Learning and Skills Improvement Service (now dissolved and functions transferred to various bodies including the Education and Training Foundation)
NAO	the National Audit Office
NUS	the National Union of Students
OECD	the Organisation for Economic Co-operation and Development
OfS	The Office for Students
OFSTED	the Office for Standards in Education
Revised Schedule 4	Schedule 4 Further and Higher Education Act 1992 as substituted by the Education Act 2011
SFA	the Skills Funding Agency, from July 2016 an executive agency within the DfE. Combined with the EFA from April 2017 to form the ESFA
SFA member	a member of the Corporation appointed by the CE of Skills Funding under section 56AA of the FHEA 1992
the UK Corporate Governance Code	the UK Corporate Governance Code issued by the Financial Reporting Council in June 2016 first issued by the Financial Reporting Council in 2003 and formerly known as the Combined Code
YPLA	the Young People's Learning Agency. Replaced by the EFA and subsequently ESFA
YPLA member	means a member of the Corporation appointed by the YPLA under section 56I of the Further and Higher Education Act 1992 (repealed by the 2011 Act).

Preface to first edition by Baroness Blackstone

"The Instrument and Articles of further education Colleges set out the law of the land in respect of governors' responsibilities. It is essential that all governors understand their responsibilities and their role in the life of their College. This publication provides an immense amount of carefully considered guidance and explanation not just on the Instrument and Articles but also many other related topics. In particular, the Guidance is informed by the public sector values that have been developed through the work of the Committee on Standards in Public Life. It will be a useful resource and reference guide for governors, principals and clerks. This Government places great emphasis on improving the standards of governance in our Colleges, which play such an important part in delivering lifelong learning. I welcome Eversheds' [Sutherland's] initiative in developing this project, which is particularly timely with the implementation of the new arrangements that took effect from 1 August."

Tessa Blackstone, Minister for Further and Higher Education, August 1999

Note to the 18th edition

Since the 17th edition was published the Coronavirus pandemic has forced worldwide changes in the way we live our lives and the way we work.

Colleges have grappled heroically with a rapid shift to online learning, turmoil in the exam system, adapting to staff home working and significant changes to working practices to accommodate social distancing. For corporations it meant rapidly adapting governance to accommodate the changes and so as to continue to provide effective support to hard pressed senior leadership teams. Most Corporations have now embraced virtual meetings as an effective ways of making decisions and in many cases participation of busy members has increased rather than decreased because of the convenience of the online platforms.

As sixth from colleges emerge from the pandemic, other pressing issues are beginning to assert themselves. Key priorities include: ensuring that students are not left behind by Covid; raising the rate of funding for sixth form students; and campaigning to keep Applied General Qualifications such as BTECs. The sector is also striving to establish dedicated capital expansion and maintenance funds for sixth form providers as well as reform of the process for establishing new sixth form provision. The potential benefits of academisation are still being carefully considered by a number of institutions.

In addition to the above, the UK have also left the European Union. There is still a lack of clarity on some key issues for the education sector, such as how potential changes in export markets might shape the demand for further education and training, the impact of a reduction in free movement of workers and how to make the country more self-sufficient in skills if there is lower migration.

The insolvency regime for colleges has been introduced and the first institutions have entered educational administration. The sector has been watching the outcomes carefully and it will be interesting to see how often the powers under the regime will be invoked. There has been understandable concern amongst governors about personal responsibility in insolvency situations and it is hoped that able individuals are not deterred from serving as corporation members as a result.

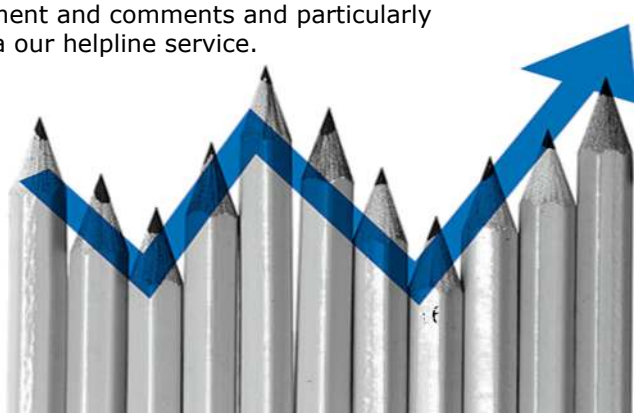
At the time of writing in remains to be seen what impact the forthcoming Skills and Post-16 Education Bill will have on college funding arrangements and those facing intervention.

Other changes of note since the last edition include the introduction of updated rules around the disqualification of individuals from acting as charity trustees or senior managers, debates about which code of governance to adopt, as well as the introduction of significant changes to data protection legislation. All of these matters are addressed in the updated commentary below. In particular, please note the addition of a new Appendix 5 which provides information on the impact of the GDPR on college governance.

Against the above backdrop good governance will be essential if corporations are to continue to function efficiently, effectively and with propriety. The expectations on the almost entirely unpaid band of volunteers which make up college corporations, together with their first line advisers, corporation clerks, has never been higher. We hope that our governance guide will continue to be clerks' first port of call in tackling governance issues, followed by the helpline for those colleges which are Plus members.

We continue to be indebted to subscribers for their encouragement and comments and particularly for asking a varied and often challenging range of questions via our helpline service.

November 2021



The seven principles of public life

The following is an extract from the Second Report of the Nolan Committee on Standards in Public Life, May 1996

1

Selflessness

Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

2

Openness

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

3

Integrity

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.

4

Honesty

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

5

Objectivity

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

6

Leadership

Holders of public office should promote and support these principles by leadership and example.

7

Accountability

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Instrument of Government

Official text and Eversheds Sutherland Commentary

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1. Interpretation of the terms used

In this Instrument of Government –

(a) any reference to "the Principal" shall include a person acting as Principal;

(b) "the Clerk" means the Clerk to the Corporation;

(c) "the Corporation" means any further education Corporation to which this Instrument applies;

(d) "the institution" means the institution which the Corporation is established to conduct and any institution for the time being conducted by the Corporation in exercise of its powers under the Further and Higher Education Act 1992;

(e) "this Instrument" means this Instrument of Government;

(f) "the local education authority" means the local authority in whose area the institution is situated;

(g) "local education authority member" means a member of the Corporation appointed by the local education authority under section 56F of the Further and Higher Education Act 1992;

(h) "meeting" includes a meeting at which the members attending are present in more than one room, provided that by the use of video-conferencing facilities it is possible for every person present at the meeting to communicate with each other;

(i) "necessary skills" means skills and experience, other than professional qualifications, specified by the Corporation as appropriate for members to have;

(j) "parent member", "staff member" and "student member" have the meanings given to them in Clause 2;

(k) "the previous Instrument of Government" means the Instrument of Government relating to the Corporation which had effect immediately before 1 January 2008;

(l) "the Secretary of State" means the Secretary of State for Education;

(m) "staff matters" means the remuneration, conditions of service, promotion, conduct, suspension, dismissal or retirement of staff;

(n) "the students' union" means any association of students formed to further the educational purposes of the institution and the interests of students, as students;

(o) "a variable category" means any category of members whose numbers may vary according to Clauses 2 and 3;

(p) "the YPLA" means the Young People's Learning Agency for England;

(q) "YPLA member" means a member of the Corporation appointed by the YPLA under section 56I of the Further and Higher Education Act 1992.

General comments

Paragraph (a)

Revised Schedule 4 states that a SFC Corporation must have a "chief executive". There is nothing in the Revised Schedule 4 that requires the holder of that office to have that title. It is therefore

permissible, but not mandatory, to amend Paragraph (a) accordingly and to substitute references to "the Principal" in the Instrument and Articles with references to "the Chief Executive".

Whilst it is common for the Principal/Chief Executive Officer to be referred to as the "Principal and Chief Executive", some Corporations have chosen to split the role into two separate roles, performed by two separate individuals. If a Corporation adopts this course, it will be necessary to amend the Instrument and Articles of Government to make it clear that there will be a Chief Executive and a Principal and to specify the responsibilities of each. This will require an amendment to Article 3 of the Articles of Government together with a number of consequential changes.

Revised Schedule 4 requires the Instrument to set out the Chief Executive's responsibilities but it does not itself specify what these are.

Paragraph (d)

Significantly, the powers of SFC Corporations are referred to at the very beginning of the Instrument, in the definition in paragraph (d) of "institution", as being "the institution which the Corporation is established to conduct and any institution for the time being conducted by the Corporation in exercise of its powers under the Further and Higher Education Act 1992". For a summary of the statutory powers of SFC Corporations, please refer to Part Two, paragraph 1 and in particular appendix 1 which sets out their principal and supplementary powers, and also note the impact of charity law as outlined in Part Two, paragraph 2.

Paragraphs (f) and (g)

Under section 56 of the Further and Higher Education Act introduced as the result of the Machinery of Government changes in the Apprenticeships, Children, Learning and Skills Act 2009, the responsible local education authority used to have the power to appoint up to two members of a SFC Corporation. Section 56 was repealed by the Education Act 2011 with effect from 1 April 2012 and accordingly no further local authority members can be appointed under these provisions. There is nothing to prevent a Corporation appointing as a member a person from a local authority, although as local authorities become more concerned with skills strategies for their areas (either directly or as part of combined authorities with powers devolved from central government) care will need to be taken to avoid conflicts of interest where a Corporation member is also a member of such an authority.

Paragraph (h)

The use of Teams, Zoom and other platforms to conduct Corporation meetings has had and will continue have a significant impact on the way that Corporation business is transacted. Many Colleges are reporting better attendance by governors at virtual Corporation and committee meetings and, to date, there has been no meaningful decline in the quality of decision making. Whilst it is unlikely that Corporations will continue the practice of having nearly all meetings on line after the pandemic has receded, it is anticipated that virtual meetings will be a permanent feature of College governance.

The definition of "meeting" in the 2008 Instrument allowed for Corporation members to participate in meetings by video conference (which would include Teams and Zoom meetings) but not by telephone. In practice it was permissible for members to attend and contribute to a Corporation meeting by telephone, but they could not form part of the quorum or be permitted to vote.

Under Revised Schedule 4 many Corporations have amended their Instrument and Articles to extend the definition of meeting to include meetings conducted by teleconferencing and/or to enable the Corporation and its committees to make decisions other by other means, e.g. by written resolution. If adopted, such facilities should be used sparingly where it is impracticable to convene a special meeting.

It may be advisable to provide guidance on the use of such facilities in Standing Orders. All methods of decision making, especially those not involving face to face communication, have their limitations so careful consideration should be given to how they are used.

Paragraphs (p) and (q) – YPLA member

Under section 56I of the Further and Higher Education Act 1992 the YPLA had the power to directly appoint up to two members to a Corporation. The 2011 Act repealed section 56I and accordingly no further YPLA members can be appointed under these provisions.

For a summary of the ESFA's powers of regulation under the Conditions of Funding Agreement please refer to Part Two, paragraph 3.

2. The composition of the Corporation

(1) Subject to the transitional arrangements set out in Clause 4, the Corporation shall consist of –

(a) up to [fifteen[1]/eleven[2]] members who appear to the Corporation to have the necessary skills to ensure that the Corporation carries out its functions under article 3 of the Articles of Government;

(b) up to two local education authority and YPLA members (if appointed);

(c) the Principal of the institution, unless the Principal chooses not to be a member;

(d) at least one and not more than three members who are members of the institution's staff and have a contract of employment with the institution and who have been nominated and elected as set out in paragraphs (3), (4) or (5) ("staff members");

(e) at least two and not more than three members who are students at the institution and have been nominated and elected by their fellow students, or if the Corporation so decides, by a recognised association representing such students ("student members");

(f) at least one and[3] not more than two members, who are parents of students under the age of 19 years attending the institution, who have been nominated and elected by other parents, or if the Corporation so decides, by a recognised association representing parents ("parent members");

(g) [up to four members ("foundation members") calculated in accordance with the following table –

Total Membership of the Corporation	The minimum number of those members who must be foundation members
12 to 14	3
15 to 20	4

who has been nominated –

(i) by the relevant Diocesan Board of Education (in the case of a Corporation established to conduct an institution which, on the date of establishment of the Corporation, was a voluntary controlled school where religious education was provided in accordance with the tenets of the Church of England), or

(ii) by the trustees appointed under the trust deed or Charity Commissioners' Scheme relating to the institution (in the case of any other Corporation),

for the purpose of securing, so far as practicable, that the established character of the institution (namely its character immediately before it began to be conducted by the Corporation) is preserved and developed and, in particular, that the institution is conducted in accordance with the provisions of any trust deed relating to it.]

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1 Only applies to Former Sixth Form Colleges.

2 Only applies to Former Voluntary Controlled Sixth Form Colleges.

3 It is compulsory for both Former Sixth Form Colleges and Former Voluntary Controlled Sixth Form Colleges to have at least one parent member.

(2) A person who is not for the time being enrolled as a student at the institution, shall nevertheless be treated as a student during any period of authorised absence from the institution for study, travel or for carrying out the duties of any office held by that person in the institution's students' union.

(3) Where the Corporation has decided or decides that there is to be one staff member; the member may be a member of the academic staff or the non-academic staff and shall be nominated and elected by all staff.

(4) Where the Corporation has decided or decides that there are to be two staff members:

(a) one may be a member of the academic staff, nominated and elected only by academic staff; and the other may be a member of the non-academic staff, nominated and elected only by non-academic staff, or

(b) each may be a member of the academic or non-academic staff, nominated and elected by all staff.

(5) Where the Corporation has decided that there are to be three staff members –

(a) all may be members of the academic or non-academic staff, nominated and elected by all staff,

(b) one may be a member of the academic or the non-academic staff, nominated and elected by all staff, one may be a member of the academic staff, nominated and elected by academic staff only, and one may be a member of the non-academic staff nominated and elected by non-academic staff only,

(c) two may be members of the academic staff, nominated and elected by academic staff only, and one may be a member of the non-academic staff, nominated and elected by non-academic staff only, or

(d) one may be a member of the academic staff, nominated and elected by academic staff only, and two may be members of the non-academic staff, nominated and elected by non-academic staff only.

(6) The appointing authority, as set out in Clause 5, will decide whether a person is eligible for nomination, election and appointment as a member of the Corporation under paragraph (1).

General comments

With effect from 1 April 2012 (when the Revised Schedule 4 came into force) the following changes to the composition of the Corporation were introduced:

- a maximum number of Corporation members was no longer specified however there is a practical limit to the size of an effective Corporation
- the YPLA no longer has power to appoint members to the Corporation[4] (though see below)
- the minimum number of staff, student and parent members was reduced to one of each (that is; one staff, one student and one parent member). No maximum number of staff/student/parent members was specified
- staff, student and parent members were no longer required to be elected (but see the detailed commentary on clause 1(d) and (e) below)

[4] Note further that the role of Chief Executive Of Skills Funding has also been abolished.

The required categories of membership are staff, student, parent and independent members. In addition, the Principal will be a member of the Corporation unless s/he chooses not to be. If it is decided to split the role of "Principal and Chief Executive" into two separate roles, consideration would need to be given as to whether both the Principal and the Chief Executive were to be members of the Corporation. It is a widely accepted principle of good governance that the number of independent (that is external) members of the Corporation should exceed by at least one the number of internal members.

Former Voluntary Controlled Sixth Form Colleges also have foundation members nominated by the diocesan board or by trustees under a trust deed or a Charity Commission scheme relating to the office. Such Colleges will need to refer to their specific instrument for the exact definition of such members. With the exception of staff, student and parent members, the Search Committee must advise the Corporation before any other member is appointed by it (Article 5(2)).

It should be noted that there is no mechanism for the removal of Corporation members by members of the public. From 1 April 2012 the Secretary of State gained the power[5] previously held by the responsible local education authority to intervene by removing Corporation members for mismanagement and on other grounds. It would, however, be more accurate to regard the arrangements for composition as a means of ensuring responsiveness to stakeholder groups rather than accountability to them.

The distinction between accountability (which in a strict sense means giving an account, normally financial, to another person) and responsiveness is an important one. Lines of financial accountability run vertically up to the ESFA, Government and Parliament (in the case of the latter through the accounting officer system and the Committee of Public Accounts), whereas responsiveness may be said to run horizontally from the Corporation to the internal community (staff and students) and to the external community at large (private, public and voluntary sector partners). While the vertical accountability of Colleges can be enforced by legal and financial sanctions and, more remotely by the Parliamentary process, there are no similar sanctions to enforce responsiveness (save perhaps by means of the ESFA, audit and inspection). However, following the issue of the report produced by the independent commission chaired by Baroness Sharp, A dynamic nucleus: Colleges at the heart of local communities:

https://www.aoc.co.uk/files/dynamic-nucleus-colleges-the-heart-local-communitiespdf-0

Ofsted consider the extent of a College's engagement with local employers as this is increasingly seen as part of its responsiveness or "horizontal" accountability. See Further Education and Skills Inspection Handbook:

https://www.gov.uk/government/publications/further-education-and-skills-inspection-handbook-eif

See also "A new conversation: employer and College engagement", UKCES/157 Group/Gazelle Colleges, April 2014:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306968/A_New_Conversation.pdf

The means for ensuring that the Corporation's composition reflects the interests of its internal stakeholders is the requirement for the Corporation to include staff, student and parent members. These must first be nominated and elected by the relevant nominating body before they are appointed by the Corporation under Clause 5(1). No form of nomination is specified and this should be a matter for each College's Standing Orders. Subject to those, self-nomination is possible.

With the exception of staff, student and parent members, the Search Committee (if there is one - see the commentary on Article 5) must advise the Corporation before any other member is appointed by it).

The Instrument, and indeed the 1992 Act make no provision for the appointment of associate members as is possible in relation to the governing body of maintained schools, though Godbold in his survey of board composition undertaken in 2015 for the Education and Training Foundation found that a small number of Corporations had made such appointments.

https://www.gov.uk/government/publications/further-education-and-skills-inspection-handbook-eif

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5 Under section 56E of the 1992 Act.

Where it is desired to allow an individual to attend a meeting without being a member of the Corporation, consideration could be given to allowing such person to attend as an observer. The Corporation should, however give careful consideration to the impact of such attendance on, e.g. the willingness of members to discuss matters freely.

Although the Instrument makes no provision for the appointment to the Corporation of associate members, a minority of non-Corporation members may be included on committees of the Corporation.

From 1 April 2012 the Education Act 2011 removed local authorities' powers of intervention which have been transferred to the Secretary of State. The power to dissolve Corporations has also been transferred from the Secretary of State to Corporations themselves (see Article 26 and the commentary thereon). The Secretary of State retains the power to order a Corporation to resolve to dissolve itself where s/he is exercising his/her intervention powers. The former coalition government's approach to the use of the intervention powers was set out in Rigour and Responsiveness in Skills, published by the DfE and DBIS in May 2013 and applied to sixth form Colleges as well as general further education Colleges. See:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/186830/13-960-rigour-and-responsiveness-in-skills-amended.pdf

Subsequently, on 7 December 2016 an Early Intervention Strategy was published jointly by the EFA and SFA (updated July 2021):

https://www.gov.uk/government/publications/college-funding-early-intervention-and-prevention/early-intervention-strategy

Intervention may come about where serious concerns have arisen about a College's financial performance or other significant matters (e.g. where a College requires re-inspection and has failed to produce an adequate post inspection plan, or a College is unable to take action to address weaknesses satisfactorily).

Inspection reports have placed much emphasis on the knowledge, skills and expertise of members of Corporations as illustrated by the following comments: "Governors have an excellent understanding of the work of the College. They promote the strong student-centred ethos of the College and support the high aspirations of all staff for outstanding student achievement. Governors actively contribute to the development of the College's strategic plan and provide valuable and carefully considered support and challenge for managers in improving quality and performance. Governors hold senior managers to account very effectively and ensure that the College maintains its capacity to serve the community well." (Strode College, 2014). Inspection reports also emphasise that Corporations need to ensure that their membership reflects an appropriate gender and ethnic balance.

On the ways in which Corporations can address equality and diversity issues in relation to its operation see Equality, Diversity and Governance issued by LSIS in 2009. The need for many Corporations to do more to address issues of equal opportunities in relation to membership was identified in the review of further education and sixth form College governance issued by DBIS in July 2013:

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiku6WTyaDvAhVDlFwKHZyLBAcQFjAAegQIAhAD&url=https%3A%2F%2Fwww.aoc.co.uk%2Fsites%2Fdefault%2Ffiles%2FEquality%2520and%2520Diversity%2520and%2520Governance%2520LSIS.pdf&usg=AOvVaw2ut_cx7Z8zaF3a29rqj3AR

Useful information about improving diversity on governing bodies can be gleaned from the Equality Challenge Unit's 2017 publication for Scottish colleges:

https://www.ecu.ac.uk/wp-content/uploads/2017/09/Governing-bodies-equality-and-diversity-a-handbook-for-board-members-in-Scotlands-colleges.pdf

Another point highlighted in some inspection reports is that Corporation members should be known to the staff of their College. Presumably being known to the staff might be evidence that members have made efforts to get to know their College in a way which will aid decision-making. Ofsted praised governors' "intimate knowledge" of their Colleges in its reports on New College Pontefract (2014) and John Ruskin College (2013). As discussed in the commentary on clause 3 the Revised Schedule 4 does not contain any detailed rules about the composition of Corporations, other than

in relation to staff, student and parent members discussed in the commentary below. Corporations are, therefore, largely free to amend clause 2 if they think it appropriate.

Sub-paragraph (1)(a)

No description is provided for this important category of membership. It is open to Corporations to decide (at the time of making a fresh determination under Clause 3) how they wish to describe external members appointed under paragraph (1)(a). Possible options include "independent members" or "external members".

Sub-paragraph (1)(b)

Until 31 March 2012 the local education authority and YPLA could appoint up to two additional members to a Corporation where they considered this to be appropriate. The power to appoint two additional members was repealed when the Education Act 2011 came into force on 1 April 2012 so no further local education authority or YPLA members will be appointed. Corporations that had no such members as at 31 March 2012 were therefore able to remove this sub-paragraph from their instruments.

Sub-paragraph (1)(c)

Revised Schedule 4 does not stipulate, as the previous Instrument did, that the Principal shall be a member of the Corporation unless the s/he chooses not to be. Nevertheless, in the vast majority of cases, Corporations have retained sub-paragraph (1)(c) and the Principal is a member ex officio, i.e. membership derives from the office of Principal rather than being appointed following nomination, selection or co-option or a combination of these, unless the Principal chooses to opt out of membership.

Where the Principal is not a member, s/he "is entitled and would be expected to attend all meetings of the Corporation and its Committees, as if they were a member… "except where s/he was required to withdraw in accordance with Clause 14(5) of the Instrument if s/he were a member.

Sub-paragraph (1)(d)

Prior to 1 April 2012, the Corporation was required to include at least one and not more than three staff members. It was initially proposed that the requirement for staff and student members of the Corporation should be removed altogether, but this proposal was abandoned during the passage of the 2011 Act through parliament. Revised Schedule 4 (paragraph 4(c)(i)) stipulates that the Instrument must provide for the members to include "staff and students" at the institution. DBIS publicly indicated that they considered that this reference was to the body of staff and the body of students respectively, meaning that the requirement is for a minimum of one staff member and one student member. Under Revised Schedule 4, therefore, the number of staff and student members may be reduced to one of each. It must be said, however, that the reference (in particular to "students" in the plural) could be read literally as meaning that there should be at least two students. If the literal meaning is the correct one in respect of student representation it would be surprising if "staff" were to be interpreted in the singular. The point is therefore not free from doubt. The Parliamentary Debates reported in Hansard do not throw any light on the matter. Corporations considering reducing the number of staff and/or student members should in any event as a matter of fairness and natural justice take appropriate steps to consult staff and/or students (as appropriate) and their representatives before deciding whether to make such a change.

Other changes introduced under Revised Schedule 4 were that:

- there is no maximum number of staff members
- it is up to the Corporation how it arranges for staff members to be appointed.

Nevertheless, election by staff remains good practice. Note that the Further Education Commissioner in his published assessment summary following his review of governance at Stratford-upon-Avon College in 2014 questioned the appropriateness of the College's actions in moving from a process of election of staff (and student) governors to one of nomination and appointment by the Corporation. See:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/343861/Stratford_Upon_Avon_College_Summary_Assessment.pdf

Sub-paragraphs (3), (4) and (5) provide some alternative options regarding the identity of staff members and the constituencies from which they may be drawn, depending on the total number of staff members. These provide that:

- if one staff member is to be appointed that member may be a member of the academic staff or the non-academic staff but all members of staff at the College (full and part-time, academic and non-teaching) must be free to elect that nominee
- if the Corporation decides to appoint two staff members, one may be an academic staff member and the other a non-academic staff member (in each case, elected and nominated by the respective category of academic or non-academic staff at the College) (Clause 2(4)(a)) or each may be a member of the academic or non-academic staff, nominated and elected by all staff
- in the case where there are to be three staff members, Clauses 2(5)(c) and (d) allow two to be academic staff members nominated by academic staff and one to be a non-academic staff member nominated by the non-academic staff and vice versa. There is no longer a requirement for the third staff member to be elected and nominated by all members of staff, although this is still allowed. It is, of course, also still possible to have all three staff members elected and nominated by all staff

Where there is more than one staff member, the Corporation may wish to consider other issues, such as whether there should be one staff member from each campus if the institution has more than one site.

The Principal cannot be a staff member, though a senior post holder might be if elected by staff.

Under the 2008 Instrument, staff were only permitted to be members of the Corporation if they were one of the elected staff members. A Corporation could resolve to amend its Instrument to permit one or more members of staff (e.g. senior post holders or equivalent) to be members of the Corporation in addition to and separate from the elected staff member(s). If the Corporation wishes one or more members of staff to be members of the Corporation in addition to the elected staff members:

- the Instrument must be amended to provide for this. If the Instrument is not amended, the appointment of members of staff to the Corporation who are not elected staff members will be in breach of the Instrument
- as a matter of good governance and to ensure compliance with charity law, the Corporation must ensure that the number of independent/external members of the Corporation always exceeds the number of internal members.

The Clerk cannot be a member of the Corporation in any category (see Clause 8(2)).

Membership of this category will terminate automatically on the individual ceasing to be a member of staff at the College (Clause 10(3)). This provision could be amended if, e.g. a Corporation decided to amend the clause to provide for one or more members of staff to be appointed to the Corporation without being elected by staff.

There is no guidance given as to the method of election and nomination of staff members; these are matters for the Corporation. The same applies to student members in paragraph (1)(e). It is open to the Corporation to resolve to delete this wording, however, the Further Education Commissioner has expressed his concerns about the appropriateness of such a change. See the Commissioner's summary assessment of governance at Stratford-upon-Avon College referred to in the commentary on sub-paragraph (1)(d) above.

Revised Schedule 4 is not prescriptive about whether the staff member must have a contract of employment with the institution whereas the wording of the previous (i.e. the 2008) Instrument stipulated that staff members must have a contract of employment with the institution, thereby precluding agency workers and other staff member without a contract of employment with the College such as seconded staff from being members of the Corporation. Under the Revised Schedule 4 there is, therefore no reason in principle why the staff member could not be an agency worker or a secondee. However, if the Corporation wants this flexibility it would need to resolve to amend the wording of sub-paragraph (1)(d) to remove the reference to the member of staff needing to have a contract of employment with the institution. The Corporation may consider it appropriate to retain the requirement that the staff member(s) have a contract of employment with

the institution on the basis that it is appropriate for the staff member to be committed to the institution in this way.

On the role of staff governors generally see The Role of the Staff Governor as a Member of a College Governing body issued by LSIS in 2009.

Sub-paragraph (1)(e)

Prior to 1 April 2012, the Corporation was required to include at least two and not more than three student members. Revised Schedule 4 (paragraph 4(c)(i)) stipulates that the Instrument must provide for the members to include "staff and students" at the Institution. Comments on the minimum number of staff and student members appear in the commentary on sub-paragraph (1)(d).

Other changes introduced by Revised Schedule 4 were as follows:

- there is no maximum number of student members
- it is up to the Corporation how they arrange for student members to be appointed.

If the wording of the 2008 Instrument is retained student member(s) may either be elected and nominated by the students at the College, i.e. by all the students, whether full or part-time, or by a "recognised association representing such students", such as a students' union. In the case of the latter, it will be open for the students' union to nominate one or more of its elected officers for appointment as a student member, although there is no obligation on it to do so. The safe interpretation of this paragraph is, however, that a student nominated by a recognised association representing students should be elected by members of that association, i.e. nomination alone will not suffice.

If Clause 2(1)(e) is retained in the form required under the 2008 Instrument a person must be enrolled as a student at the College in order to be eligible to be nominated as a student member or to vote in the relevant elections, unless s/he has been granted leave of absence by the institution in the circumstance set out in Clause 2(2). Please see the commentary on Clause 8 paragraph (4) for a discussion relating to a student member who holds a sabbatical post in the student union.

There is provision (Clause 10(4)) for membership under this category to terminate at the end of the academic year in which the individual ceases to be a student or such other time in the year after the individual ceases to be a student as the Corporation determines (to ensure that Corporations will not automatically lose their student members too early in the year where the student completes his or her exams in May or June) or if the student is expelled.

Student members often serve for only one year as the result of Clause 10(4) since many students only undertake courses of one academic year. If their studies continue beyond the year their term will continue for the duration of their studies unless the Corporation has determined otherwise. As student governors are often, but not always, inexperienced and their length of service is relatively short, Corporations often arrange appropriate support and guidance. This may take the form of special briefings or the use of mentors. Sometimes Corporations find it helpful to appoint more than one student member or to invite a student observer to attend meetings of the Corporation. The National Union of Students arranges training sessions for student members and has also launched a programme to help Colleges support student governors. See:

http://www.nusconnect.org.uk/articles/five-reasons-to-sign-up-to-our-student-governor-programme

On the role of student governors generally see The Role of the Student Governor as a Member of a College Governing body issued by LSIS in 2009.

Sub-paragraph (1)(f)

Parent membership is compulsory for both Former Sixth Form Colleges and Former Voluntary Controlled Sixth Form Colleges. This remains the case under Revised Schedule 4. Parent members must, however, be parents of students under the age of 19 on the date of appointment. It will be for the Corporation to determine the method of nomination and election. This could include the Corporation accepting an elected nomination from a body which represents parents of students under 19 such as a College parents' association. The DfES Guidance confirms that the term "parent" includes "… natural parent, adoptive parent, legal guardian and step-parent". Unlike staff and student members, the Instrument makes no provision for the appointment of parent members

to terminate automatically on their child either ceasing to be a student at the College or attaining the age of 19. In this situation they will remain members until the expiry of their term of office. They would not, however, be eligible for reappointment as a parent member at the end of that term.

Sub-paragraph (2)

The Corporation may decide whether to retain this Clause. It is mainly relevant where a College has a student member who is a sabbatical officer of the students' union.

Sub-paragraph (6)

Emphasises that the Corporation, as the "appointing authority" (Clause 5(1)), has the power to decide who is eligible for appointment to any description or category specified in Clause 2. This should be read in conjunction with Clause 5(1) which states that the Corporation is not the appointing authority in relation to local education authority and YPLA members. Please refer also to the technical requirements for eligibility in Clause 8, although see the commentary on that Clause.

3. Determination of membership numbers

(1) Subject to paragraph (2) and the transitional arrangements in Clause 4, the number of members of the Corporation, other than local education authority and YPLA members, and the number of members of each variable category shall be decided by the Corporation in the most recent determination made under the previous Instrument of Government.

(2) The Corporation may at any time vary the determination referred to in paragraph (1) and any subsequent determination under this paragraph provided that –

(a) the number of members of the Corporation, other than local education authority and YPLA members, shall not be less than twelve or more than twenty; and

(b) the numbers of members of each variable category shall be subject to the limit which applies to that category set out in Clause 2.

(3) No determination under this clause shall terminate the appointment of any person who is already a member of the Corporation at the time when the determination is made.

General comments

Revised Schedule 4 largely de-regulated the issue of Board composition. The minimum number of members is probably now three – one staff member, one student member and one parent member – although see the commentary on Clause 2(1)(e) above. In practice Corporations have continued to include independent members and the Principal. No maximum number of members is specified. The Corporation could, therefore, resolve to amend sub-paragraph 2(a) to alter the minimum and maximum number of members of the Corporation.

Corporations will need to exercise caution in determining overall numbers. A number once determined becomes the means by which the quorum is determined. Thus, if a Corporation increases its membership from, e.g. 14 to 18, there would need to be at least eight members present before a meeting is quorate (unless it resolves to change the quorum).. High attendance at Corporation meetings is an important component of good governance and Corporations need to be mindful that increasing the number of members also raises the quorum (see the commentary on Clause 13 of the Instrument).

The size and composition of the Board should be consistent with the Board's overall concept of governance. From the point of view of business efficiency there is evidence that more successful companies have smaller boards[6]. This conclusion should, however, be tempered by the recognition of the different governance models which exist in the for-profit sector and the different considerations which apply to the typical "business board". The Godbold survey of College board composition (2015) found that the average size of the board of a sixth form College was 18 governors, though a small number of Colleges had increased their determined number above 20. See:

http://www.et-foundation.co.uk/wp-content/uploads/2015/09/ETF-Summary-of-Clerks-reports-commissioned-0-8.pdf

As Clause 3 is currently drafted it should be noted that the Board must set the number of members in each category. It is not possible for the Board to stipulate a range. It would, however, be possible for a Corporation to amend Clause 3 to provide for a range of members if that was felt to be desirable.

[6] e.g. in the Eversheds Sutherland Board Report of 2013 which was compiled following interview with directors from 241 global companies.

Paragraph (1)

There are two legacy references in sub-paragraph 1 – the first to "the transitional arrangements" and the second to "local education authority and YPLA members". These are explained below.

The composition arrangements of Clause 2(1) of the original 2008 Instrument (being that in force prior to entry into force of the 2011 Act on 1 April 2012) took effect on 1 January 2008. These composition arrangements were expressly made subject to the transitional arrangements of Clause 4 in accordance with which Corporation members appointed from a date before 1 January 2008 continued in membership of the categories to which they were originally appointed until their membership ceased or ceases. Their successors should then have been appointed to the membership categories determined by the Corporation following the 2007 Order. If the Corporation's determination of numbers is in accordance with the original 2008 Instrument, the Corporation could resolve to delete Clause 4 and the reference in this sub-paragraph to "transitional arrangements".

As explained in the commentary to Clause 2(1)(b) above, until 31 March 2012 the local authority and the YPLA could appoint up to two additional Corporation members. These provisions were repealed by the 2011 Act. As no such members can now be appointedthe Corporation should, if it has not done so already, resolve to delete references to "local education authority and YPLA members" from its Instrument.

Paragraph (2)

Any local education authority and YPLA members did not count towards the total membership for the purpose of determining the maximum or minimum number of members under sub-paragraph (2)(a) (see commentary on sub-paragraph (1)(b) of Clause 2).

Paragraph (3)

If a fresh determination of numbers is made, members appointed before the date of such determination will serve out their period in office, unless they decide to resign.

4. Transitional arrangements

(1) Where, following the last determination under the previous Instrument of Government, the membership of the Corporation does not conform in number to that determination –

(a) nothing in Clauses 2 and 3 of this Instrument shall require the removal of members where the previous Instrument would not have required their removal; but

(b) the Corporation shall ensure that any new appointments are made so that its composition conforms to the determination as soon as possible.

General comments

When Corporations avail themselves of the more flexible composition arrangements by making fresh determinations of the membership numbers in each variable category, it is not intended that existing members at the time of determination should be removed. Rather, there should be a gradual move towards the desired new structure. As each appointment comes to an end the Corporation should make new appointments to conform to the overall composition set out in Clause 2(1) and its particular determination. See also the general commentary on Clause 3.

Assuming a Corporation no longer has members who were appointed under the arrangements preceding the 2007 Order it would be preferable for the Corporation to delete this clause.

5. Appointment of the members of the Corporation

(1) Subject to paragraph (2) the Corporation is the appointing authority in relation to the appointment of its member other than local education authority and YPLA members.

(2) If the number of members falls below the number needed for a quorum, the Secretary of State is the appointing authority in relation to the appointment of those members needed for a quorum.

(3) The appointing authority may decline to appoint a person as a parent, staff or student member if –

(a) it is satisfied that the person has been removed from office as a member of a further education Corporation in the previous ten years; or

(b) the appointment of the person would contravene any rule or bye-law made under article 23 of the Articles of Government concerning the number of terms of office which a person may serve, provided that such rules or bye-laws make the same provision for each category of members appointed by the appointing authority; or

(c) the person is ineligible to be a member of the Corporation because of Clause 8.

(4) Where the office of any member becomes vacant the appointing authority shall as soon as practicable take all necessary steps to appoint a new member to fill the vacancy.

General comments

Revised Schedule 4 requires that the Instrument provide for the appointment of members. The Code of Good Governance states that the governing body should "adopt a formal and open policy for recruiting governors" (paragraph 9.2.5).

The whole Corporation is now involved in the appointment of all members of the Corporation. Accordingly, the Corporation should, if it has not done so already, resolve to delete references to "local education authority and YPLA members" from its Instrument.

Revised Schedule 4 requires the Instrument to set out rules of eligibility (and, implicitly, ineligibility) for membership but does not prescribe the content of such rules. Subject to compliance with charity law, Corporations are free to agree their own rules and resolve to amend Clause 5. See further the commentary to Clause 8 below.

For Corporations which decide to retain the existing wording of Clause 5 (as set out above), this clarifies the circumstances in which the Corporation *may* [emphasis added] decline to appoint an elected member – that is, a parent, staff or student member. For obvious reasons, declining to appoint is not an issue in relation to independent members who are either eligible or ineligible to be members in accordance with Clause 8. Eligible elected members may only be rejected if:

- they have been removed as unfit from a further education Corporation (either the same Corporation or that of another College) in the previous 10 years
- the appointment would contravene rules made by the Corporation relating to the number of terms which members can serve (see commentary on paragraph (3) below)
- they are ineligible to serve as members on one of the grounds set out in Clause 8.

Unless the Corporation resolves to delete Clause 2(1)(c) (which it could do under the Revised Schedule 4) such that the Principal is no longer a member of the Corporation, the Corporation does

not have the right to prevent the Principal from serving on the Corporation, provided that s/he has been properly selected for the appointment as Principal. This is because the Principal is not appointed to the Corporation but a member ex officio (see the commentary to Clause 2(1)(c)). Any Corporation considering deleting Clause 2(1)(c) to remove the Principal from the Corporation is strongly encouraged to take legal advice before doing so.

For a discussion of whether a Disclosure and Barring Service ("DBS") check should be carried out before members are appointed or re-appointed, see the general commentary on Clause 8 and the Eversheds Sutherland Briefing on the changes made to the safeguarding regime by the Protection of Freedoms Act 2012: Safeguarding changes come into force: Education e-brief – 10 September 2012.

The general commentary on Clause 8 also looks at the issue of whether potential members should be asked to declare political or other affiliations.

Paragraph (1)

In making appointments, it will be important for the Corporation to take into account the principles set out in the Second Report of the Nolan Committee. The process should be open and transparent. Corporations may wish, potentially through the Search Committee if one is retained (see the commentary for Article 5), to draw up role descriptions and person specifications for potential (and existing) Corporation members and to carry out a skills audit of existing members to identify any gaps in experience and expertise.

Regulators will consider the adequacy of governors' understanding of both financial and educational issues, and the extent to which governors' expertise in these areas is being deployed. The Corporation should consider issues such as the desirability of providing an indication of the time commitment needed from Corporation members and from those undertaking particular roles, ensuring an appropriate gender and ethnic balance of membership and how well membership reflects the communities served by the College. See the general commentary on Clause 2[7]. The gender and ethnicity balance of the Corporation may be commented upon on inspection, e.g. the inspection report on an inner city College inspected February 2012 observed that "the proportions of female governors and of governors from a minority ethnic background are below those of the student body and the communities the College serves." See also the comments in the 2013 DBIS Review of Further Education and Sixth Form College Governance.

The Corporation will also have to decide on:

- appropriate nominating bodies (with regard to students and parents)
- on the election procedures for staff, student and parent members
- defining who staff and students are.

A Corporation has no power to restrict nominations for staff members to full-time staff only or nominations for student members to full-time students only. What may be problematic is clarifying the electorate. If part-time staff and part-time students are excluded from voting (a College may have thousands of part-time students and hundreds of part-time staff, making elections very expensive and cumbersome, with the added risk of irregularity), the Corporation may find itself subject to close scrutiny by staff (e.g. through a claim for less favourable treatment under the Part–Time Workers (Prevention of Less Favourable Treatment) Regulations2000 and student associations. The appointment itself could also be the subject of legal challenge or the exercise by the Secretary of State of the powers of intervention under section 56E of the FHEA 1992 (as extended by the Further Education and Training Act 2007 and amended by the Apprenticeships, Skills, Children and Learning Act 2009 and the Education Act 2011).

In the event of there being some defect in the appointment or nomination of a member, section 20(3) of the FHEA 1992 provides that the validity of any proceedings of the Corporation will not be affected. Thus, if the election or nomination of a staff, student or parent member is flawed in some way, a decision taken subsequently by the Corporation cannot be challenged on the grounds of a defect in the appointment or nomination process.

Paragraph (1) should be read in conjunction with Article 5(2) which provides that the Corporation must consider the advice of the Search Committee before appointing any member, save that the

[7] Also paragraphs 1.4, 2.1.1 and 2.1.3 and 2.2 of the English Colleges' Foundation Code of Governance and sections 8 and 8.6 of the Code of Good Governance for English Colleges.

advice of the Search Committee does not need to be sought in relation to the appointment of elected members, i.e. staff, student or parent members. See the commentary to Article 5(2), however, which confirms that Revised Schedule 4 does not require a Search Committee. If the Corporation retains a Search Committee then the provisions of Article 5 will continue to apply and the Search Committee's advice must be made available for public inspection.

Note that the advice of the Search Committee does not need to be sought in relation to the appointment of the Principal as a member of the Corporation as the Principal is a member ex officio. In any event, the Principal's appointment is regulated by the selection provisions of Article 12 (see the commentary on Article 12).

Paragraph (2)

If the Corporation neglects or fails to appoint to vacancies as they arise, so that no quorate meeting of the Corporation can be held, the Secretary of State has the power to appoint such number of members as is necessary to enable the Corporation to hold a quorate meeting. The provisions relating to quorum are contained in Clause 13.

If, e.g. the Corporation has a determined membership of 12 (under Clause 3(1)), and allows eight vacancies to arise, the remaining four members will not constitute a quorum under Clause 13(1), since they will not constitute at least 40% of the determined membership of 12[8]. In this situation, the Secretary of State should be invited to appoint one member to bring the total number of members to five.

Paragraph (3)

The Corporation can decline to appoint any nominee (including elected nominees) who is otherwise eligible to serve under Clause 8 on the three grounds set out here.

The first ground ("removal from office") will generally mean removal on grounds of absenteeism or of inability or unfitness to serve (Clause 10(2)). The Corporation may, but is not required to, reject such a nominee. It may be wise to exercise caution before declining to appoint a nominee who, e.g. has previously been removed from office because of some illness or accident which rendered him/her "unable" to discharge his or her duties but from which s/he is now fully recovered.

The second ground is where such an appointment would breach rules made which limit the number of consecutive terms members can serve[9]. This provision will only apply if the rules limiting the number of terms a member can serve apply equally to all categories of membership (save that of the Principal who is an ex-officio member).

The third ground is where an individual is ineligible to be a member of the Corporation under Clause 8 of the Instrument (see commentary on Clause 8).

A Corporation could resolve to amend Clause 5 to provide an additional power enabling it to decline to appoint a person as a staff, student or parent member if the Corporation considers that it is not in the best interests of the Corporation for the members so elected to be appointed. Such a power would need to be used judiciously and in accordance with the principles of natural justice.

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8 Although see the commentary to Clause 13 which confirms that the Corporation may resolve to alter the quorum.

9 Following the recommendations of Lord Nolan many Corporations have introduced a maximum of two four-year terms.

6. Appointment of the Chair and Vice-Chair

(1) The members of the Corporation shall appoint a Chair and a Vice-Chair from among themselves.

(2) Neither the Principal nor any staff or student member shall be eligible to be appointed as Chair or Vice-Chair or to act as Chair in their absence.

(3) If both the Chair and Vice-Chair are absent from any meeting of the Corporation, the members present shall choose someone from among themselves to act as Chair for that meeting.

(4) The Chair and Vice-Chair shall hold office for such a period as the Corporation decides.

(5) The Chair or Vice-Chair may resign his office at any time by giving notice in writing to the Clerk.

(6) If the Corporation is satisfied that the Chair is unfit or unable to carry out the functions of office, it may give written notice, removing the Chair from office and the office shall then be vacant.

(7) If the Corporation is satisfied that the Vice-Chair is unfit or unable to carry out the functions of office, it may give written notice, removing the Vice-Chair from office and the office shall then be vacant.

(8) At the last meeting before the end of the term of office of the Chair, or at the first meeting following the Chair's resignation or removal from office, the members shall appoint a replacement from among themselves.

(9) At the last meeting before the end of the term of office of the Vice-Chair, or at the first meeting following the Vice-Chair's resignation or removal from office, the members shall appoint a replacement from among themselves.

(10) At the end of their respective terms of office, the Chair and Vice-Chair shall be eligible for reappointment.

(11) Paragraph (10) is subject to any rule or bye-law made by the Corporation under Article 23 of the Articles of Government concerning the number of terms of office which a person may serve.

General comments

Revised Schedule 4 does not require the Corporation to elect a Chair or a Vice Chair. This is presumably because the Corporation would be unworkable without such appointments and Corporations can be trusted to put such arrangements in place. Indeed, the role of the Chair is key to the success of a Corporation, acting as a vital link between the Corporation and senior management. Yet it is a role which, in the most part, is undefined by the Instrument and Articles. Clause 6 deals with the appointment, term of office, removal and resignation of the Chair. The role is mentioned in the Articles of Government only in relation to delegation (Article 4(1)) and the selection of senior post holders (Article 12(1)). Under Clause 12(5) of the Instrument, the Chair is empowered to convene a special meeting of the Corporation at any time and on less than seven days' notice if the Chair certifies that there are matters demanding urgent consideration. Under Clause 12(3) it is also the Chair's responsibility to send to members a copy of the agenda item and relevant papers relating to any proposal regarding the suspension, dismissal or retirement or remuneration package of the Clerk.

Given this lack of detail in the Instrument and Articles, many Corporations have drawn up and agreed a role description for the Chair. A specimen description is available through the Excellence Gateway:

http://www.excellencegateway.org.uk/search?content=Chair+role+description&=Search

Corporations may also find it useful to give the Vice-Chair an active role and some clear responsibilities.

The Chair is responsible for the leadership of the Corporation and is ultimately responsible to the College's stakeholders for the effectiveness of the Corporation. A view in the role of the Chair can be found in the Financial Reporting Council's guidance on board effectiveness:

https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code/frc-guidance-for-boards-and-board-committees

Increasingly, the ESFA, FE Commissioner and the DfE are writing directly to the Chair on matters affecting the governance of Colleges.

It is important to remember, however, that with the exception of responsibilities conferred by the Instrument and Articles, or to the extent that the Corporation has delegated specific responsibilities to the Chair pursuant to Article 4(1), the Chair has the same legal authority as other members of the Corporation, i.e. is "first among equals". Except in the limited case described below, the Chair does not have greater power than other members. Decisions must be made by the Corporation as a whole.

Between meetings of the Corporation, the Chair may only exercise such functions as have been specifically delegated to him/her by the Corporation pursuant to Article 4(1). Any other decision which the Chair may purport to take on behalf of Corporation members has to be ratified, i.e. approved and not merely reported for information at a subsequent meeting of the Corporation. Thus, taking any such action without prior Corporation approval is risky for the Corporation (because of the absence of a collective view) and for the Chair (because of the risk of personal liability).

"Chair's action" may be specifically authorised by the Corporation in its Instrument and Articles and/or standing orders) and including such provisions may be useful to the Corporation. Any such powers should generally only be used with extreme caution and where it is not possible to convene a special Corporation meeting[10].

If provision is to be made for Chair's action the standing orders should include some or all of the following constraints to protect the Corporation (and the Chair):

- that the matter can genuinely be shown to be urgent
- it is not possible to convene a special meeting of the Corporation in time
- the Chair will liaise with the Clerk and/or the CEO before exercising the power
- attempts will be made to take soundings from governors (even if outwith a quorate Corporation meeting) to ascertain if there are any strong objections
- any action taken will be reported to the Corporation asap after it is taken for ratification.

Paragraphs (1) and (2)

With the exception of the Principal and staff and student members, any member of the Corporation is eligible to be appointed Chair or Vice-Chair or to act as Chair in the Chair's absence. It is up to the Corporation to determine the duration of the appointment, although it should not exceed the appointee's period of office as a member.

As drafted Clause 6(1) allows for only one Vice-Chair to be appointed but, the Corporation could resolve to amend Clause 6(1) to allow for the appointment of two or more Vice Chairs. It may be advisable for the Standing Orders to specify the mechanism for identifying which Vice Chair would

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10 Convening a quorate meeting at short notice is much less onerous than it used to be with the event of electronic communications and virtual meeting platforms.

take over in the Chair's absence: see the following discussion of issues raised by appointing Joint Chairs.

Indeed, the Corporation could resolve to amend Clause 6(1) to allow for the appointment of two or more Chairs. The Search Committee – or equivalent – should, however, give any proposal to appoint joint Chairs very careful consideration before making a recommendation to the Board. There would need to be a clear rationale and protocol for how the joint role would be performed and an awareness of the practical difficulties that may be involved including:

- the risk of confusion about which of the incumbents is Chair at any particular time
- the risk of disagreements between the joint Chairs
- potential inefficiencies arising from having more than one Chair.

With regard to how the role would be performed, careful consideration would need to be given to whether:

- the joint Chairs would take decisions jointly
- one of the joint Chairs would be "in charge" for specified periods (for example, six months or a year) before handing over the reins to the other joint Chair for a further specified period
- the joint Chairs would chair alternate meetings
- specific functions would be specifically allocated to one or other of the joint Chairs.

While a blanket refusal to consider the appointment of joint Chairs would may be challenged on equality and diversity grounds[11], an awareness of the practical difficulties which may arise under a joint Chair arrangement should not be underestimated. Making greater use of the Chair/Vice Chair roles to allocate certain functions might offer a better solution in many cases.

Under the Conditions of Funding Agreement, the Corporation is obliged to inform the ESFA in writing of the appointment of a new Chair and when the role of Chair becomes vacant. Note that this notification obligation also arises on the vacating or filling of the positions of Principal and Clerk.

Paragraph (4)

It is not necessary for the Chair and Vice-Chair to be appointed for the same period, or for such period or periods to be co-terminus with their periods in office as members (although, necessarily, their appointment as Chair or Vice-Chair cannot be longer than the unexpired period of their membership).

Paragraphs (6) and (7)

These paragraphs mirror the provisions in Clause 10(2) setting out the circumstances in which a Corporation member can be removed. The test as to whether the Chair or Vice-Chair is unable or unfit to serve is a subjective one. Any resolution to remove the Chair or Vice-Chair will need to be passed by a majority of the other members. For guidance as to the practical steps which should be taken see the commentary on paragraph (2)(a) of Clause 10.

Where it is proposed to remove the Chair or Vice-Chair another member of the Corporation should propose the resolution to remove and a member or the Clerk should be authorised by the Corporation to give notice to the Chair of that resolution. Once notice is given the office becomes vacant immediately though the person remains a member of the Corporation unless s/he is to be removed as a member of the Corporation as well. If this is the case, the resolution should make this clear.

A Corporation could resolve to amend paragraphs (6) and (7) to change or expand upon the circumstances in which the Chair and/or Vice Chair may be removed. In the past, it has sometimes been difficult to remove a Chair or a Vice Chair when it could not reasonably be said that the Chair/Vice Chair (as appropriate) was "unfit" or "unable" to carry out the functions of office. Since the Education Act 2011 governance freedoms were introduced, some Corporations

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11 Bearing in mind that Corporations are subject to the public sector equality duty and are therefore under a proactive duty to promote equality.

have resolved to amend paragraphs (6) and (7) (and Clause 10(2)) to provide a third potential ground for removal, i.e. where it is not considered to be in the best interest of the Corporation for the individual to continue in office as Chair/Vice Chair. This is intended to provide a way forward where the individual in question is not incapacitated in any way but has ceased to be actively engaged and/or to make a full contribution to the business of the Corporation and/or command the confidence of the majority of Board members. Clearly the power of removal would need to be exercised reasonably and in accordance with the principles of natural justice.

Paragraphs (8) and (9)

It is important that the appointment of the Chair and Vice-Chair should be properly planned so that candidates are nominated and elected by members in an orderly and democratic manner. Paragraphs (8) and (9) provide for a new Chair or Vice-Chair to be appointed at the last Corporation meeting before the expiry of the existing Chair's or Vice-Chair's term of office or at the first meeting of the Corporation following his/her resignation or removal from office. Sometimes, however, it will be beneficial to have a "handover period" between the outgoing Chair and the new Chair, particularly where the latter is relatively new to the Corporation. Whilst two Chairs would not ordinarily hold office at the same time (see commentary on paragraphs (1) and (2) above) there is nothing to prevent the Corporation electing a "Chair designate" some time prior to the expiry of the existing Chair's term of office. The Chair designate would not be a formal office and would not carry any specific authority, but it would allow for a more structured handover or learning period. All being well, the Chair designate would then be formally appointed as Chair on the last meeting before or the first meeting which follows the expiration of the outgoing Chair's term. The Corporation's Standing Orders dealing with the appointment of Chair would need careful amending to allow for this.

Further, paragraphs (8) and (9) could be amended to provide greater flexibility regarding the timing of appointment of the Chair and the Vice Chair. For example, the wording could be amended to provide that a replacement Chair/Vice Chair will be appointed before the end of the term of office of the Chair/Vice Chair (as appropriate) or at the first meeting following their resignation or removal from office.

Paragraphs (10) and (11)

The Chair or Vice-Chair is eligible for reappointment at the expiry of the term of office provided they are still members of the Corporation and any reappointment will not breach any rules limiting the consecutive terms of office of the Chair or Vice-Chair made by the Corporation under Article 23.

7. Appointment of the Clerk to the Corporation

(1) The Corporation shall appoint a person to serve as its Clerk, but the Principal may not be appointed as Clerk.

(2) In the temporary absence of the Clerk, the Corporation shall appoint a person to serve as a temporary Clerk, but the Principal may not be appointed as temporary Clerk.

(3) Any reference in this Instrument to the Clerk shall include a temporary Clerk appointed under paragraph (2).

(4) Subject to Clause 14, the Clerk shall be entitled to attend all meetings of the Corporation and any of its committees.

(5) The Clerk may also be a member of staff at the institution.

General comments

The Clerk or Governance Professional is an independent officer of the Corporation who has a key role to play in ensuring that the College's system of checks and balances operates effectively. The Clerk has a pivotal role in ensuring good governance, a role emphasised following the implementation of the new governance freedoms. See the 2013 report by Dr Susan Pember for the AoC Governors' Council Creating Excellence in College Governance:

https://www.aoc.co.uk/files/creating-excellence-in-college-governancepdf

at paragraph 2.37 and also the general commentary on Article 3 below. The Clerk is also part of the triumvirate between the Clerk, the Chair and the Principal, which is a major contributor to effective governance. The FE Commissioner in his 2014 open letter to Chairs and Principals stated that "Effective clerking is essential to good governance". See:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/287541/further-education-commissioner-open-letter-24-2-2014.pdf

The Clerk's line of accountability is, as its officer, to the Corporation via the Corporation Chair. It is the Corporation (not the Principal) which is responsible for appointing the Clerk. As mentioned above, this function is of such importance that under the 2008 Instrument it may not be delegated by the Corporation, e.g. to a committee or to the Principal[12].

Although the Instrument does not define the Clerk's role, Article 3(3) sets out the main functions of the office. This change was introduced by the 2007 Order with the clear intention of strengthening the status of the Clerk as the constitutional officer of the Corporation. The Corporation, therefore, should ensure that the terms of the Clerk's appointment are properly documented and that the key functions of the office holder are clearly set out.

Whilst the Instrument must make provision for there to be a clerk to the Corporation, there is no requirement for the incumbent to be known as "the Clerk". Corporations wishing to further strengthen the status of the Clerk could, therefore, resolve to amend Clause 7 to change the job title of the Clerk to, e.g. "Governance Professional" or "Secretary to the Corporation".

[12] Although see the Commentary on Article 9(e) regarding the possibility of amending this Article to provide for the appointment of the Clerk to be delegated to a committee of the Corporation.

The Instrument must also make provision about the respective responsibilities of the Corporation, the Chief Executive and the Clerk but it does not stipulate what these should be. Best practice dictates that the Clerk should:

- be competent to service the Corporation and its committees including being qualified to provide constitutional advice
- have sufficient time and be allocated sufficient resources to discharge the responsibilities of the Clerk – this may militate against the role of Clerk being performed by an individual with senior management responsibilities or indeed by any member of staff (or whatever level of seniority) who has any other full time role[13].
- be able to act independently – again, this may militate against the role of Clerk being undertaken by a member of staff with other (potentially conflicting) responsibilities and/or it being undertaken by a junior to middling member of College staff.

Regular appraisals of the Clerk need to take place, involving the Corporation Chair and possibly other key Corporation members (although, in fact this function is not listed as one of those which the Corporation cannot delegate under Article 9). Care must be taken that sufficient time and resources are allocated to enable the Clerk to perform his/her functions properly. Although the Instrument allows for the appointment of a temporary Clerk (Clause 7(2)), it makes no explicit provision for the appointment of a deputy or assistant Clerk. There is, however, no reason why larger Colleges should not appoint a deputy or assistant Clerk. Once again, the terms of such an appointment must be carefully documented.

Whether it is necessary to amend the Instrument to provide expressly for a deputy/assistant clerk rather depends on how it is intended that the arrangement will operate. If the role of the deputy/assistant clerk is limited to deputising for the clerk when s/he is absent then it is unlikely to be necessary to amend the Instrument. The arrangement could simply be provided for in the Corporation's Standing Orders. If on the other hand a College becomes so large and/or the business of its Corporation and its committees so extensive that two clerks are needed on a permanent basis, then consideration should be given to amending the Instrument or alternatively to providing for a deputy/assistant clerk in the Corporation's Standing Orders. In any event, a Corporation intending to appoint a deputy or assistant clerk should consider to what extent, if at all, the deputy/assistant clerk should have the protections afforded to the Clerk by the Articles.

In practice, for all meetings of the Corporation and its committees, the Clerk should be responsible for convening the meeting, preparing the agenda and distributing the papers (Clause 12), taking and writing the minutes (Clause 15) and publishing the minutes and other papers (Clause 17).

In addition, the Clerk should act as an administrative support in connection with any proceedings to suspend or dismiss the holders of a senior post and the convening of a committee of the Corporation for this purpose (under procedures made in accordance with Article 16). The Clerk should also:

- maintain records of the membership of the Corporation (Clause 2(1))
- monitor the membership to ensure that appointments are properly made (Clauses 5, 6, 8 and 9)
- ensure that the Corporation remains quorate (Clause 13), that its meetings and those of its committees are quorate, and that if they cease to be quorate that they are terminated immediately (Clause 13)
- make certain that the Corporation has established an effective scheme of delegation (Article 4)
- maintain a register of interests of the members of the Corporation (Clause 11(6))

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[13] The 2015 survey of College clerks undertaken for the ETF found that clerks had concerns about term time only contracts, reduced qualification requirements, reduced budgets for training and perceived reduction in status and the value placed on the Clerk's role. See: http://www.et-foundation.co.uk/wp-content/uploads/2014/09/FINAL-PDF-Clerks-Survey-Summary-Report-May-2015.pdf

Inspection reports underline the importance of the role of the Clerk. For example, "sub-committees operate extremely effectively and Corporation board meetings ensure the accountability of leaders at all levels" (Leicester College, inspected January 2011). "All Corporation and committee meetings are well attended and governors benefit from very effective clerking" (PETROC, inspected March 2012). This should be contrasted with criticisms by the FE Commissioner of clerking in other Colleges.

In addition, the Clerk is increasingly expected to oversee questions which may arise in relation to the powers of the Corporation to ensure that they are not exceeded and are properly exercised (sections 18 and 19 FHEA 1992), and to be a source of constitutional advice, liaising closely with the Corporation Chair and Principal on governance matters. There is a clear analogy between the Clerk's role and that of the Company Secretary with regard to being a constitutional adviser, save that (unlike the Company Secretary) the Clerk may not be a member of the Corporation. There is no definitive blueprint for the most suitable clerking arrangements. While it is still common for a Clerk to be employed by a College in some other capacity as well as clerk, inspection reports highlight a move towards independent Clerks and across the sector as a whole an increasing number of Clerks are members of staff who have no other role within the College or are "external" Clerks engaged on a contract for services rather than being employed by the College.

There is nothing in the Instrument and Articles to prohibit a Clerk from being employed in any particular role with the exception of the Principal (Clause 7(1)) although certain roles such as Finance Director are clearly inappropriate. The Audit Code of Practice (LSC Circular 04/07) stated that "where the clerk is a senior manager … or has significant financial responsibility, another individual should act as clerk to the audit committee" so as to protect its independence and objectivity. Circular 04/07 was replaced by JACOP and subsequently, in March 2017, by ACOP. Neither JACOP nor ACOP refer to the clerking of the Audit Committee. ACOP does, however, continue to stress the need for the independence of that committee so the 2007 advice remains sound.

When it comes to considering whether a Corporation's clerking arrangements are appropriate the key issue to be addressed is whether the Clerk is able and is perceived to be able to effectively discharge his/her role of giving independent advice to the Corporation. Where the Clerk is a member of the senior management team this independence may be called into question and it is perhaps for this reason that the ESFA/FE Commissioner may be concerned about such arrangements. These concerns are likely to be reflected in the updated version of the AoC Code. This does not mean, however, that there cannot be effective clerking arrangements in place when there is such a combination of roles (nor does such a dual role always appear to be unacceptable to auditors and inspectors): it will depend upon the arrangements in place, the individual concerned, as well as practical considerations such as the size and resources of the College. What is certain, however, is that where the role of Clerk is combined with other senior management responsibilities the Corporation will need to put in place extra safeguards to ensure that independent clerking is maintained. These may include:

- keeping the role of Clerk and the other role distinct. There should be separate job specifications, separate appointments and separate lines of accountability
- ensuring that the Clerk understands the nature of the role and the potential for conflicts so these can be addressed and discussed in advance where possible and appropriate arrangements put in place
- encouraging and supporting the Clerk in attending training and development sessions including various clerks' networks
- having alternative clerking arrangements such as a deputy or assistant Clerk, or failing that, a minute Clerk who undertakes the role of Clerk where there is a potential conflict, e.g. when the Corporation is considering a matter for which the Clerk, in his/her senior management role, is responsible
- holding regular appraisals of the Clerk
- the Clerk and the Chair having open discussions about these potential difficulties and how they are being addressed
- the Corporation keeping clerking arrangements under review.

Where the Clerk has a dual role within the College and the Corporation is minded to separate the two roles so they are not held by the same person, care must be taken to ensure this is done fairly

and in accordance with the procedures made under Article 16 (and see also Article 17). Generally, a proposal to separate the two roles should only be implemented following consultation with the Clerk and ideally with his/her freely given consent to the proposed variation in his/her terms of employment. For further guidance see the general commentary on Article 17.

Under its Conditions of Funding Agreement a College should notify the ESFA when a new Clerk is appointed.

Paragraph (1)

From the simple fact that the Corporation appoints the Clerk flows the consequence that the Clerk owes duties directly to the Corporation, whereas other senior managers, unless they are senior post holders, relate to the Corporation indirectly through the Principal. The Principal may not be appointed as Clerk.

Paragraph (4)

This confirms that, save when required to withdraw pursuant to Clause 14(10), the Clerk is entitled to attend all meetings and committees. This does not mean that the Clerk must necessarily clerk all committee meetings. It is up to the Corporation to make appropriate arrangements and some larger Colleges have appointed a deputy clerk to clerk certain committees (see the general commentary above). The Audit Code of Practice (LSC Circular 04/07), however, stated that in order to "maximise the independence of the Audit Committee, the Clerk to the Corporation should normally be the clerk to the Audit Committee" (unless s/he is a senior manager or has significant financial responsibility at the College). On this point see the general commentary above.

8. Persons who are ineligible to be members

(1) No one under the age of 18 years may be a member, except as a student member.

(2) The Clerk may not be a member.

(3) A person who is a member of staff of the institution may not be, or continue as, a member, except as a staff member or in the capacity of Principal.

(4) Paragraph (3) does not apply to a student who is employed by the Corporation in connection with the student's role as an officer of a students' union.

(5) Subject to paragraphs (6) and (7), a person shall be disqualified from holding, or from continuing to hold, office as a member, if that person has been adjudged bankrupt or is the subject of a bankruptcy restrictions order, an interim bankruptcy restrictions order or a bankruptcy restrictions undertaking within the meaning of the Insolvency Act 1986, or if that person has made a composition or arrangement with creditors, including an individual voluntary arrangement.

(6) Where a person is disqualified by reason of having been adjudged bankrupt or by reason of being the subject of a bankruptcy restrictions order, an interim bankruptcy restrictions order or a bankruptcy restrictions undertaking, that disqualification shall cease

(a) on that person's discharge from bankruptcy, unless the bankruptcy order has before then been annulled; or

(b) if the bankruptcy order is annulled, at the date of that annulment; or

(c) if the bankruptcy restrictions order is rescinded as a result of an application under section 375 of the Insolvency Act 1986, on the date so ordered by the court; or

(d) if the interim bankruptcy restrictions order is discharged by the court, on the date of that discharge; or

(e) if the bankruptcy restrictions undertaking is annulled, at the date of that annulment.

(7) Where a person is disqualified by reason of his having made a composition or arrangement with creditors, including an individual voluntary arrangement, and then pays the debts in full, the disqualification shall cease on the date on which the payment is completed and in any other case it shall cease on the expiration of three years from the date on which the terms of the deed of composition, arrangement or individual voluntary arrangement are fulfilled.

(8) Subject to paragraph (9), a person shall be disqualified from holding, or from continuing to hold, office as a member if:

(a) within the previous five years that person has been convicted, whether in the United Kingdom or elsewhere, of any offence and has received a sentence of imprisonment, whether suspended or not, for a period of three months or more, without the option of a fine; or

(b) within the previous twenty years that person has been convicted as set out in sub-paragraph (a) and has received a sentence of imprisonment, whether suspended or not, for a period of more than two and a half years; or

(c) that person has at any time been convicted as set out in sub-paragraph (a) and has received a sentence of imprisonment, whether suspended or not, of more than five years.

(9) For the purpose of this regulation there shall be disregarded any conviction by or before a court outside the United Kingdom for an offence in respect of conduct which, if it had taken place in the United Kingdom, would not have constituted an offence under the law then in force anywhere in the United Kingdom.

(10) Upon a member of the Corporation becoming disqualified from continuing to hold office under paragraphs (5) or (8), the member shall immediately give notice of that fact to the Clerk.

General comments

The Instrument must provide for the eligibility of persons for membership, but Revised Schedule 4 does not indicate what the content of such rules should be. Corporations may want to reduce the detail in Clause 8, or indeed to add additional provisions. They should, however, ensure that no person is allowed to join the Corporation who would be prohibited from being a trustee of a charity under sections 178-179 Charities Act 2011. These provisions are more comprehensive than those in Clause 8 and include persons debarred from acting as a charity trustee or as a company director. The provisions have been strengthened by the Charities (Protection and Social Investment) Act 2016 giving the Charity Commission the power to disqualify someone from being a trustee and increasing the number of situations in which a person can be automatically disqualified from acting as a charity trustee. The statutory grounds of disqualification should be reflected in the declaration of eligibility which members should be expected to sign.

The new provisions came into force on 1 August 2018. Note that the new rules also state that while a person is disqualified from being a charity trustee, that person is also disqualified from holding an office or employment in the charity with senior management functions. A senior management function is defined as one relating to the management of the charity, and the individual is not responsible to another officer or employee (other than a trustee of the charity); or involving control over money and the only officer or employee (other than a trustee of the charity) to whom to individual is responsible for it is person with senior management functions other than ones involving control over money. This means that the relevant senior manager positions in a corporation will be that of the Principal and Finance Director (or equivalent).

Prospective Corporation members and relevant senior managers should, prior to appointment, be asked to confirm that they are not disqualified under the current and new automatic disqualification rules. Existing members and relevant senior managers engaged prior to 1 August 2018 should also have been asked to sign fresh declarations that they are not disqualified and it would also be prudent to ask them to sign fresh declarations at relevant intervals. If a Corporation member or senior manager becomes disqualified they will have to cease to act unless a waiver can be obtained (see below). Legal advice will need to be sought about the employment law position of any affected senior managers.

Corporations may wish to consider amending Instrument 8 to include a specific provision stating that a person who is disqualified from acting as a charity trustee by virtue of the Charities Act 2011 may not be a member. Instrument 10 may also be amended to include a provision that states that a member shall cease to hold office if they are disqualified from acting as a charity trustee by virtue of the Charities Act 2011.

Those who become disqualified by the automatic disqualification rules changes can apply for a waiver of their disqualification allowing them to be a Corporation member or hold senior management positions. The Charity Commission will consider each application on its merits, taking in to account what is in the best interests of the charity and whether the waiver would damage public trust and confidence in a charity or charities. Note that the Charity Commission will not be able to grant a waiver where the Instrument and Articles of the Corporation disqualify them from being a trustee or from holding a senior management position.

In general Corporations will need to focus on the extent to which a potential member raises real concerns, e.g. that they could pose a risk to the institution's financial security. The Corporation's duties in relation to safeguarding children and vulnerable adults mean that any individual in respect of whom the Corporation has evidence that they present a risk to such vulnerable groups should also not be treated as eligible for membership.

Disclosure and Barring Service ("DBS") checks – In the past it may have been the practice to inform prospective Corporation members about the grounds for ineligibility and invite them to disclose whether there is any reason why they may be ineligible under paragraphs (8) and (9). There was also much debate about whether checks of potential members' criminal records should be carried out on prospective members through the Criminal Records Bureau (now the Disclosure and Barring Service or "DBS") under the Police Act 1997 (as amended). In summary, it was until recently the case that whether such checks needed to be undertaken depended on the nature of the provision at the College: SFCs were required to carry out such checks on prospective Corporation members but there was generally no such requirement on members of other types of further education Colleges.

Recent Governments have been concerned at the extent of bureaucracy resulting from the need for DBS checks and the related Vetting and Barring Scheme. Changes to the disclosure arrangements and to the Vetting and Barring Scheme were therefore introduced by the Protection of Freedoms Act 2012. The aim was to restrict the need to check individuals to those who will be employed, whether for payment or not, in positions where they will be in regular unsupervised contact with children or vulnerable adults. The definition of "regulated activity" in the Safeguarding Vulnerable Groups Act was narrowed with effect from 10 September 2012, in particular by removing the category of positions where the holder is automatically regarded as undertaking regulated activity. As a result, the DBS may query checks on governors of general FE Colleges unless they are involved in additional activity (such as teaching or providing guidance) which brings them into regular unsupervised contact with under 18s or, as a matter of discretion, where the College were previously entitled to request checks because the individual was formerly within the definition of regulated activity.

Nevertheless, if a College has a substantial number of students who are under 18, or indeed under 16, consideration should be given as to whether it could be said that the College could be defined as an institution "exclusively or mainly for the provision of full time education of children". If it is, and one or more governors will be engaged, whether for payment or not, in positions where they will be in regular unsupervised contact with children or vulnerable adults, then consideration should be given to undertaking checks.

Other changes introduced by the Protection of Freedoms Act 2012 which are relevant in this context include:

- that, as a consequence of the narrowing of the definition of "regulated activity", it is no longer possible to undertake checks of the "barred list" on governors unless they undertake additional tasks such as to bring them within the updated definition of regulated activity
- the Act removed the need for individuals undertaking regulated activity to register with what used to be the Independent Safeguarding Authority (now part of the DBS)
- as noted above, the ISA and CRB were merged into a single DBS at the beginning of December 2012

The duty to refer individuals to the DBS in certain circumstances (with a view to the DBS considering whether they should be barred from regulatory activity) remains in place.

For further information in this area see the DfE guidance Keeping Children Safe In Education accessible at:

https://www.gov.uk/government/publications/keeping-children-safe-in-education--2

The Guidance has statutory force in relation to the Corporation's duty to promote and safeguard the welfare of children pursuant to section 175 of the Education Act, on which also see the general commentary on Article 3.

See meanwhile the Home Office Guidance which is available on the Home Office website at:

http://www.homeoffice.gov.uk/publications/crime/disclosure-and-barring/leaflet-england-wales?view=Binary

Where a member or potential member discloses a conviction or the College becomes aware of a conviction as the result of a DBS check careful consideration will need to be given as to the member's eligibility. Where the conviction falls outside Clause 8(8) it will be necessary to ask the member or potential member to provide, in confidence, full details of the conviction, any mitigating circumstances on which they wish to rely and (where applicable) any explanation as to why they have not disclosed the conviction.

Political affiliations – Another difficult question is whether the Search Committee (if one is retained – see commentary on Article 5) and/or Corporation can and should legitimately ask prospective Corporation members and existing members who are being considered for reappointment, to declare any particular activities or affiliations. Many Corporations may feel it undesirable and damaging to have, e.g. an active member of Britain First on the Board. Such a position could, however, potentially leave the Corporation open to legal challenge under the Human Rights Act 1998 if the member or prospective member considers that his/her rights had been infringed (e.g. the rights to respect for private and family life; to freedom of thought, conscience and religion; and/or to freedom of expression). Whilst it may be feasible to ask prospective members whether they are members of particular groups which are felt by the College to be undesirable, care must be taken. It is necessary to distinguish between:

- membership of groups which are actually organisations proscribed under the Terrorism Act 2000 and appear on the list on the Home Office website. This would include some of the extremist animal liberation groups as well as extreme religious and terrorist organisations

- groups whose objectives can be shown to be inconsistent with British values as defined by the government in its guidance on the Prevent duty in Colleges accessible here:

  https://www.gov.uk/government/publications/prevent-duty-guidance/prevent-duty-guidance-for-further-education-institutions-in-england-and-wales

  The College will need to consider the adequacy of its arrangements for identifying suitable new members as part of the process of adopting a Prevent strategy

- groups whose objectives can be shown to be inconsistent with the College's public sector equality duties and/or existing policies, e.g. on equal opportunities. This may well include the Britain First etc.

- other groups whom individuals in the College may feel are undesirable.

It is submitted that it is perfectly proper to ask individuals if they are members of groups in the first two categories but not in relation to groups in the latter category.

The request to declare any political affiliations should be related to certain specified groups and the reason for the request given, e.g. that the College is concerned to ensure that those joining the Corporation are committed to promoting the best interests of the College and that the College's particular policies are followed. Finally, it should be emphasised that the issue is not simply about requesting disclosure of membership of certain organisations. It is also about how the Corporation deals with such a disclosure once made. A disclosure by itself will not render a person ineligible on the grounds set out in Clause 8. In particular, the Corporation should have regard to the perceptions of a reasonable member of the outside community in addition to the motives of the individual. It may well be that a reasonable external observer would accept that a member is entitled to his/her own political views, even though they may be unpopular in the locality, provided that these are left at the door of the College and the member does not allow them to affect in any way his/her involvement in College business. Similarly, a member of an unpopular political organisation who does not get involved in campaigning or in other public activities should be distinguished from one who is well known in the area as an activist.

Paragraphs (1) and (2)

Given their role as charity trustees, members other than student members should not be under the age of 18. There is no upper age limit restricting eligibility. Only members of staff and students can serve as staff or student members respectively. The Principal can only serve in his/her capacity as Principal.

The Clerk is ineligible for membership (paragraph 2). There are also rules preventing those who have been adjudged bankrupt or have a criminal record from being appointed or continuing to serve as members. These have not been updated in the light of the creation of new types of alternative to bankruptcy in Part 5 of the Tribunals, Courts and Enforcement Act 2007. It would,

however, be open to a Corporation to amend Clause 8 to add such matters to the list of disqualifying circumstances: see the comment on the Education Act 2011 changes above.

Paragraphs (3) and (4)

As referred to in the commentary on Clause 2(1)(e) above, under the 2008 Instrument, staff were only permitted to be members of the Corporation if they were one of the elected staff members. A Corporation could resolve to amend its Instrument to permit one or more members of staff, e.g. senior post holders or equivalent, to be members of the Corporation in addition to and separate from the elected staff member(s). If the Instrument is not amended, the appointment of members of staff to the Corporation who are not elected staff members will be in breach of the Instrument and potentially void. Further, the number of any such members who are also members of staff will be limited by the requirement that the number of independent/external members of the Corporation should always exceeds the number of internal members.

Clause 8(4) states that the restriction at Clause 8(3), i.e. that a member of staff cannot be, or continue as, a member of the Corporation except as a staff member or the Principal, does not apply to students employed in a sabbatical post.

One can be a member and a student as well without having to be a student member.

Paragraphs (5) (6) and (7)

These paragraphs cover bankruptcy and the main alternatives to it including compositions and arrangements with creditors, such as individual voluntary arrangements. They have not, however, been updated to take account of alternatives to bankruptcy proceedings, such as debt relief orders being introduced by the Tribunals, Courts and Enforcement Act 2007[14]. While a person subject to such a scheme may not strictly be ineligible to be a member an existing or potential member should declare the making of such a court order and the Corporation will need to consider carefully the circumstances leading to the making of the order and decide whether it is appropriate for the person concerned to become or remain a Corporation member.

It is advisable that the Corporation takes legal advice should these issues arise.

Paragraph (8)

A previous iteration of Clause 8(8) prevented individuals from being appointed as a member if they had been convicted of an offence in the previous five years and the sentence passed was imprisonment of more than three months. The reference to a conviction in the previous five years, however, created the anomaly that someone who was convicted of a serious crime, e.g. rape or murder over five years ago and who may only recently have been released from prison would not have been rendered ineligible on this ground, whilst someone convicted of a less serious crime four years ago and receiving a three month sentence would have been. This was clearly not what was intended. The effect of the current provisions is that a person who has received a sentence of over two and a half years imprisonment in the previous 20 years or of over five years imprisonment at any time in the past is ineligible to be a member.

Paragraph (9)

The grounds for ineligibility as a member have been extended to cover all offences committed outside the United Kingdom provided they would have been offences under UK law if they had been committed in the UK. This brings the further education sector in line with restrictions on the members for governing bodies of other public educational institutions.

Interestingly, unlike Scottish law, the issue of being of unsound mind is not a reason for disqualification, although it would be a ground for removal under paragraph (2)(a) of Clause 10.

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[14] The 2008 Instrument & Articles were given only essential updating by the 2012 Modification Order so this was not addressed.

9. The term of office of a member

(1) A member of the Corporation shall hold and vacate office in accordance with the terms of the appointment, but the length of the term of office shall not exceed four years.

(2) Members retiring at the end of their term of office shall be eligible for reappointment, and Clause 5 shall apply to the reappointment of a member as it does to the appointment of a member.

(3) Paragraph (2) is subject to any rule or bye-law made by the Corporation under Article 23 of the Articles of Government concerning the number of terms of office which a person may serve.

General comments

Revised Schedule 4 no longer stipulates a maximum term for members but it is good practice for Corporations to do so in the Instrument or in Standing Orders. Whilst it is, therefore, possible to amend Clause 9, Corporations should consider any significant departures from it with care to ensure that they continue to comply with good practice in the sector and with the UK Corporate Governance Code (formerly known as the Combined Code) 2018 edition available at:

https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code

It should be noted that the English Colleges' Foundation Code of Governance published by the AoC in November 2011 states (at paragraph 2.1) that the governing body should aim to "acknowledge the value of refreshing its membership" (2.1.2) and to "have due regard to the benefits of diversity" (2.1.3). Similar provisions appear in the 2015 Code of Good Governance (amended May 2019) (at paragraphs 9.20 (refreshing the Board) and paragraph 8 (expanded provisions in relation to equality and diversity)). See also the discussion in the DBIS Review of Further Education and Sixth Form College Governance issued in July 2013.

Paragraph (1) refers to "the terms" of a Corporation member's appointment. Those terms should include as a minimum the category of membership (see Clause 2(1) of the Instrument), the date of commencement and the duration of the appointment, and should be recorded in a letter of appointment issued to the individual member by the Chair or the Clerk and in a minute of the Corporation meeting at which the appointment was made.

Following company law practice it is recommended that all appointments (and terminations of membership) should also be recorded in a register of Corporation members which should be made available for public inspection.

Certain categories of members, e.g. students, will normally serve for one year only. The Principal, as an ex-officio member, will also be excluded from the requirement of a maximum four-year term of office. The Corporation may decide to appoint some members for periods of less but never more than four years. This may follow the wishes of the Corporation, the nominating authority or the individual. It may be desirable for Corporations to ensure that, as far as possible, appointments do not all end at the same time so that continuity and expertise may be maintained.

Paragraph (2)

The Nolan Committee in its Second Report recommended that as a general rule members should not serve more than two consecutive terms of office, i.e. for a maximum period of eight consecutive years. The Commissioner in his report on King George V College commented that *"the College should introduce succession planning and urgently refresh its current membership to ensure that there are more members with recent relevant educational experience"*.

Furthermore, it is worth noting that the UK Corporate Governance Code includes a test of independence for its non-executive directors as follows: *"whether there are relationships or circumstances which are likely to affect, or could appear to affect, the director's judgement". The Code lists relationships and circumstances which may appear relevant to the question of whether a non-executive director is independent, one of which is if the director "has served on the board for more than nine years from the date of their first election"*. Serving longer will not automatically mean that the director is not independent, but the board will have to explain why it thinks the director is independent notwithstanding such a long appointment.

Nolan, however, emphasised that what was more important than laying down prescriptive maxima is to ensure that all appointments are made openly and on the basis of merit. A balance needs to be struck between retaining good existing members and ensuring a managed turnover to introduce new blood and to ensure that members who may properly be said to be independent continue to constitute a majority of board members.

It is, therefore, up to the Corporation to determine whether it wishes to limit the number of terms of office of members. If it does impose such a limit in its Standing Orders, rules or bye-laws then such limitation must be adhered to (Clause 9(3)). Alternatively, the Corporation may limit the number of terms of office which members may serve but incorporate an element of discretion permitting the chosen maximum number of terms of to be exceeded on the advice of the Search Committee (if any – see the commentary on Article 5), in exceptional circumstances. Reappointing members to third or fourth terms of office is, however, not consistent with good governance and should be avoided other than in wholly exceptional circumstances. Matters to be taken into account when considering such reappointments might include the balance of experience of the remaining members of the Corporation, the skills required by the Corporation and the availability of other candidates. Before deciding whether reappointment is justified, it would be advisable for the Corporation to have carried out a skills audit and prepared a person specification.

In the private sector many companies achieve a balance between continuity and change by requiring board members to retire or resubmit themselves for reappointment once in every three years. By phasing, i.e. rotating, the appointments of Corporation members in this way it may be possible to strike a balance.

When it comes to the reappointment of staff, student and parent members the individual in question will have to be subject to re-nomination and re-election by the relevant body.

10. Termination of membership

(1) A member may resign from office at any time by giving notice in writing to the Clerk.

(2) If at any time the Corporation is satisfied that any member

(a) is unfit or unable to discharge the functions of a member; or

(b) has been absent from meetings of the Corporation for a period longer than six consecutive months without the permission of the Corporation,

the Corporation may by notice in writing to that member remove the member from office and the office shall then be vacant.

(3) Any person who is a member of the Corporation by virtue of being a member of the staff at the institution, including the Principal, shall cease to hold office upon ceasing to be a member of the staff and the office shall then be vacant.

(4) A student member shall cease to hold office –

(a) at the end of the student's final academic year, or at such other time in the year after ceasing to be a student as the Corporation may decide; or

(b) if expelled from the institution,

and the office shall then be vacant.

General comments

The most difficult provisions in Clause 10 are those in paragraph (2) relating to removal. The Corporation determines whether or not any member shall continue to be a member and can remove a member from office. Surprisingly, there is no explicit reference to the need for procedural fairness in removing a member from office (unlike the provisions in the Companies Act 1985 which gives a company director the right to protest his/her proposed removal as a director). Only two grounds for removal are specified in Clause 10(2), and there is a lack of definition. This is the reason for the detailed commentary which follows.

Revised Schedule 4 gave Corporations the freedom to simplify or recast the power of removal, e.g. by making the grounds for removing members and/or the procedure for removal clearer and/or wider (see further below), and by providing an express power to suspend members. While a decision to suspend a member should not be regarded as involving any judgment on the suitability of that person to remain a member, Corporations will be under the same duty to treat the member fairly and give the member an opportunity to have their say before any decision to suspend is made. A formal oral hearing will not, however, be required, nor would there be a right to an appeal against a decision to suspend. It may be helpful to provide members with indications of the circumstances when a decision to suspend may be appropriate, and the procedure that may be used, perhaps in the Code of Conduct or in Standing Orders.

Outwith the provisions of Instrument 10, the only other statutory grounds for removal of a Corporation member are set out in section 56 of the FHEA 1992. Under this clause the Secretary of State can (usually during an intervention) remove and appoint members in cases of perceived mismanagement of the Corporation's affairs. See College Oversight: Support and Intervention:

https://www.gov.uk/government/publications/college-funding-early-intervention-and-prevention/early-intervention-strategy

Under Clause 8(3) of the 2008 Instrument a member of staff could not be appointed to the Corporation other than as an elected staff member or in the capacity as Principal. Corporations could now resolve to amend Clause 8(3) to permit one or more members of staff, e.g. senior post holders or equivalent, to be members of the Corporation in addition to and separate from the elected staff member(s). See the commentary on Clause 8(3). There is, however, no provision in Clause 10 for termination of the office of a Corporation member who, after appointment, becomes a member of staff, i.e. by entering into a contract of employment with the College. Although this may be a rare occurrence and such a member may choose to resign from office in this situation, Corporations may wish to provide for this eventuality explicitly in Clause 10 of the Instrument or in their Standing Orders and/or in the terms of appointment for governors. See also the commentary on Clause 8(4) for the position of a student member who holds a sabbatical post in the College's student union.

Paragraph (1)

Under paragraph (1) membership may at any time be terminated by resignation from office provided that it is given by notice in writing to the Clerk. On receipt of the written notice of resignation, membership will terminate.

Paragraph (2)(a)

The first ground for removal is where the Corporation is "satisfied" that a member is "unfit or unable to discharge the functions of a member", and is more problematic than the second ground at paragraph (2)(b). The Instrument does not specify what renders a person "unfit" or "unable" to discharge the functions of a member. This is, therefore, a matter for the Corporation to determine. The test is subjective and if the Corporation is satisfied that a member is unfit or unable and the decision is later challenged in the Courts, the Courts will not be concerned to reach a conclusion as to whether or not the member was unfit or unable, but only as to whether the decision has been properly taken. The Corporation's statutory power must, however, be exercised rationally and not unfairly or capriciously or in breach of the principles of natural justice. If the decision reached is one which no reasonable Corporation could have reached, the decision could be declared unlawful.

The provision is concerned with the fitness or ability of the member to fulfil his/her functions at the time the decision is taken. Although past conduct may throw light on the question, the provision is not designed, and could not properly be used, to punish past behaviour. It is suggested that the member's "inability" (as distinct from "unfitness") to discharge his/her functions should relate to the member's physical or mental capability to perform the duties expected of him/her as a member.

Participation in the discussion of confidential matters in the course of meetings of the Corporation and its committees is one of the functions which the member has to discharge and by reference to which his/her fitness might properly be considered. The same can be said of conflicts of interest. Each member owes to the Corporation fiduciary duties, and if these conflict with other duties which the member owes, e.g. to a trade union or to an education provider which competes with the College, the member should resolve the conflict, either by resigning from the Corporation or otherwise. Such a conflict must not detract from the member's duties to the Corporation, and Clause 12(6) of the Instrument specifies that mandates requiring a member to speak or vote in a particular way shall not be binding.

As referred to in the commentary relating to Clause 6(6) and 6(7), , a Corporation could resolve to amend those paragraphs and Clause 10(2)(a) to change or expand upon the circumstances in which a member may be removed from office. In the past, it has sometimes been difficult to remove a member when it could not reasonably be said that s/he was "unfit" or "unable" to carry out the functions of office. A number of Corporations have amended Clause 6(6), 6(7) and 10(2) to provide a third potential ground for removal, namely where the Corporation no longer considers it to be in its best interests for the individual to continue in office. This is intended to provide a way forward where the individual in question is not incapacitated but has, e.g. ceased to be actively engaged and/or to make a full contribution to the business of the Corporation. Clearly the power of removal would need to be exercised reasonably and in accordance with the principles of natural justice.

Paragraph (2)(b)

The second ground for removal is absenteeism. The importance of governors attending Corporation meetings regularly has been stressed by Ofsted and the FE Commissioner. This paragraph provides for the removal of a member if the Corporation is satisfied that s/he has been

absent from meetings of the Corporation for more than six consecutive months without permission. The DfES Guidance confirmed that permission for absence from a Corporation must be "… clear and definite". In considering whether a member should be removed on the grounds of absenteeism, consideration should be given as to whether any reasons for the absence have been given and whether any apologies have been offered by the member, although "merely accepting apologies for absence at meetings would not be considered giving permission for absence" (DfES Guidance). It may also be appropriate to take into account any other contributions to the College made by the member, such as attending other meetings and events, e.g. award presentations, the annual public meeting (if held), "link governor" involvement and training sessions.

If the Corporation proposes to remove a member under paragraph (2) there are a number of practical steps which it should follow as set out below. Note that if the Corporation is considering removing more than one member, each case should be dealt with separately.

- the member concerned should be notified in advance in writing of the proposal to remove him/her and the grounds for their proposed removal. The member should be invited to a meeting of the Corporation at which his/her removal will be considered and notified of the charge(s) that s/he will be called on to answer. The particulars set out in the notice should be sufficiently explicit to enable the member to understand the charge to be answered and to prepare his/her own case. Although a lack of detailed specification may be held to be immaterial if the member concerned is, in fact, aware of the case against him/her or if the deficiency does not cause any substantial prejudice, Corporations should nevertheless seek to ensure that the charges are specified in sufficient detail to enable the member to understand them and to prepare his or case

- the member concerned should be given an opportunity to reply to the complaints made against him/her and to make representations either in writing or at the meeting. See in particular the case of R -v- Brent London Borough Council ex parte Assegai [1987] The Times 18 June in which it was held that a local authority could not dismiss a school governor without first informing him of the proposed dismissal and giving him an opportunity to reply to the complaints made against him. It was noted in particular that the position of school governor had an element of public service, was supported by statute and was of the nature of an office or status. This description would also apply to the position of a member of a further education Corporation

- the member may be allowed to bring someone with them, to provide moral support rather than as an advocate

- if, having carefully considered the member's answer to the charges made against him/her, it is proposed to proceed with removal of the member a resolution should be put to the Corporation in the following terms (amended as necessary if the Corporation has amended its Instrument to enable it to remove a member where the Corporation considers it not to be in the best interests of the Corporation for the member to continue in office and it is proposed to remove him/her under that power – see the commentary on Clauses (6(6), 6(7) and 10(2) above):

  "THAT the Corporation is satisfied that [name of member] is unfit/unable to discharge the functions of a Member of the Corporation, and that the Chair of the Corporation be authorised to give notice to that effect in writing to [name of member] to remove him/her from office in accordance with Clause 10(2) of the statutory Instrument of Government, this decision to take effect from [the time] on [date of this meeting]."

- if the Chair has had any direct participation or personal involvement in the debate over the individual concerned, the resolution should be proposed by a member other than the Chair

- unless the Corporation has amended its constitution so that more than a simple majority is needed to effect the removal from office of a member (not recommend), the resolution will be determined by a simple majority vote in accordance with Clause 14(1) of the Instrument

- since there is no statutory duty to give reasons for the decision reached, the Courts are unlikely to hold that a statement of reasons is required as a matter of procedural regularity. If the resolution to remove is passed, however, there is a strong argument that the Corporation should specify reasons in the interest of openness and fairness. If the Corporation decides to specify reasons, professional advice should be sought because the adequacy of those reasons could be open to legal challenge

– if the resolution is passed, the Chair must give notice in writing to the member:

(i) informing the member of the resolution, its date, and the fact it was passed; and

(ii) removing the member from office in accordance with Clause 10(2) of the Instrument.

Some Corporations may have an approved procedure for dealing with the proposed removal of a member under paragraph (2) but many will not. Fortunately, the removal of a Corporation member is a rare occurrence. Where, however, a Corporation is faced with this situation and it does not have such a procedure in place, it may be advisable for the Clerk to write to the member in question, explaining in outline the procedure which the Corporation proposes to follow. This need not be complicated (e.g. explaining whether a written report is being prepared for the Corporation, whether the member will have the opportunity to respond in writing and if so within what timescale, that the member will have the opportunity of making oral representations to the Corporation at the meeting and whether the member can be accompanied at the meeting, etc). By explaining what will happen in advance, there is less likelihood that the member will challenge the process after the event.

As discussed in the commentary on paragraphs 3 and 4 below, if a staff or student member were suspended as a member of staff or student, they would retain the right to attend Corporation meetings (unless they were also prevented from accessing College premises as a condition of the suspension). Likewise, there may be circumstances where it is desirable to suspend an external member, e.g. where there is alleged misconduct affecting the member's role as a Corporation member and the member is under investigation. Even before the introduction of the Education Act 2011 governance freedoms it was open to the Corporation to grant a member, e.g. one about to face trial in a criminal court, leave of absence for a certain period and on certain conditions, such as that they do not enter College premises. Further it was open to a Corporation to agree that it should have the power to suspend members (including all categories of membership) in certain circumstances, and to introduce a standing order to such effect. Revised Schedule 4 enables a Corporation to amend the Instrument to include a right of suspension. Care should, however, still be taken before a decision to suspend a member is taken.

Paragraph (3)

Staff members and the Principal automatically cease to hold office if they cease to be members of staff. Under the 2008 Instrument and Articles of Government, there is no provision allowing the Corporation to suspend a member. Unless the Instrument is amended to include a right to suspend (see below), if a staff or student member is suspended as a member of staff/as a student, his/her membership of the Corporation and right to attend meetings would continue (although the terms of suspension may prevent him/her from entering College to attend meetings).

Paragraph (4)

Paragraph (4) allows for a student to remain a member until the end of the academic year in which s/he ceases to be enrolled as a student, so a student who finishes a course in June can remain a member until the end of the academic year. The student member, however, can be appointed for such period as the Corporation sees fit. The period need not be tied to the academic year. The clause also confirms that such an appointment will automatically come to an end if the student is expelled. Once again if a student is suspended as a student from the College s/he will continue to be a member of the Corporation unless the Corporation has introduced a standing order allowing it to suspend members in certain circumstances (please see the commentary on paragraph (3) above).

There is no provision requiring a parent governor to cease to be a member when his/her child ceases to be a student or reaches the age of 19. It is up to the Corporation to decide for how long a parent member's period of office should be.

11. Members not to hold interests in matters relating to the institution

(1) Except with the written approval of the Secretary of State, no member shall acquire or hold any interest in any property that is held or used for the purposes of the institution.

(2) A member to whom paragraph (3) applies shall –

(a) disclose to the Corporation the nature and extent of the interest; and

(b) if present at a meeting of the Corporation, or of any of its committees, at which such supply, contract or other matter as is mentioned in paragraph (3) is to be considered, not take part in the consideration or vote on any question with respect to it and not be counted in the quorum present at the meeting in relation to a resolution on which that member is not entitled to vote; and

(c) withdraw, if present at a meeting of the Corporation, or any of its committees, at which such supply, contract or other matter as is mentioned in paragraph (3) is to be considered, where required to do so by a majority of the members of the Corporation or committee present at the meeting.

(3) This paragraph applies to a member who –

(a) has any financial interest in –

(i) the supply of work to the institution, or the supply of goods for the purposes of the institution;

(ii) any contract or proposed contract concerning the institution; or

(iii) any other matter relating to the institution; or

(b) has any other interest of a type specified by the Corporation in any matter relating to the institution.

(4) This clause shall not prevent the members considering and voting upon proposals for the Corporation to insure them against liabilities incurred by them arising out of their office or the Corporation obtaining such insurance and paying the premium.

(5) Where the matter under consideration by the Corporation or any of its committees relates to the pay and conditions of all staff, or all staff in a particular class, a staff member –

(a) need not disclose a financial interest; and

(b) may take part in the consideration of the matter, vote on any question with respect to it and count towards the quorum present at that meeting, provided that in so doing, the staff member acts in the best interests of the Corporation as a whole and does not seek to represent the interests of any other person or body, but

(c) shall withdraw from the meeting if the matter is under negotiation with staff and the staff member is representing any of the staff concerned in those negotiations.

(6) The Clerk shall maintain a register of the interests of the members which have been disclosed and the register shall be made available during normal office hours at the institution to any person wishing to inspect it.

General comments

Members are required to disclose not only financial interests but *"any other interest specified by the Corporation."* Such a specification will normally be dealt with in the College's Code of Conduct or Standing Orders.

A conflict of interest (of a non-financial nature) may arise where a member owes a duty to some other body or organisation, e.g. where a Corporation has dealings with:

- a company owned (wholly or partly) by a member
- a Corporation member's employer
- a local authority of which a Corporation member
- a charity of which a Corporation member is a charity trustee

The principles which underpin Clause 11 are essential to any system of good governance. Indeed, Clause 11 could be said to bring together, in a legal sense, no less than four of the Nolan Committee's Principles of Public Life, namely:

- **Selflessness** – holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.
- **Integrity** – holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.
- **Objectivity** – in carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
- **Honesty** – holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Clause 11 is directed at ensuring that Corporation members act, and are seen to act, in a manner which is rigorously impartial. The reason for this is that, in law, Corporation members are *"fiduciaries"* and this expression, in turn, means a person who holds a position of trust or confidence with respect to someone else, i.e. the Corporation, and who is obliged to act solely for that person's benefit.

Fiduciary responsibilities impose strict and exacting standards upon members. They are designed to ensure that members act with loyalty and good faith (sometimes described as *"utmost good faith"*) towards the Corporation whilst performing their tasks. *"Good faith"* means that a member must act honestly and without ulterior motive, and by analogy with the duties of a trustee, *"must put his own interests entirely out of the question"* (see Lord Eldon LC in Cook -v- Collingridge [1823]).

When considering the importance of ensuring that members are and are seen to be *"impartial"* it is also worth noting the provisions of the UK Corporate Governance Code which incorporates some of the key recommendations of the Higgs Report following an independent review of the role and effectiveness of non-executive directors of listed companies in January 2003. Although some of Higgs' recommendations were watered down in the Code, the Code led to a shift in the plc boardroom in favour of the non-executive director. The report sets out a test of independence for non-executive directors. As stated in the commentary on Clause 9(2) the Code states that *"the board should determine whether the director is independent in character and judgement and whether there are relationships or circumstances which are likely to affect, or could appear to affect, the director's judgement"*. Such circumstances could include where the director:

- has been an employee of the company or group within the last five years

- has, or has had within the last three years, a material business relationship with the company either directly or as partner, shareholder, director or senior employee of a body that has such a relationship with the company
- has received or receives additional remuneration from the company apart from directors' fees or participates in the company's share option or performance related pay scheme, or is a member of the company's pension scheme
- has close family ties with any of the company's advisers, directors or senior employees
- holds cross-directorships or has significant links with other directors through involvement in other companies or bodies
- represents a significant shareholder; or
- has served on the board for more than nine years from the date of their first election

The Board of a publicly listed company is required to identify in its annual report each non-executive director it considers to be independent, and if any of the factors listed above apply, it must state its reasons why, notwithstanding, it considers that a director is independent.

Of course Corporation members are not non-executive directors, and the Corporate Governance Code does not apply directly to further education colleges. Nevertheless, it has had a knock on effect on governance in other spheres beyond the plc including in the education sector. For example:

- in the FE sector, the English Colleges' Foundation Code of Governance issued by AoC in November 2011 adopted the UK Corporate Governance Code's *"comply or explain"* approach. The Code of Good Governance for English Colleges issued in March 2015 and updated in May 2019 now states at paragraph 2.10 "*Board members are required to fulfil their duties in line with accepted standards of public life. Board members must avoid conflicts of interest and act solely in the interests of the College at all times*". At paragraph 9.19 the Code states: "*Members must act in the best interest of the College, rather than selectively or in the interests of any particular constituency. Members must act with honesty, frankness and objectivity, taking decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias*."
- in 2018 the Committee of University Chairs updated its Higher Education Code of Governance:

  http://www.universitychairs.ac.uk/wp-content/uploads/2018/06/HE-Code-of-Governance-Updated-2018.pdf

  The Code serves to emphasise the importance of the independence of governing body members.

The UK Corporate Governance Code and the CUC Guide appear to have influenced the development of the English Colleges' Foundation Code of Governance which recommends that:

"each College should report that it has adopted the Code in the corporate governance statement contained in its annual, audited financial statements. Where a College's practices are not consistent with any particular provision of the Code, it should publish in its corporate governance statement an explanation for that inconsistency."

Note, however, that Colleges are under no obligation to commit to the Code or to explain if they decide not to do so. They are, however, required by the College Accounts Direction[15] to commit either to the Charity Code, the Code of Good Governance for English College or to have regard to the principles and guidance of the UK Corporate Governance Code (in so far as they are applicable to the College sector). All Colleges must include in in their annual financial statements a Statement of Corporate Governance and Internal Control complying with best practice.

The duty to act in the interests of the Corporation means that members must not allow any personal interest to conflict with their duty to the Corporation, or put themselves in a position where a conflict could arise (see Lord Herschell in Bray -v- Ford [1896]). The Fourth Report of the Nolan Committee concluded that "*it is important that rules governing conflicts of interest are*

15 https://www.gov.uk/government/publications/college-accounts-direction

introduced across all sectors considered in this report". One mechanism for disclosing actual or potential conflicts of interest is the maintenance of a register of interests which has been mandatory in Colleges since the entry into force of the 1999 Order.

Another complex and perhaps controversial issue is whether a Corporation should engage the services of a member directly or engage an organisation with which a member has a close personal connection: e.g. appointing as the Corporation's legal advisers a firm of which one of the members is a partner. It is a fundamental principle of trust law that trustees (or in the case of members of SFC Corporations "quasi trustees") must not make a personal profit from their position and must not retain any benefit directly or indirectly received from the trust (the College) without specific authorisation in the trust's deed (the Instrument and Articles), or by statute or with the specific consent of the Courts or the Charity Commission. Note, however, that this fundamental principle has been modified by Section 185 of the Charities Act 2011, which is discussed below.

Until the Charities Act 2006 (now consolidated into the Charities Act 2011) there was nothing in statute to authorise the arrangement described. The view of the Charity Commission was that in the case of a member being engaged personally at a profit explicit authority beyond Clause 11(2) was required and this also applied where the member is a partner, the managing director or chief executive or a major shareholder of a company which is so engaged. From a strict legal point of view, therefore, there were arguments that Colleges should not be engaging the services of a member directly at his/her personal profit or engaging the services of a firm in which the member has a significant interest, e.g. partner, managing director, substantial shareholder. If they did there was a risk, albeit a technical one, that the member or the firm in question would hold the fees received on constructive trust for the College, and could be held to account in respect of those fees, i.e. to repay them.

The Charity Commission is of the view, however, that a distinction can be drawn between a situation where a member has a significant interest in the firm being engaged and one where the member is simply an employee: e.g. a secretary in the law firm in question. In the latter case, unless there are special features such as payment of bonuses or commission on the introduction of a new client, or the possibility of promotion of the employee, the member will not receive a financial benefit as a result of the appointment. The member still has an interest and Clause 11(2) establishes a regime to ensure that the appointment is considered in a manner which is principled and transparent.

Arguably the provisions of Clause 11, measured against what the common law requires of "fiduciaries", do not go far enough. In particular:

- it may be wiser for a member who has a relevant interest to withdraw from the part of the meeting at which the interest is considered, so as to avoid any suggestion of influence (i.e. to withdraw physically from the room in which the meeting is being held). This may be provided for by amending Clause 11 or the College's Standing Orders
- the register of interests should cover interests (financial and non-financial) not only of members but also of their immediate family and dependants
- the register of interests should be extended to all senior managers of a College who have financial or budgetary responsibility. It is also advisable for the Clerk to disclose any relevant interest s/he may have.

For many Colleges the register of interests is a standing item on the agenda of Corporation meetings to remind members of the need routinely to update the register. Many Colleges also provide an opportunity at the beginning of each Corporation meeting for members to declare any interest they may have in the business to be transacted. These are both examples of good practice, particularly since it is not possible to foresee in advance all the situations where a member may have a conflict.

It is clear that in all these situations care must be taken so that, whenever the Corporation is considering the appointment of, the award of a contract to, or the procurement of services from, an organisation with which a member has a close connection, the Corporation (and individual members) should be aware of the potential risks and should weigh these matters carefully before making the appointment, awarding the contract or procuring the services (as appropriate).

Changes arising from the introduction of the Education Act 2011 governance freedoms

DBIS proposed to delete Clause 11 in its entirety on the basis that members would still be bound by the provisions of charity law (see below). The sector responded negatively to this proposal,

indicating that the deletion of Clause 11 could be misconstrued as implying that conflicts of interest were not important. The 2012 Modification Order therefore deleted only what was previously Clause 11(1) which provided that no member could acquire or hold any interest in any property held or used for the purposes of the institution save with the consent of the Secretary of State. What used to be Clauses 11(2)-(5) have consequently been re-numbered.

Revised Schedule 4 says nothing about conflicts of interest so Corporations are free to amend or delete Clause 11 if they wish provided they comply with charity law. Corporations may also wish to consider adopting a policy on conflicts of interest. The Eversheds Sutherland model policy (available on the Governance Plus extranet) has been revised in the light of strengthened guidance on managing (and if possible avoiding) conflicts of interest issued by the Charity Commission and accessible at:

https://www.gov.uk/government/publications/conflicts-of-interest-a-guide-for-charity-trustees-cc29

Charities Acts 2006 and 2011

It is worth noting two important implications of the Charities Act 2006 (now subsumed into the Charities Act 2011) on this area of law.

First, the Act amends the principle that a charity cannot pay its trustees unless authorised by the trust deed, by the Courts, or by the Charity Commission, to allow a trust, in appropriate circumstances, to remunerate a trustee where that trustee, or person connected with the trustee, provides goods or services to the charity.

An example given by the Government's Strategy Unit report Private Action, Public Benefit is that of a trustee who is a plumber replacing the central heating at cost price. As this is likely to be a lower price than if the service was provided from an external source, it is in the charity's interests to engage the services of the trustee as a plumber. For the trustee to carry out the work certain safeguards are required to prevent an abuse of this power, such as ensuring that any such transaction is conducted and reported openly and by setting out the maximum remuneration in writing.

Despite this relaxation, any Corporation proposing to engage the services of a member should still proceed with extreme caution. Only in a limited number of circumstances will such an appointment can be capable of justification.

It is also important to note that the amendments do not permit a charity to pay a trustee for services provided by the trustee in his/her capacity as a trustee (that is, a charity cannot pay a trustee simply for being a trustee): such remuneration would currently require an order from the Charity Commission[16]. This area of law was covered by Lord Hodgson in his 2011 review of the Charities Act 2006:

https://www.gov.uk/government/consultations/charities-act-2006-review

Lord Hodgson recommended that larger charities (which would include most SFCs) should be able to pay their trustees. The then Government in its interim response to the review rejected this proposal. Sections 185 to 188 of the Charities Act 2011 (which codified and replaced the Charities Acts 1993 and 2006 with effect from 14 March 2012) will apply where the College wishes to remunerate either a Corporation member or a person connected with a member where the remuneration might result in the member receiving any benefit either direct or indirect. "Person" includes corporate bodies and the necessary connection may be established where the member is related to, or in a social or business partnership with, the person who will receive the remuneration or is a corporate body in which the member or business partner of the member have a substantial interest (normally more than one fifth of the voting power). Where the person to receive the remuneration will not be the Corporation member it must be possible that the member will receive some benefit. That might be, e.g. where the member may receive some bonus as the result of their firm undertaking the work for the College.

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16 We are aware that in the context of the Area Based Review process and subsequently where interim Chairs have been parachuted into Colleges during interventions Colleges have applied for the right to pay Chairs in connection with the additional requirements being placed on them. Each case will be considered by the Charity Commission on its merits and there are generally better prospects of success where the proposal is focussed on completing particular activities and is time limited.

Where the provisions apply:

- the amount or maximum amount of the payment must be set out in a written agreement between the College and the Corporation member, and must not exceed what is reasonable in the circumstances
- before entering the agreement, the Corporation must decide that it is in the best interest of the College for the services to be provided by the particular member or his/her firm for the amount agreed
- Corporation members entitled to receive such payments must be a minority of the Corporation
- finally, the Instrument and Articles must not contain any express prohibition of the payment.

The second important implication of the Charities Act 2011 on this area of law is that SFC Corporations are exempt charities, which means they are not required to register with the Charity Commission. From 1 August 2011 the DfE was appointed principal regulator, responsible for ensuring that SFCs comply with charity law, although in practice the role is undertaken by the ESFA. The DfE has developed a protocol with the Charity Commission (which retains the statutory enforcement powers under the Charities Acts). For a description of the way that the principal charity law regulator works in the academies and SFC sector see the DfE information note:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/294996/Academies_as_exempt_charities_FINAL3.pdf

Paragraphs (1), (2) and (3)

As explained above, under the common law, a trustee (or quasi trustee) must not make a personal profit from his/her position without express authorisation. Accordingly, the general rule is that members are not authorised to:

- receive remuneration, other than in respect of legitimate expenses (under Clause 18)
- hold any interest in any property held or used for the purpose of the College under paragraph (1)
- enter into contracts with the College, or any other transactions of a financial nature.

Neither the 2008 Instrument and Articles, nor the 2012 Modification Orders nor revised Schedule 4 contain any authority for the payment of remuneration to members for their services as members of the Corporation. Any such payment would need to be authorised by the Charity Commission. Lord Hodgson in his review of the Charities Act 2006 recommended that larger charities (which would include Colleges) should be able to remunerate their governors, but this recommendation was not accepted by the government. The DBIS Review of Further Education and SFC Governance clarified the limited situations where some payment may be made and the process for seeking Charity Commission consent. The Charity Commission has issued guidance on payments to College governors which is accessible at:

https://www.gov.uk/government/publications/payment-and-expenses-for-college-governors

Paragraph (2), sets out a procedure whereby members may enter into a contract or financial transaction provided that they disclose to the Corporation the nature and extent of the relevant financial or other specified interest and take no part in the consideration or vote on the matter (please see our general commentary above).

In that event, it should be noted that a member with such an interest must not be counted in the quorum present, and this could conceivably lead to the meeting becoming inquorate, e.g. if several members are interested in the same matter under consideration. Paragraph (2) emphasises three distinct stages for dealing with a conflict of interest, namely:

- disclosing to the Corporation of the nature and extent of the relevant interest
- taking no part in the consideration of the proposed transaction or voting on it, nor be counted in the meeting's quorum. This means that the member cannot take part in the debate of the matter. If invited to do so by the Corporation, it may be permissible for such a member to make a statement (for example of fact) and then fall silent. In practice, this is dealt with by a short adjournment of the formal meeting to allow for an informal discussion.

Although this provision may cause practical difficulties, it is worth remembering that Corporation members have fiduciary duties and one of these is to take action to avoid an actual or potential conflict of interest. Taking part in the debate and advancing arguments in relation to a matter in which the member has a financial or other relevant interest crosses the boundary of what is acceptable and it does not sit well with the seven Nolan Principles of Public Life

- withdrawing from the meeting where required to do so by a majority of the members present. This clarifies that whilst members who have an interest in the matters relating to the institution cannot vote on any question with respect to it nor may be counted towards the quorum for the issues, they are not automatically excluded from the meeting unless the Corporation votes to exclude them.

Paragraph (4)

The reason for this provision is simply to enable members to authorise the Corporation to take out indemnity insurance policies for their protection. Without such a provision, members would be barred from voting under Clause 11 on a proposal to take out such insurance. It is worth noting that:

- the UK Corporate Governance Code states that a public company "should arrange appropriate insurance cover in respect of legal action against its directors"

- section 189 of the Charities Act 2011 now allows charity trustees to purchase insurance to indemnify trustees against personal liability without the necessity for an application to the Charity Commission where they are satisfied that it is in the best interests of the charity for them to do so. Such insurance must not cover liability for fines imposed in criminal or regulatory proceedings relating to fraud, dishonesty or deliberate misconduct or liabilities arising from conduct which the trustee must have known was not in the interest of the charity

Paragraph (5)

The wording of a previous iteration of Clause 11 raised the issue of whether staff members were required to declare an interest where a general pay review was being considered by the Corporation or one of its committees. Strictly speaking, a member of staff would have a financial interest in any general pay awards and technically staff members should have declared an interest, with the result that they could then take no further part in the discussion nor form part of the quorum. The DfES' view, however, was that it would not presume staff members to have a conflict of interest when general staff matters were being discussed. This issue was clarified by the 2006 Order with insertion of Clause 11(5). Under this clause, if the matter under consideration relates to the pay and conditions of all staff or staff in a particular staff class, the staff member need not disclose a financial interest and may vote on the matter and count in the quorum present provided that in doing so that staff member acts in the best interests of the Corporation and not in the interests of another person or body. Please also refer to Clause 14(5)(c).

If the matter is under negotiation with staff and the staff member is representing those concerned, the staff member must withdraw from that meeting.

Under Clause 14(5)(d), members of the Corporation can no longer resolve to remove a staff member from a meeting of the Corporation or a committee (as the case may be) at which staff matters relating to a more senior staff member is to be considered if the consideration relates to the pay and conditions of all staff or a particular class of staff.

Another interesting issue is whether a Corporation member who is a director of a College subsidiary company should declare an interest when any item involving that company is under discussion. Such members will not be remunerated for their services and should not have any "financial interest" in the matter. The question is therefore whether s/he has any "interest of a description specified by the Corporation". It is submitted, for the following reasons, that Corporations should require members who are directors of subsidiary companies to declare such an interest. Such an individual has two sets of responsibilities to fulfil: those attaching to him/her as a Corporation member and those attaching to him/her as a company director. Whilst, for the majority of time the interests of the College and its subsidiary will coincide, there is a potential for conflict. A member of the Corporation, as a fiduciary, has a duty to avoid putting himself/herself in a position where conflict arises. It is for this reason that the Corporation should require the declaration of,

and the member/director should declare, any interest whenever subsidiary company matters are under discussion by the Corporation or its committees.

The consequence of this is that the member, under Clause 11(2)(b), cannot take part in the discussion of the matter or vote or form part of the quorum. One of the reasons for appointing a member as a director is so s/he can report back to the Corporation. Some Corporations may seek to get round this prohibition of "taking part in the consideration" of the matter by stopping the official meeting, asking the member/director for his/her view on an informal basis and then reconvening the meeting.

On the question of the extent to which Corporation members should be appointed to the boards of College companies see the guidance Consent for further education Colleges to invest in companies issued by SFA in June 2011 and accessible at:

http://dera.ioe.ac.uk/12399/1/college_companies_guidance_-_final_revised_published_version_-_published_21_oct_2011.pdf

which remains relevant as good practice guidance even though the need for SFA consent was repealed from 1 April 2012 by the Education Act 2011. See however the Code of Good Governance which at paragraph 7.5 requires that board members or trustees of a subsidiary entity of the College should not be members of the Board or staff or students of the College: this goes further than is required by the ESFA guidance.

Paragraph (6)

The register of interests of Corporation members maintained by the Clerk should cover not only financial interests but also any other interests of which the Corporation requires disclosure. Please refer also to the commentary in relation to the register of interests in the General section above and in particular, the suggestion that the register should cover interests not only of members but also of:

- their immediate family and dependants
- all senior managers of a College who have financial or budgetary responsibility
- the Clerk.

The register must be made available during normal office hours to any member of the public wishing to inspect it. While there is no specific requirement that the register must be made available electronically, it must be borne in mind that the information contained in the register could be made the subject of a request under the Freedom of Information Act 2000, and the requester may express a preference for a particular mode of communication.

12. Meetings

(1) The Corporation shall meet at least once in every term, and shall hold such other meetings as may be necessary.

(2) Subject to paragraphs (4) and (5) and to Clause 13(4), all meetings shall be called by the Clerk, who shall, at least seven calendar days before the date of the meeting, send to the members of the Corporation written notice of the meeting and a copy of the proposed agenda.

(3) If it is proposed to consider at any meeting the remuneration, conditions of service, conduct, suspension, dismissal or retirement of the Clerk, the Chair shall, at least seven calendar days before the date of the meeting, send to the members a copy of the agenda item concerned, together with any relevant papers.

(4) A meeting of the Corporation, called a "special meeting", may be called at any time by the Chair or at the request in writing of any five members.

(5) Where the Chair, or in the Chair's absence the Vice-Chair, decides that there are matters requiring urgent consideration, the written notice convening the special meeting and a copy of the proposed agenda may be given within less than seven calendar days.

(6) Every member shall act in the best interests of the Corporation and shall not be bound to speak or vote by mandates given by any other body or person.

General comments

The Corporation (being a separate legal entity in its own right) is the supreme decision taking body of the College. Under the updated 2008 Instrument it can take decisions in one of two ways, either by a simple majority (see Clause 14(1)) of Corporation members present and entitled to vote at a meeting which is quorate (see Clause 13), or by delegating any of its functions to a committee, the Chair of the Corporation or the Principal (see Article 4(1)). Functions may only be delegated if they do not fall within the category of responsibilities which the Corporation is prohibited from delegating (see Article 9), and provided that the functions are exercised strictly in accordance with terms which have been authorised by the Corporation, e.g. any specific remit, terms of reference and rules as to composition and quorum. Meetings, therefore, are the primary way in which the Corporation takes its decisions. Paragraphs (1) to (5) inclusive contain the procedural rules relating to the frequency and convening of meetings of the Corporation, but not of its committees in respect of which such matters should be dealt with in appropriate Standing Orders. Paragraph (6) contains provisions which are of deeper significance, since they address the role of individual Corporation members. These are considered more fully in the commentary below.

Revised Schedule 4 does not prescribe how meetings should be undertaken or indeed whether decisions need to be taken by meetings. It only requires the Corporation to have procedures for itself and the institution. Much of the detail of Clause 12 could, therefore, be moved to Standing Orders. Furthermore, it is now possible for Corporations to make rules regarding the process of decision making and to allow, for instance, decisions to be taken by written resolution, as is possible for companies. If it is intended to allow decisions to be taken by alternative means, e.g. by written resolution – and/or meetings to be held by telephone conferencing, the Instrument, or at the very least the Corporation's Standing Orders, should be amended to provide for this. Making such changes will provide increased flexibility to deal with urgent unexpected items of business in circumstances where it is not possible or practicable to convene a special meeting. Corporations will, however, need to consider carefully with the benefit of legal advice the circumstances in which alternative methods of decision making are appropriate and the need for procedures to be established to ensure that such alternative procedures are robust and fair and address the problems that can occur if reliance is placed on, e.g. technology involved in video or telephone

conferencing. It may still be the case that the most appropriate means of dealing with an urgent but important matter of business may be to convene a special meeting if at all possible: see comment on paragraphs (4) and (5). See also the comment on Clause 1(h) (definition of "meeting") and also the comment on Clause 13(1) (possibility of relaxing the quorum requirement).

Paragraph (1)

It is important for Corporation members to meet with sufficient frequency to enable them to perform their decision taking responsibilities as set out in Article 3(1). Paragraph 9.4 of the Code of Good Governance for English Colleges states that "*Members should attend all meetings where possible*." Poor attendance may lead to criticism on inspection – see for example the FE Commissioner's criticism of attendance in his 2015 report on Darlington College accessible at:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/436359/Darlington_College_-_Further_Education_Commissioner_Assessment_Summary.pdf

Under Revised Schedule 4, no minimum or maximum number of meetings per term or year is specified. While technically the Corporation could resolve to amend this paragraph to provide for fewer meetings than the minimum of once in every term specified in the 2008 Instrument, in practice it is very difficult (if not impossible) to see how the Corporation could discharge its responsibilities if meetings took place less frequently than this. On the contrary, the volume of Corporation business, the pace of change in the education sector and the increasing emphasis placed on the Corporation monitoring the financial health of the College have resulted in many Corporations adopting a more frequent pattern of meetings (e.g. meeting every other month) which are carefully synchronised with the cycle of management and committee meetings, the strategic planning agenda and approval of the College's annual report and financial accounts. The Code of Good Governance states at paragraph 9.4 that "*The full board should meet as often as required to undertake its responsibilities*." LSDA Research in 2002 in the further education sector showed that Corporations met on average five times per year. Corporations which have moved towards a strategic or "Carver" model of governance tend to meet even more frequently – often monthly. The Commissioner, in his 2014 summary report on Prior Pursglove College commented approvingly on the Corporation's move to monthly meetings.

Paragraph (2)

Specifies the period of notice which must be given by the Clerk in order to convene a meeting of the Corporation and what must be sent to Corporation members when a meeting is summoned. The Clerk must send to members (e.g. by post) written notice together with a copy of the proposed agenda *"at least"* (i.e. not less than) seven calendar days before the date of the meeting. Strictly speaking paragraph (2) does not require the accompanying papers to be circulated seven calendar days in advance of the meeting although it is good practice to send the papers out at the same time as the agenda.

Under the 2008 Instrument hard copies of the notice and agenda must be circulated, although it may be permissible to transmit the supporting papers to members electronically provided that they have agreed to this form of communication and any member requesting hard copies is provided with them. Revised Schedule 4, however, contains no requirement to circulate hard copies of the notice and agenda. It is therefore possible to amend paragraph 2 specifically to allow circulation by e mail. Corporations considering making such a change will need to remember the importance of ensuring that all members are able to receive such communications, and to provide hard copies for such members who, e.g. through disability, are unable to do so. Standing Orders will also need to address the position where, as a result of, e.g. technological problems, one or more members do not receive notice of a meeting.

The reference to *"calendar days"* means that the days on which the notice was received or deemed to have been received by members and the day of the meeting itself have to be taken into account. It is suggested that Clerks should always seek to give to Corporation members longer notice than that specified in paragraph (2), e.g. 10 calendar days or more, to enable them to familiarise themselves with what are often complex issues.

The agenda must set out the business to be transacted at the meeting with sufficient particularity. If an item of business does not appear on the agenda, it will be impermissible to introduce it subsequently at the meeting of the Corporation, e.g. as a tabled paper or under any other business. In that event, proper notice of the matter under consideration will not have been given to Corporation members, and they will be entitled to object. It should also be noted that only the

agenda sent by the Clerk has any authority, and Corporation members may only propose the agenda where a special meeting of the Corporation is called under paragraph (4) (see below).

The Clerk will wish to ensure, as a matter of good practice, that:

- the agenda is clear and well ordered, distinguishing between those items where decisions need to be taken from those items where information is being reported
- papers are relevant, contain sufficient information and are not clouded by unnecessary technicality or jargon (for many newly-appointed Corporation members acronyms will be a barrier to understanding)
- as a minimum any complex agenda papers are accompanied by an executive summary indeed many Corporations insist on all papers having such an executive summary

Getting the key information to Corporation members in an accessible format without overburdening them with unnecessary or irrelevant data is crucial for the effective and efficient conduct of the Corporation. The English Colleges' Foundation Code says (at section 1.7), largely following similar wording in the Corporate Governance Code, that *"The Chair should ensure that the governing body receives high quality information in a form that allows it to monitor and scrutinise the College's activities effectively, and to challenge performance where required"*. See now sections 4 and 6 of the Code of Good Governance in English Colleges in relation to information needed to appraise the College's teaching and learning and financial strategy respectively. For a critique of the information provided to Corporations see How College Senior Staff Contribute to College Governance by Ron Hill and Ian James, accessible at:

http://www.excellencegateway.org.uk/content/eg5569

See also Creating Excellence in College Governance at paragraphs 2.30-2.31. The lack of a monthly dashboard and benchmarking was criticised by the FE Commissioner in his 2015 report on New College Nottingham:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/436361/New_College_Nottingham_-_Further_Education_Commissioner_Assessment_Summary.pdf

A Corporation website or intranet site can make an important contribution to the effective dissemination of information and access to it by Corporation members. For example, although agendas must, and key papers should, be circulated in hard copy, these papers could be shorter concentrating on key information with detailed or background information available on the website for those members who want this level of information. Papers circulated *"for information only"* could be posted on the website instead. Ensuring copies of previous papers and minutes are available electronically may relieve members of the need to hold on to their hard copies *"just in case"*. Of course it is for each Corporation to discuss and decide for itself how its members want to access information. Where use of the internet/e-mail is made, however, special provision must be made for any member who does not have access to these facilities.

If the agenda includes an item of confidential business which will require the staff or student member(s) to withdraw under Clause 14 of the Instrument, the Clerk will need to exercise care and, in appropriate circumstances, send the papers relating to that confidential item (which can be separately colour-coded) only to the other Corporation members who are not required to withdraw from that part of the meeting. The detailed provisions of Clause 14 should be consulted. Where a resolution is required from other Corporation members present to exclude a staff or student member (under paragraphs (5)(d) or (9)(b) of Clause 14 respectively), special care must be taken. Please refer to the commentary on paragraphs (5) to (9) of Clause 14 for more detailed guidance.

Please also note the Chair's power to call a special meeting in the event of a meeting being or becoming inquorate under Clause 13(4) of the Instrument and commentary.

Paragraph (3)

Is intended to reinforce the Clerk's independent role as an officer of the Corporation. Thus, any proposal relating to the Clerk's position (as described in paragraph (3)) must be dealt with by the Chair isolating this item of agenda business and sending it, separately from the main agenda, to Corporation members together with any relevant papers. Arrangements will need to be in place to enable the Chair to do this (e.g. addresses of members, access to secretarial support). Paragraph (3) should be read as applying to committee meetings, in which case it may be appropriate for the agenda item and papers to be circulated by the Chair of the relevant

committee. This provision should be read in conjunction with Article 3(1)(e) and Article 9(e) which make the appointment and dismissal of the Clerk a non-delegable responsibility.

Paragraphs (4) and (5)

Special meetings of the Corporation may be called at any time by the Chair or at the written request of any five members. The Instrument is silent on what procedure should be followed by members who wish to requisition a meeting, but it is suggested that they should prepare a draft agenda and send it to the Chair or the Clerk together with the written request that a meeting of the Corporation be convened and an indication of the timescale within which the meeting should be held. If there are matters demanding *"urgent consideration"*, the Chair or, in his/her absence, the Vice-Chair may direct that a special meeting is called on less than the minimum of seven calendar days' notice. It is for the Chair (or Vice-Chair) to be satisfied that the matter is sufficiently pressing and important to justify dispensing with the normal notice provisions (see also the commentary on Clause 6 in relation to "Chair's action").

Paragraph (6)

The duty to act in the best interests of the Corporation is based on the same common law principles as underpin Clause 11 (see general commentary above), namely that Corporation members, as "fiduciaries", should not allow any personal interests to conflict with their duties to the College or put themselves in a position where a conflict could arise. The primary duty of each Corporation member is, therefore, to act in accordance with the *"best interests"* of the College and not the particular interests of any external nominating body or the constituency which has elected that member. The member must not regard himself/herself as the representative on the Corporation of that particular body, nor should the nominating body regard him/her as their representative. In practice, this means that every Corporation member must exercise his/her independent judgement. Corporation members are not delegates in the sense of being bound by mandates given by others or representatives in the sense of representing the interests of only one particular constituency. This is stressed in paragraphs 2.10 and 9.19 of the Code of Good Governance in English Colleges.

It follows that no Corporation member may appoint another member as his/her proxy or *"alternate*[17]*"* (see Clause 14(2)). It is the application of the principle of acting *"in the best interests"* of the Corporation which has often caused practical difficulty for certain categories of members, often those elected and nominated by the staff. There has sometimes been an unreasonable expectation on the part of the relevant constituency that the nominee member must fight the constituency's corner, as opposed to, ensuring that the meeting is aware of the views of staff when these are relevant to the matter under consideration. Paragraph (6) makes explicit the common law requirement that each Corporation member owes an individual duty of loyalty to the Corporation coupled with the duty to exercise his/her own independent judgement. Once that independent judgement has been exercised, Corporation members must take collective responsibility for whatever decision is taken.

[17] Unlike company law practice where the Articles of Association permit shareholders to appoint proxies and normally provide for company directors to nominate "alternates" to cover periods of absence.

13. Quorum

(1) Meetings of the Corporation shall be quorate if the number of members present is at least 40% of the total number of members, determined according to Clause 3, together with any local education authority and YPLA members.

(2) If the number of members present for a meeting of the Corporation does not constitute a quorum, the meeting shall not be held.

(3) If during a meeting of the Corporation there ceases to be a quorum, the meeting shall be terminated at once.

(4) If a meeting cannot be held or cannot continue for lack of a quorum, the Chair may call a special meeting as soon as it is convenient.

General comments

Generally, the Corporation is required to act collectively when conducting the College's business and taking any decisions. The function of the quorum is to determine what minimum number of Corporation members need to be present at a meeting in order for the meeting to be quorate and a decision to be validly taken so as to be binding on the Corporation. Quorum is determined by reference to the total number of members. It is the purpose of Clause 13 to specify the requisite number. If a decision is taken without the Corporation being quorate, the resultant decision will be void and unenforceable. Under Clause 1(h) a meeting can be quorate when some Corporation members are attending via video-conferencing facilities (see also the commentary on Clause 1(h)). Under the Revised Schedule 4 this could be extended to telephone conferencing but see the commentary on Clause 1(h) and the general note on Clause 12.

Paragraph (1)

Sets the minimum number of Corporation members to form a quorum at 40 percent of the total membership including current vacancies. In other words, any vacancies in the membership as determined by the Corporation (under Clause 3(1)) will count towards the calculation of the total membership. This is another reason for the Corporation to ensure that vacancies are filled promptly. When calculating the number of members required to meet the quoracy requirements the number should be rounded up, not down. So if the determined membership of the Corporation is sixteen, 40 percent of this is 6.4 which is rounded up to seven members.

Revised Schedule 4 leaves it to the Corporation to set rules about quorum and to calibrate those rules according to its total membership number. Unless the Corporation decides to reduce its determined number significantly 40 percent may be regarded as too high a threshold and consideration could be given to reducing it slightly.

Clause 13(1) refers only to meetings of the Corporation not of its committees. The 40 percent quoracy rule can, and often is, adopted by Corporations for their committees but another rule could be adopted. The important point is that the terms of reference and/or Standing Orders for the committees should specify clearly the requirements for a quorum.

Corporations should seek to have maximum attendance from their members. Research shows that poor attendance can be a factor in poor governance. For example, Jeffrey A Sommerfield's study of what went wrong in a number of spectacular corporate crashes in the United States, such as Enron, concluded that low attendance at Board meetings was a crucial contributor (Harvard Business Review, September 2002). The 2014 summary assessment of the FE Commissioner on governance at Stratford-upon-Avon College noted that there were only 10 governors in place, most of whom had been in post when the College's financial problems developed. This can be contrasted with the average size of SFC Boards found by Godbold in his 2015 survey to be 18.6. The survey is accessible at:

http://www.et-foundation.co.uk/wp-content/uploads/2014/09/AoC-Board-Composition-Survey-Report-2015.pdf

For criticism of poor attendance at meetings see the report of the FE Commissioner on Darlington College referred to in the commentary on clause 12(1) above.

Paragraphs (2), (3) and (4)

Specify that, if a meeting becomes inquorate after it has commenced, e.g. because one or more members have to leave the meeting or are required to withdraw from the meeting because of an interest in the matter under discussion, the meeting must be terminated at once and in that case the Chair has a discretion to cause a special meeting to be summoned at the earliest opportune moment.

14. Proceedings of meetings

(1) Every question to be decided at a meeting of the Corporation shall be decided by a majority of the votes cast by members present and entitled to vote on the question.

(2) Where, at a meeting of the Corporation, there is an equal division of votes on a question to be decided, the Chair of the meeting shall have a second or casting vote.

(3) A member may not vote by proxy or by way of postal vote.

(4) No resolution of the members may be rescinded or varied at a subsequent meeting unless consideration of the rescission or variation is a specific item of business on the agenda for that meeting.

(5) Except as provided by procedures made pursuant to Article 16 of the Articles of Government, a member of the Corporation who is a member of staff at the institution, including the Principal, shall withdraw –

(a) from that part of any meeting of the Corporation, or any of its committees, at which staff matters relating solely to that member of the staff, as distinct from staff matters relating to all members of staff or all members of staff in a particular class, are to be considered;

(b) from that part of any meeting of the Corporation, or any of its committees, at which that member's reappointment or the appointment of that member's successor is to be considered;

(c) from that part of any meeting of the Corporation, or any of its committees, at which the matter under consideration concerns the pay or conditions of service of all members of staff, or all members of staff in a particular class, where the member of staff is acting as a representative (whether or not on behalf of a recognised trade union) of all members of staff or the class of staff (as the case may be); and

(d) if so required by a resolution of the other members present, from that part of any meeting of the Corporation or any of its committees, at which staff matters relating to any member of staff holding a post senior to that member's are to be considered, except those relating to the pay and conditions of all staff or all staff in a particular class.

(6) A Principal who has chosen not to be a member of the Corporation shall still be entitled to attend and speak, or otherwise communicate, at all meetings of the Corporation and any of its committees, except that the Principal shall withdraw in any case where the Principal would be required to withdraw under paragraph (5).

(7) A student member who is under the age of 18 shall not vote at a meeting of the Corporation, or any of its committees, on any question concerning any proposal

(a) for the expenditure of money by the Corporation; or

(b) under which the Corporation, or any members of the Corporation, would enter into any contract, or would incur any debt or liability, whether immediate, contingent or otherwise.

(8) Except as provided by rules made under Article 18(3) of the Articles of Government relating to appeals and representations by students in disciplinary cases, a student member shall withdraw from that part of any meeting of the Corporation or any of its committees, at which a student's conduct, suspension or expulsion is to be considered.

(9) In any case where the Corporation, or any of its committees, is to discuss staff matters relating to a member or prospective member of staff at the institution, a student member shall

(a) take no part in the consideration or discussion of that matter and not vote on any question with respect to it; and

(b) where required to do so by a majority of the members, other than student members, of the Corporation or committee present at the meeting, withdraw from the meeting.

(10) The Clerk

(a) shall withdraw from that part of any meeting of the Corporation, or any of its committees, at which the Clerk's remuneration, conditions of service, conduct, suspension, dismissal or retirement in his capacity of Clerk are to be considered; and

(b) where the Clerk is a member of staff at the institution, the Clerk shall withdraw in any case where a member of the Corporation is required to withdraw under paragraph (5).

(11) If the Clerk withdraws from a meeting, or part of a meeting, of the Corporation under paragraph (10), the Corporation shall appoint a person from among themselves to act as Clerk during this absence.

(12) If the Clerk withdraws from a meeting, or part of a meeting, of a committee of the Corporation, the Corporation shall appoint a person from among themselves to act as Clerk to the committee during this absence.

General comments

To understand Clause 14 a sense of double perspective is helpful. From one angle, the clause deals with procedural matters, e.g. voting, the rescission or variation of resolutions and the mechanics requiring certain Corporation members to withdraw from meetings. On a more significant level, Clause 14 addresses important issues relating to the independent judgement of Corporation members and the need for Corporation members to be impartial. These provisions complement those appearing in Clause 12(6) (independent judgement) and Clause 11 (impartiality). The requirements relating to the withdrawal from meetings, especially withdrawal by staff members, have proved to be controversial and call for great care because of the perception that certain categories of governor (e.g. staff and student members) are not accorded an equality of treatment under the Instrument.

Paragraphs (1) and (2)

Provide that decisions of the Corporation are taken by simple majority voting (i.e. more than 50 percent) by all those members who are present and entitled to vote (but note the requirements regarding quorum in Clause 13). On any important matter, therefore, a vote should be called since this is the only method prescribed for obtaining a decision of the Corporation. In the event of voting deadlock, the person who chairs the meeting, e.g. the Corporation Chair or Vice-Chair, has a second or casting vote. Note that unless the Corporation amends these provisions they apply also to fundamental matters such as the amendment of the Instrument and Articles under Article 25 and the dissolution of the Corporation under Article 26. Corporations may wish to consider requiring a greater majority where such matters are concerned. On decision making generally, see the general note to Clause 12.

Paragraph (3)

Expands on the provisions relating to voting in paragraph (1) by prohibiting voting by proxy or by postal vote. Corporation members are expected to exercise their independent judgement and not follow without thought the instructions of others. Under the 2008 Instrument there was no provision for Corporation members to take a decision by signing a written resolution, i.e. in accordance with the practice adopted by company directors where written resolutions are permitted under the company's Articles of Association. Indeed, unless the Instrument is amended to provide expressly for decisions to be taken by written resolution, voting by such means would be in breach of the Instrument either because a written resolution would breach the prohibition on postal votes in paragraph (3) and/or because such a method of decision making would not satisfy the requirement in paragraph (1) that decisions should be taken by the votes of members who are present at a meeting of the Corporation and entitled to vote on the question.

As set out in the commentary to Clause 1(h) and the General commentary on Clause 12 above, the 2008 Instrument permits Corporation members to attend meetings by videoconference but not by telephone conference. Voting by means of teleconference facilities will only be effective if this is expressly authorised by amendment to the Instrument. Such an express provision is not uncommon in the articles of companies in the private sector. Care should be taken when using video-conferencing and other forms of teleconferencing (where allowed) to ensure that it is possible for every person present at the meeting to communicate with each other (see commentary on Clause 1(h) and the General commentary on Clause 12 of the Instrument). If it ceases to be possible for all those counted in the quorum to communicate effectively with each other the meeting should immediately be adjourned for lack of quoracy[18].

Paragraph (4)

Emphasises the importance of ensuring that any proposed rescission or variation of a resolution which has already been passed by the Corporation is made a specific item of business on the agenda. Corporation members should not treat lightly any reversal of a decision which has been validly taken by them.

Paragraphs (5) to (9)

The remaining provisions of Clause 14 fall into three main categories relating to the participation of certain Corporation members in meetings of the Corporation in the following circumstances:

- the first category – members who are members of staff (including the Principal) are obliged to withdraw automatically from part of any meeting (including a committee meeting) to which paragraphs (5)(a), (5)(b) or (5)(c) apply. Likewise, student members are obliged to withdraw automatically from part of any meeting to which paragraph (8) applies. This provision now also applies to a Clerk who is also a member of staff (paragraph (10)). In this situation the Corporation has no discretion to allow the excluded Corporation member to participate in the meeting. The obligation to *"withdraw"* means, in practice, to leave the room in which the meeting is being held for the duration of the relevant business

- the second category – staff and student members may be required to withdraw in the circumstances specified in paragraph (5)(d) or (9) respectively if a majority of the other Corporation members present so decide. Again this will apply to a clerk who is also a member of staff (paragraph (9)). Under Clause 14(5)(d), members of the Corporation can no longer resolve to remove a staff member from a meeting of the Corporation or a committee (as the case may be) at which staff matters relating to a more senior staff member are to be considered if the consideration relates to the pay and conditions of all staff or a particular class of staff. The obligation to withdraw in either case is not an automatic one, but depends on a decision taken by the other Corporation members present. Such a vote should be recorded in the minutes of that meeting

- the third category – student members under 18 are debarred from voting in the circumstances specified in paragraph (7) and from considering or discussing the matter and voting in the circumstances specified in paragraph (9). These paragraphs are likely to include situations in which e.g. the Corporation is asked to consider the saving of money and/or where the position of groups of staff or staff generally (not just the position of an individual staff member) is to be considered. In either situation the student member is not

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18 Purchasers of Eversheds Sutherland's Education Act 2011 Toolkit Service can receive a copy of our guidance note on use of alternatives to meetings.

required to withdraw unless (as noted in relation to paragraph (9)), this is required by the majority of Corporation members present

These provisions are undoubtedly complicated and call for decisive and diplomatic leadership from the Chair. While the provisions are not specifically required by Revised Schedule 4, the DfE remain concerned to ensure that the rules of charity law regarding conflicts of interest are complied with. Accordingly, Corporations should consider any amendment to these provisions with great care to ensure they are consistent with charity law. Legal advice should be obtained.

The exceptions to the rules requiring withdrawal from meetings should be noted, i.e. under staff procedures made pursuant to Article 16 and student rules of conduct made under Article 18(3). If a member is required to withdraw from a meeting, that member is entitled to know the reason why, by reference to the relevant provision in the Instrument. It should also be noted that under Clause 11(2)(b), if a member declares an interest, s/he should not take part in the discussion or vote on the matter being considered and must not be counted as part of the quorum in relation to the resolution on which s/he is not entitled to vote.

An interesting point which is not specifically addressed in the Instrument is the circulation of the agenda and papers to members of the Corporation who will automatically be required to withdraw (or who may be required to withdraw if the Corporation so resolves) under the provisions of paragraphs (5) to (9). The starting point is that all members are entitled to all Corporation papers, including papers relating to confidential items, unless specified otherwise. If a member will be required automatically to leave the meeting when an item comes up for consideration then it is submitted that the Clerk would be justified in not forwarding the papers to the individual, e.g. if the agenda item relates specifically to the staff member. This, however, should be provided for in the Corporation's Standing Orders. The situation, however, is different where there is no automatic requirement to withdraw, and a resolution is required by the Corporation before the member can be required to withdraw (as under paragraphs (5)(d) and (9)(b) of Clause 14).

In the past DfES indicated that it would take a dim view if a complaint is received from a member of the Corporation who has been denied access to papers in relation to a matter where the member has a right to be present unless and until the Corporation decides otherwise. Where a matter is particularly sensitive, however, one way forward would be for the item to appear on the agenda and for the papers to be tabled at the meeting rather than circulated in advance. The Corporation can then make the decision to require staff and student members to withdraw before the paper is tabled at the meeting. This approach may not be workable in practice if the paper is very lengthy and/or complex and its contents could not reasonably by digested by members within a relatively short time during the meeting.

Another practical way forward would be for the Corporation to agree, through its Standing Orders, that the papers will not be circulated to staff and student members in a situation where they may be required to withdraw. If no decision is taken to request them to withdraw, they should be given the papers and the opportunity to consider them fully at the meeting (although again this raises the issue of whether the papers can reasonably be digested within a relatively short time during the meeting). Finally, it may simplify matters if the agenda is divided into confidential and non-confidential parts so that staff and student members need only be excluded from and be debarred from receiving agenda papers relating to the former part of the meeting. The division of the agenda in this way is now common practice across the sector.

Paragraph (6)

Preserves the right of a Principal who has chosen not to be a Corporation member to attend and speak (but not vote) at all meetings of the Corporation.

Paragraph (7)

The provisions in Paragraph (7) which restrict a student member who is under 18 form voting on certain matters have been in the Instrument since incorporation and have largely been though tof as uncontroversial. We are aware that there have been questions in recent times about whether they are complaint with charity law. Section 177 of the Charities Act 2011 defines charity trustees as being *"the persons having the general control and management of the administration of a charity"*. The argument is that Paragraph (7) has the effect of preventing student board members under 18 from being charity trustees in law because someone subject to the restrictions of the clause cannot be said to be able to exercise control and management over a charity's administration. There is nothing in Revised Schedule 4 that would prevent a Corporation from removing the restrictions if it so wishes although at the time of writing and absent specific

guidance from the DfE or ESFA on the point few Corporations have chosen to do so. Advice should be taken on the terms of any revised provisions.

Paragraph (10)

Is intended to ensure that the Clerk's position as an independent officer is not compromised by discussions by the Corporation or its committees about the terms of the Clerk's employment or engagement. Where the Clerk is required to withdraw, there are special provisions relating to the Clerk's right to see the minutes of that part of the meeting (see Clause 15(4) and commentary). In such circumstances a temporary Clerk should be appointed from among the members for that part of the meeting. Clause 7(2) of the Instrument provides that the Principal cannot act as temporary Clerk.

Any Clerk who is employed by the College (whether solely as Clerk or in a dual capacity) is a member of staff. Under paragraph 10(b), such a Clerk is to be treated as if s/he were a staff member and will be required to withdraw in the circumstances set out in paragraph (5). The effect of this is that if the Corporation, when considering a matter relating to a senior member of staff for example, resolves pursuant to paragraph (5)(d) that the staff members should withdraw, then providing that the senior member of staff under consideration holds a position senior to the Clerk, the Clerk will automatically have to withdraw as well unless the Corporation in its resolution makes it clear that it does not require the Clerk to so withdraw. It may be that members of the Corporation are comfortable for the Clerk to be permitted to remain (whilst requiring staff members to withdraw) on the basis that a distinction can be drawn between the staff members and the Clerk in this situation as the two roles are different, and in particular the Clerk does not directly participate in the decision making process.

A Clerk who is not a member of staff at the institution, e.g. a clerk who provides services under a consultancy arrangement rather than a contract of employment – would not be caught by Clause 10(b) and therefore would not be required (and indeed could not be compelled) to withdraw automatically where members of staff are required to withdraw under paragraph 5. The distinction in this regard between Clerks who are members of College staff and those who provide services to the Corporation via a clerking agency/on a self-employed/freelance basis has a certain logic. In contrast to Clerks who are employed by the College, freelance/independent Clerks operate at one remove from the College and therefore there may be less sensitivity regarding their attendance at meetings during which matters relating to particular senior staff are discussed.

15. Minutes

(1) Written minutes of every meeting of the Corporation shall be prepared, and, subject to paragraph (2), at every meeting of the Corporation the minutes of the last meeting shall be taken as an agenda item.

(2) Paragraph (1) shall not require the minutes of the last meeting to be taken as an agenda item at a special meeting, but where they are not taken, they shall be taken as an agenda item at the next meeting which is not a special meeting.

(3) Where minutes of a meeting are taken as an agenda item and agreed to be accurate, those minutes shall be signed as a true record by the Chair of the meeting.

(4) Separate minutes shall be taken of those parts of meetings from which staff members, the Principal, student members or the Clerk have withdrawn from a meeting in accordance with Clause 14(5), (6), (8), (9) or (10) and such persons shall not be entitled to see the minutes of that part of the meeting or any papers relating to it.

General comments

Revised Schedule 4 does not contain any requirements regarding minutes; therefore, in principle the provisions of Clause 15 could be amended or moved to Standing Orders. It remains the case, however, that:

- corporations have an operational need to have an accurate and up to date record of their decisions. Minutes are the formal record of the Corporation's proceedings. If any question arises concerning, for example, a decision of the Corporation, the reasons for it, whether the Corporation members based their decision on proper advice and/or adequate information and/or or extraneous considerations, and/or whether any views were expressed by dissenting members, reference must be made to the signed minutes of the relevant meeting
- minutes are documents of public record (see Clause 17(1)). It is imperative, therefore, that the draft minutes of each meeting are approved by the Corporation as an accurate record when it next meets
- corporations must comply with charity law and the requirements of the Charity Commission in relation to record keeping (see below)

All of the above considerations should be carefully taken into account and legal advice should be taken before making any changes to Clause 15.

The style of minute taking varies, with some Corporations preferring more detailed minutes than others. A balance needs to be struck between avoiding excessive detail which may prove a hostage to fortune should a decision of the Corporation subsequently be challenged, and ensuring that the minutes show that the Corporation had reasons for its decisions. See the FE Commissioner's 2015 report on New College Nottingham criticising the minutes as *"highly descriptive"* and *"not recording the questions asked by the Board"*:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/436361/New_College_Nottingham_-_Further_Education_Commissioner_Assessment_Summary.pdf

It should be remembered that, save where an exemption from disclosure applies, the Corporation may be required to:

- make information contained in the minutes available under the Freedom of Information Act 2000 (see commentary on Clause 17)

– disclose the minutes themselves in response to a subject access request made under the Data Protection Act 1998 if and in so far as they contain personal data relating to the individual making the request

This underlines the importance of careful and accurate minute taking.

Where a motion is closely argued it may be prudent to record the number of votes cast for and against it, and if the member(s) concerned wish and the Corporation agrees, the number of any abstentions.

The advice of the Charity Commission is that the original signed minutes should be retained indefinitely. Supporting papers should be kept for at least 12 years. For detailed guidance on the periods for which Corporation papers should be retained see the JISC template retention schedules:

https://www.jisc.ac.uk/full-guide/records-retention-management

Paragraph (1)

Makes it clear for the avoidance of any doubt that written minutes of every Corporation meeting need to be prepared. The approval of minutes need not be taken as the first agenda item but it will be advantageous for the minutes to be approved as an early item at the meeting in case a matter needs to be considered by the Corporation which relies on a decision taken at the previous meeting.

Paragraph (2)

This clause allows a special meeting of the Corporation to choose not to consider the minutes of the last meeting but to do so at the next meeting. This will allow special meetings to consider only the urgent business they have been called to discuss.

Paragraph (4)

Provides that, where the Clerk, the Principal or a staff or student member has to withdraw from a meeting on any of the grounds specified in the Instrument, a separate (and necessarily confidential) minute must be taken in respect of that part of the meeting. Paragraph (4) goes on to provide that a Clerk, the Principal, staff or student member who has been required to withdraw from the meeting shall have no right to see the separate minute or any papers relating to it. It is, however, worth bearing in mind that under the GDPR, the Clerk, the Principal, staff and student members have the right to make a data access request to see those minutes if and in so far as they contain personal data relating to that individual, notwithstanding the fact that paragraph (4) states that they are not entitled to see it, i.e. the provisions of the GDPR prevail over Clause 15(4). Should such a request be made it would be prudent for the Corporation to seek legal advice.

16. Public access to meetings

The Corporation shall decide any question as to whether a person should be allowed to attend any of its meetings where that person is not a member, the Clerk or the Principal and in making its decision, it shall give consideration to Clause 17(2).

General comments

Corporations will need to balance the need for free and open discussion in which Corporation members are not inhibited by the presence of members of the public against the need to uphold the Nolan principles of accountability and openness (see general commentary on Clause 17).

17. Publication of minutes and papers

(1) Subject to paragraph (2), the Corporation shall ensure that a copy of –

(a) the agenda for every meeting of the Corporation;

(b) the draft minutes of every such meeting, if they have been approved by the Chair of the meeting;

(c) the signed minutes of every such meeting; and

(d) any report, document or other paper considered at any such meeting,

shall as soon as possible be made available during normal office hours at the institution to any person wishing to inspect them.

(2) There shall be excluded from any item made available for inspection any material relating to –

(a) a named person employed at or proposed to be employed at the institution;

(b) a named student at, or candidate for admission to, the institution;

(c) the Clerk; or

(d) any matter which, by reason of its nature, the Corporation is satisfied should be dealt with on a confidential basis.

(3) The Corporation shall ensure that a copy of the draft or signed minutes of every meeting of the Corporation, under paragraph (1), shall be placed on the institution's website, and shall, despite any rules the Corporation may make regarding the archiving of such material, remain on its website for a minimum period of twelve months.

(4) The Corporation shall review regularly all material excluded from inspection under paragraph (2)(d) and make any such material available for inspection where it is satisfied that the reason for dealing with the matter on a confidential basis no longer applies, or where it considers that the public interest in disclosure outweighs that reason.

General comments

Corporations are expected to conduct themselves in a manner which is open, transparent and accountable. The principles of accountability and openness (being two of the Nolan Committee's Principles of Public Life) have been defined by Nolan as follows:

- **Accountability** – holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
- **Openness** – holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Having regard to their stewardship of public funds and assets and responsibility for the delivery of an important public service, it is entirely proper that the presumption should always be in favour of Corporations acting openly, since this will enhance their accountability. The Code of Good Governance in English Colleges states at paragraph 2.5 "*The board must conduct its affairs as openly and transparently as possible, consulting fully on its plans and delivery*."

In its Second Report the Nolan Committee acknowledged, however, that "*there will be occasions in which a degree of confidentiality is necessary. Universities and Colleges operate in competitive markets. Sometimes their competitors may be commercial enterprises which operate with a high degree of secrecy, and requiring complete transparency will be unfair to educational bodies. Yet limitations on openness have to be carefully defined if they are not to act against the public interest*." See further below in relation to what constitutes good practice on the limits of commercial confidentiality.

Against the above background, Clause 17 is only one of many duties to act openly, e.g. Colleges are also required to make available for public inspection and/or publish:

- registers of interests (Clause 11(5))
- any rules of the conduct of the Search Committee (if there is one – see the commentary on Article 5) together with its remit and advice (Article 5(3))
- a written statement of policy regarding attendance at committee meetings (Article 8(a))
- minutes of committee meetings if they have been approved by the Chair of the meeting (Article 8(b))
- annual financial accounts (Article 22), including the statement of governance and internal control required by the ACOP
- information included in the College's publication scheme required under the Freedom of Information Act.

Save where an exemption from disclosure applies, the Corporation may also be required to:

- make information contained in the Corporation and committee minutes and papers available under the Freedom of Information Act 2000
- disclose Corporation and committee papers in response to a subject access request made under the DPA if and in so far as they contain personal data relating to the individual making the request

Corporations should never forget that they operate *"in the public gaze"* because they have assumed positions of public trust.

Revised Schedule 4 does not require that the Instrument provide for publication of minutes and papers. Clause 17 could, therefore, be moved to the College's Standing Orders or deleted altogether provided the College continues to comply with applicable general law including the FOIA and the DPA, and the principles of accountability and openness (see below).

Sub-paragraph (1)

In accordance with the principles of accountability and openness, Corporations are required to make agendas, minutes (both draft minutes which have been approved by the Chair even though not yet confirmed by the Corporation at its next meeting and also signed minutes) and papers considered at Corporation meetings available to any person wishing to inspect them. In addition to the requirement to publish under Clause 17, these documents will form part of the College's Publication Scheme which, under the Freedom of Information Act 2000, Corporations have been required to have in place since February 2004. The Information Commissioner's Office issues and from time to time updates *"definition documents"* intended to help public bodies draft their publication schemes. The document for further education colleges is accessible at:

https://ico.org.uk/for-organisations/guide-to-freedom-of-information/publication-scheme/definition-documents/

The main provisions of the Freedom of Information Act 2000 as they apply to further education Colleges came into force in January 2005. Under the Act individuals have an extended right of access to information as the Act both extends the scope of the DPA and introduces new access provisions which establish a general right to information. Any individual or organisation can request information from a public authority (which includes Colleges) and will be entitled to be informed whether the public authority holds the information requested and, where it does, to have that information communicated to him, her or it. There are various exemptions to the obligation to disclose information some of which are absolute but some of which, including where the

information is commercially sensitive, require the public body to weigh whether the public interest in disclosing the information outweighs the public interest in maintaining the exemption.

For guidance on when a request for information can be refused see:

When can we refuse a request for information? | ICO

Sub-paragraphs (2)(a) to (c)

The DfE's Guidance confirms that "*These provisions are to protect the identity of individuals who are students or members of staff or prospective students of the Institution, who are the subject of discussion by the Corporation. It is not meant to refer to contributions to the debate made by student and staff members of the Corporation*." It should always be remembered that whenever the Corporation is processing personal data (as such items will be) it must do so in accordance with the provisions of the DPA.

Sub-paragraph (2)(c)

Any item relating to the Clerk shall be treated as confidential.

Sub-paragraph (2)(d) and paragraph (4)

These paragraphs often lead to difficulty because of the broad discretion given to the Corporation to decide what matters *"should be dealt with on a confidential basis"*. The words *"by reason of its nature"* means that the Corporation, before declaring any matter to be confidential, must carefully consider the reasons for doing so. Just because a matter is sensitive does not automatically render it confidential. Reference should be made to the Corporation's FOIA publication scheme setting out the types of information that the Corporation makes available and any Corporation policy on confidential information to ensure that the matter falls within one or more categories of confidential material. The Nolan Second Report indicated that there may be occasions where it will be helpful for Corporations to specify time limits for each piece of confidential business, e.g. sensitive matters relating to a commercial transaction which, if known during the pre-contract negotiations, would disadvantage the College financially.

The purpose of paragraph (4) is to ensure that Corporations regularly review items classified as confidential and make them publicly available once they either cease to be confidential or where the Corporation considers that the public interest disclosure outweighs the reasons for them remaining confidential. This is to re-enforce the principle that Corporations are expected to conduct themselves in a manner which is open, transparent and accountable and also to comply with the law in this area, specifically the FOIA and the DPA.

Paragraph (3)

Colleges should ensure that they place copies of minutes of every Corporation meeting on their websites in order to improve openness and increase accountability to stakeholders.

18. Payment of allowances to members

The Corporation may pay to its members such travelling, subsistence or other allowances as it decides, but shall not without the written approval of the Secretary of State, pay allowances which remunerate the members for their services as members.

General comments

The principles behind Clause 18 are, first, that Corporation members are unpaid volunteers and should not be remunerated for their services as members (a view which was strongly supported in the evidence submitted to the Nolan Committee in advance of its Second Report) and, second, that as "quasi trustees" they are not permitted to obtain any financial benefits from their trust unless and to the extent authorised by the Instrument. Their impartiality might otherwise be compromised (see also the general commentary on Clause 11).

In the years immediately following incorporation this clause created difficulty for certain Corporations which placed a broad interpretation on the power to pay allowances to members in order to justify the payment of *"flat rate"* allowances, i.e. allowances which were in the nature of remuneration rather than by way of reimbursement of expenses actually incurred. The 1999 Order clarified that the payment of *"allowances which remunerate the members for their services as members"* is unlawful, unless approved in writing by the Secretary of State.

Following the Fourth Report of the Nolan Committee, the DfES issued helpful guidance on the payment of expenses to Corporation members:

"The Secretary of State believes it is important to maintain the principle that governors should take no financial benefit from their position. But he is concerned that people from groups under-represented in governing bodies may be deterred by an over strict interpretation of the rules of expenses. If a governor incurs expenses arising directly from duties as a governor the Secretary of State would not expect him/her to be out of pocket as a result. This would apply not only to costs such as travel and subsistence, but to other costs which can be shown to be a direct consequence of those duties, such as fees for training courses and similar events for governors. It may be justifiable to pay childcare expenses if the governor cannot make alternative arrangements. In exceptional cases, such as a meeting called at short notice, it may be justifiable to pay an element of compensation to governors for loss of earnings if the governor can prove that it was not possible to re-arrange work so as to avoid the loss. However, compensation simply for the time a governor gives to governing body business is unlikely to be permissible in normal circumstances: the Secretary of State expects governors to be made fully aware before appointment that governorship is a voluntary activity. His expectation is that they give their time freely and that governing body business will be sufficiently well organised to give governors adequate notice of when their presence is required so that they can make appropriate arrangements in advance for their attendance. The governing body will need to consider each case for an exceptional payment on its merits and be satisfied that there is no remunerative element to it."

Accountability in Further Education (DfES 1998)

As a matter of good practice, Corporations should agree a policy on the reimbursement of members' expenses and Clerks should ensure that claim forms are readily available at meetings of the Corporation and its committees.

If remuneration or an allowance of a remunerative nature is paid to a Corporation member in breach of Clause 18, the recipient will be personally liable to repay the Corporation the amount of the financial benefit plus interest.

As discussed in the general commentary on Clause 11, under the provisions of the Charities Act 2006 (now consolidated in the Charities Act 2011) charities are allowed in certain circumstances to remunerate trustees, or persons connected with the trustee, for services or goods supplied to the

charity. This, however, will not allow trustees, i.e. Corporation members, to be paid for services in their capacity of trustees – they cannot be paid for being a member of the Corporation.

This contrasts with the discussion point raised by the DfES in the Draft Instrument and Articles 2006 where it asked if Clause 18 should be amended to permit Corporations to remunerate chairs of Corporations for their services as chairs. This suggestion has not been adopted in the Revised Schedule 4, which removes the express prohibition on remuneration but does not expressly allow it either. There would be nothing to prevent a Corporation amending Clause 18 by removing the requirement for the consent of the Secretary of State. However, given the requirement of Article 25 that the Corporation can make no changes to the Instrument and Articles that would result in the Corporation ceasing to be charitable, the safest interpretation of the position is that the payment of remuneration to members would only be possible with the consent of the Charity Commission.

The issues raised by the payment of allowances and other remuneration to Corporation members were considered by the DBIS Review of Further Education and Sixth Form College Governance:

https://www.gov.uk/government/publications/further-education-and-sixth-form-college-governance-review

The Review at Annex B contains useful guidance on the current boundaries of what is possible and how to apply to the Charity Commission for consent where necessary. See also the Charity Commission's guidance for Colleges Payments and expenses for College governors accessible at:

https://www.gov.uk/government/publications/payment-and-expenses-for-college-governors

19. Copies of the Instrument of Government

A copy of this Instrument shall be given free of charge to every member of the Corporation and at a charge not exceeding the cost of copying or free of charge to any other person who so requests a copy, and shall be available for inspection at the institution upon request, during normal office hours, to every member of staff and every student.

General comments

Revised Schedule 4 retains the requirement to provide copies of the Instrument. There is a corresponding provision in the Articles (Article 24) which requires a copy of the Articles and any rules and bye-laws to be made available for inspection by members of staff and students. These documents will now form part of the College's Publication Scheme under the Freedom of Information Act 2000, and should be available to any person wishing to inspect them, not just Corporation members, members of staff and students referred to in Clause 19. It is not only staff and students who have a legitimate interest in knowing how the Corporation takes its decisions and conducts its business.

A copy of the Instrument (and Articles, rules and bye-laws – see above) must be given free of charge to every Corporation member. Inspection reports and reports from the National Audit Office have criticised College governing bodies for having failed to ensure compliance with the Instrument and Articles. It is essential therefore that Corporation members understand these documents, which determine their legal duties and responsibilities. Every College should have in place a programme for new members' induction and ongoing development training in which there is an opportunity for the Instrument and Articles to be properly explained. Plus level subscribers to the Eversheds Sutherland Governance Subscription Service can refer to the guidance note on governor induction materials on the Governance extranet.

A copy of the Instrument must also be made available for inspection by every member of staff and student on request. Anyone who requests a copy of this Instrument should be provided with a copy, either free of charge or at a charge not exceeding the cost of copying (although note that members must be provided with a copy of the Instrument free of charge – see above)[19].

As a result of the freedom of Corporations to amend their Instruments and Articles, in due course it may become difficult to identify the precise form these documents were in at any particular date. Third parties such as banks and others who have dealings with the College may require evidence of the Corporation's composition and procedures at the relevant date. It will therefore be important for each version of the Instrument and Articles to be endorsed with the date it was approved by the Corporation and to be archived securely.

It is also recommended that the Clerk makes available for inspection with the instrument and Articles a copy of sections 18 and 19 of the FHEA 1992, which set out the powers of the Corporation in relation to the outside world (see Part Two, paragraph 1 and appendix 1).

Note that under Revised Schedule 4 an instrument must provide for:

- a copy of the Instrument to be given free of charge to every member of the Corporation
- a copy of the Instrument to be given free of charge or at a charge not exceeding the cost of copying, to anyone else who requests it

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19 The document provided should be the unannotated text of the Instrument (and Articles) and not this guide which is subject to copyright and is provided for internal use by College clerks and governors only.

– a copy of the Instrument to be available for inspection at the Institution upon request, during normal office hours, to every member of staff of, and every student at, the Institution

Hence there is no scope to amend or delete Clause 18 from the Instrument, notwithstanding the introduction of the Education Act 2011 governance freedoms.

20. Change of name of the Corporation

The Corporation may change its name with the approval of the Secretary of State.

General comments

Initial names under which Colleges were incorporated in 1992 are set out in the schedule to the Education (Further Education Corporations) Order 1992 No. 2097 (referred to in the commentary on Clause 21). Some of those initial names seem anomalous because they include references to a geographical location, which were not intended to form part of the corporate name. Many Colleges have subsequently changed their names and lists of names accurate as at 31 March 2012 is to be found in the Schedules to the 2012 Modification Orders.

Before any change of name, the Corporation should carefully consult with any education institutions or other bodies which have a similar name to ensure that the proposed new name will not cause confusion by misleading members of the public. No change of name will be effective until it has been approved by the Secretary of State (this requirement has been continued in Revised Schedule 4). Corporations are subject to Part 5 of the Companies Act 2006 which provides that some names are prohibited and others are sensitive and require the consent of the Secretary of State before being adopted. Legal advice should, therefore, be obtained before the Corporation is asked to approve a change of name. See the briefing for Plus members Change of name of a College (November 2011) and guidance on this point issued by DBIS:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32309/10-1141-further-education-corporation-college-names-guidance.pdf

In the event of a change of name, the letter of consent from the Secretary of State should be retained safely as this may need to be provided to banks and others entering into transactions with the College. A new corporate seal should also be adopted – see the general commentary on Clause 21.

A new corporate seal should be adopted – see the general commentary on Clause 20.

Revised Schedule 4 requires a Corporation's Instrument to permit the Institution to change its name with the approval of the Secretary of State. There is no scope to amend or delete Clause 20 from the Instrument, notwithstanding the governance freedoms.

21. Application of the seal

The application of the seal of the Corporation shall be authenticated by –

(a) the signature of either the Chair or of some other member authorised either generally or specially by the Corporation to act for that purpose; and

(b) the signature of any other member.

General comments

The use of the Corporation seal appears to cause some confusion for clerks and Corporations. Only a very small number of specific documents will require sealing (see below) but when the seal is applied it must be witnessed by two members of the Corporation: the Chair (or some other member so authorised by the Corporation) and another member of the Corporation. The Principal, in his/her capacity as a Corporation member, can witness the seal but neither the Clerk nor a senior member of staff (unless also a staff member of the Corporation) can act as a witness. This is considered in more detail below.

Revised Schedule 4 specifies only that Corporations must provide for the authentication of the application of the seal by the Institution. It therefore allows Corporations to make their own rules for the authentication of the application of the seal. Given that the seal is likely only to be used in substantial transactions where other parties will be seeking assurance that the transaction has been properly authorised Corporations may wish to leave the existing arrangements unchanged as lenders and professional advisers will be familiar with the existing rules.

There is no requirement under the FHEA 1992 for any document to be sealed by a further education Corporation. Under the general law, however, any document executed by a Corporation as a deed must be under seal. The alternative procedure for executing deeds without using a seal, available to companies under the Companies Act 2006, does not apply to statutory Corporations such as SFC Corporations. There are three situations where it may be necessary to execute a document as a deed:

- when the law requires the document to be executed as a deed. This generally applies to specific dealings with land such as the transfer of registered freehold or leasehold property or the granting of leases or mortgages, although there are exceptions when it is sufficient for the document to be signed by a duly authorised official, e.g. sale agreements and the grant of certain tenancy agreements for periods of not more than three years
- when there is no consideration for the agreement in question. In order for an agreement to be legally enforceable it has to be either executed as a deed or some *"value"* has to pass in return for the service being provided or the goods being transferred (this is what we call *"consideration"*). Often the consideration will take the form of some sort of monetary payment but this need not necessarily be the case
- when it is expedient to extend the time within which the Corporation may bring a breach of contract claim in relation to the agreement. Normally such a claim must be brought within six years of the breach occurring. When an agreement is executed as a deed this limitation period is extended to 12 years (section 8 of the Limitation Act 1980). For this reason Corporations sometimes execute contracts relating to major capital works as a deed. This is not only because of the high monetary values of such projects but because in building projects most breaches of contract will be deemed by the Courts to have occurred on the practical completion of the project. As the life of the building will be many years and it will not always be immediately apparent that there is a problem, it is sensible to protect the Corporation by extending the period within which it can have legal recourse against the contractor. Lenders such as banks may require loan agreements to be executed as deeds, even where the College is not being required to give security over their land by means of a mortgage or legal charge

– Section 20(4) of the FHEA 1992 provides that execution of a document by a Corporation under its seal shall be treated as conclusive evidence that the document has been properly issued by the Corporation. The onus of proof would be on a person challenging the document to prove a contrary intention

A specimen form of attestation is set out below:

"The Corporation Seal of)
[ ] College)
was hereunto affixed)
in the presence of:)

.....
Chair/Corporation member

.....
Corporation member"

A Corporation seal can be obtained from engravers quickly and inexpensively. The Corporation's full legal title should be used, not any trading name. A useful source of confirmation of Colleges' legal names is the schedules to the 2012 Modification Orders. To draw attention to the legal status of the College, Corporations may wish to include the words *"Sixth Form College Corporation"* in the inscription, although the words do not form part of the College's name under section 15(5) of the 1992 Act. The Corporation seal should be adopted by resolution and the affixing of the seal on each occasion should be authorised in advance by a resolution of the Corporation, minuted by the Clerk. Specimen resolutions are set out below.

"Corporation Seal

It was reported at the meeting that the Corporation Seal had been obtained and it was RESOLVED that the Seal, an impression of which appears in the margin, be and is approved and adopted as the Corporation Seal of [ ] College and that [the Chair and any other Corporation member] or [the Chair or and any other Corporation member] be authorised to authenticate the application of the Seal."

"Application of Corporation Seal

The proposed [disposal/purchase/leasing/other transaction] by the College on the terms previously outlined was discussed [and it was reported that the requirements of the [ESFA] Funding Agreement[20] had been complied with in the following respects:

It was RESOLVED that the Corporation Seal be applied to the [Transfer/Lease/other Deed] in the presence of the [Chair and any other Corporation member] or [the Chair or and any other Corporation member]."

Articles of Government

Official text and Eversheds Sutherland Commentary

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1. Interpretation of the terms used

In these Articles of Government –

(a) any reference to "the Principal" shall include a person acting as Principal;

(b) "the Articles" means these Articles of Government;

(c) "Chair" and "Vice-Chair" means respectively the Chair and Vice-Chair of the Corporation appointed under clause 6 of the Instrument of Government;

(d) "the Clerk" has the same meaning as in the Instrument of Government;

(e) "the Corporation" has the same meaning as in the Instrument of Government;

(f) "the EFA" means the Education Funding Agency;

(g) "the local education authority" means the local authority in whose area the institution is situated;

(h) "local education authority member" means a member of the Corporation appointed by local education authority under section 56F of the Further and Higher Education Act 1992;

(i) "parent member", "staff member" and "student member" have the same meanings as in the Instrument of Government;

(j) "the Secretary of State" means the Secretary of State for Education;

(k) "senior post" means the post of Principal and such other senior posts as the Corporation may decide for the purposes of these Articles;

(l) "the staff" means all the staff who have a contract of employment with the institution;

(m) "the students' union" has the same meaning as in the Instrument of Government;

(n) "the YPLA" means the Young People's Learning Agency for England;

(o) "YPLA member" means a member of the Corporation appointed by the YPLA under section 56I of the Further and Higher Education Act 1992.

General comments

Paragraph (a)

Please refer to the commentary on Clause 1(a) of the Instrument. Additional points to note are that:

- "the Principal" is by office a senior post holder
- the Principal may delegate any of his/her functions, e.g. to take disciplinary action against students or staff, other than management of budgets and resources and any functions delegated to the Principal by the Corporation, to another senior post holder. See further Article 9 and the related commentary

Paragraph (d)

The Articles do not automatically designate the Clerk as the holder of a *"senior post"* . Article 17(1) makes it clear that where a Clerk is a member of staff i.e. employed by the College the Clerk must be treated as a senior post holder for the purposes of disciplinary and dismissal procedures. Under Article 3(1)(e) the Corporation is responsible for the appointment, suspension, dismissal, and determination of the pay and conditions of service of the Clerk including, where the Clerk is employed by the College in some other capacity in addition to being Clerk, in his/her capacity as a member of staff. Responsibility for appointment and dismissal of the Clerk cannot be delegated (Articles 9(e) and 10(1) respectively). Such a person will also be treated as a senior post holder in relation to his/her dismissal as a member of staff, although not in relation to the role as Clerk if this is a separate appointment (see commentary on Article 17). See also commentary on Clause 7 of the Instrument and the functions assigned to the Clerk under Article 3(3).

Paragraph (f)

The YPLA was abolished from 1 April 2012 by the Education Act 2011. It was replaced by the EFA and subsequently in April 2017 by the ESFA which is an agency within the Department for Education. Subsequent paragraphs have been re-lettered accordingly.

Paragraphs (g) and (h)

Definition of local education authority and local authority member – see commentary on Clauses 1(g) and (h) of the Instrument.

Paragraph (i)

Definition restricted to *"parent member"*, *"staff member"* and *"student member"* – references to *"business"*, *"community"*, *"co-opted"* and *"local authority"* members removed as a consequence of changes to Clause 2(1) of the Instrument made by the 2007 Order.

Paragraph (j)

Replacement of *"Secretary of State for Education and Skills"* by *"Secretary of State for Education"*. Following the May 2010 General Election the departmental responsibility for SFCs was transferred to the DfE (the former Department for Education and Skills). As a result the relevant Secretary of State is the Secretary of State for Education.

Paragraph (k)

The number of posts designated by the Corporation as *"senior posts"* varies (research shows the range to be from one to 12). Most Corporations have traditionally appointed three to six senior post holders although the trend appears to be for the number of designated senior posts to be diminishing.

Note that under Revised Schedule 4 Corporations have the freedom to dispense with the designation of *"senior posts"*. It may, however, be impracticable to do so while the current post holder is in post since de-designation of senior post holders other than the Principal may give rise to a claim for constructive dismissal on the basis of a loss of status, loss of procedural protections in the case of dismissal and a change of reporting line (from the Corporation to the Principal).

In order to reduce the risk of claims for constructive dismissal, Colleges wishing to dispense with the designation of *"senior posts"* should do so over a period of time by de-designating such posts as they become vacant before filling them or by obtaining the express consent of the senior post holder to the change.

If the designation is dispensed with the Corporation will need to amend its arrangements for delegation of certain duties (see commentary on Articles 9-11 and 18) since under the 2008 Articles certain functions were reserved for senior post holders. Corporations considering dispensing with the senior post holder category should seek legal advice before doing so.

If the designation is to be retained it will be important for Corporations to review this designation from time to time. There is no rule of thumb or criteria for deciding which posts (other than the Principal) should be *"senior posts"*. Some Corporations have been guided by the extent of the financial authority attached to the post and the organisational structure of the College.

Holders of posts designated as *"senior posts"* within the institutional structure are only *"senior post holders"* for the purposes of the 2007 Order if they have been specifically designated as such by the Corporation under Article 1(i). Designating a post as a senior post simply requires a decision of the Corporation. It is one which should not be delegated. Similarly, it is open to the Corporation to "de-designate" a position. It is important to note, however, that whenever a position is either designated or undesignated a senior post and there is someone holding the position at the time, the Corporation will need to take care to ensure that the employer/employee relationship is appropriately managed and that the individual is notified and, where appropriate, properly consulted about the proposed designation/de-designation.

Under the 2008 Instrument and Articles:

- the Corporation is responsible for the appointment of senior post holders which it cannot delegate (Article 9(d) although see the commentary on that paragraph)
- senior post holders are directly accountable to the Corporation (Article 3(1)(e))
- senior post holders may only be dismissed in accordance with procedures made under Article 16
- the Corporation may not delegate the consideration of the case for dismissal and the determination of an appeal against dismissal of senior post holders other than to a committee of Corporation members (Article 10(1))
- senior post holders are subject to special provisions relating to selection (Article 12 although see the commentary on that paragraph)

If the Corporation resolves to dispense with the designation of *"senior posts"* and amends its Articles accordingly:

- Article 12 would require significant change and may not even be required
- the Corporation or a committee of the Corporation should nevertheless remain responsible for the selection and appointment of the Principal (see further the commentary on Article 12)
- the Principal would of course remain directly accountable to the Corporation and the proposed dismissal of the Principal and any appeal against dismissal by the Principal should continue to be dealt with by the Corporation or a committee of the Corporation
- those in roles which were previously designated as senior posts (other than the Principal – see above) would, post de-designation, be accountable to the Principal who would, in accordance with Article 3(2)(e) be responsible for their appointment, assignment, grading, appraisal, suspension, dismissal, and the determination of their pay and conditions of service

Paragraph (l)

No distinction is made between full-time and part-time staff. Corporations must bear in mind that a contract of employment does not have to comprise a written document – it can be oral or a mixture of both oral and written terms. The absence of a written contract of employment does not necessarily mean that an individual, working for the College, is not an employee, employed under a contract of employment.

Paragraph (m)

See general commentary on Article 18. The definition in clause 1(n) of the Instrument emphasises the charitable status of any students' union, i.e. because it must be formed *"to further the educational purposes of the institution and the interests of students, as students"*. The Corporation should ensure that officers of the students' union are aware of their responsibilities under charity law, for example, that if the union holds any money or other property, those in control of the union hold such property as charity trustees.

Paragraphs (n) and (o)

See commentary on Clauses 1(h) and (i) of the Instrument.

2. Conduct of the institution

The institution shall be conducted in accordance with the provisions of the Instrument of Government, these Articles, any rules or bye laws made under these Articles and any trust deed regulating the institution.

General comments

Article 2 reminds Corporation members and managers that they are accountable under the law for the proper performance of their duties. (On accountability please see further the general commentary on Clause 17 of the Instrument). They must conduct the College in accordance with the Instrument and Articles (as amended by the Corporation from time to time under Article 25 inserted by the 2012 Modification Order) and any rules or bye-laws made by the Corporation under Article 23 (see general commentary). In practical terms, Corporations are accountable to the Courts under the general law, to the Secretary of State in respect of the regulatory duties and to Parliament (via the accounting officer system and the Public Accounts Committee) for the stewardship of public funds. Subscribers to the Eversheds Sutherland Plus service can access a model code of conduct via the governance extranet.

Corporation members must also conduct the College in accordance with the *"Education Acts"* as defined by section 578 of the Education Act 1996, which has simplified the process of identifying the statutory law relating to education. The most important Act which applies to Corporations is the FHEA 1992. Sections 33E and 33F of the FHEA 1992, which set out the Corporation's principal and supplementary powers, are of particular significance (see Part Two, paragraph 1 and appendix 1 for full details of these powers).

Article 2 specifies that Colleges shall also be conducted in accordance with any trust deed regulating them. This means that if a Corporation in taking a decision fails to comply with the provisions of the relevant trust deed, the decision will be invalid and therefore unenforceable. This will be of particular concern to Corporations which conduct former voluntary controlled sixth form Colleges or which occupy or use substantial property or other assets which belong to a trust.

3. Responsibilities of the Corporation, the Principal and the Clerk

(1) The Corporation shall be responsible for the following functions –

(a) the determination and periodic review of the educational character and mission of the institution and for the oversight of its activities;

(aa) publishing arrangements for obtaining the views of staff and students on the [determination and periodic review[21]] [preservation and development[22]] of the educational character and mission of the institution and the oversight of its activities;

(b) approving the quality strategy of the institution;

(I) the effective and efficient use of resources, the solvency of the institution and the Corporation and safeguarding their assets;

(d) approving annual estimates of income and expenditure;

(e) the appointment, grading, suspension, dismissal and determination of the pay and conditions of service of the holders of senior posts and the Clerk, including, where the Clerk is, or is to be appointed as, a member of staff, the Clerk's appointment, grading, suspension, dismissal and determination of pay in the capacity of a member of staff; and

(f) setting a framework for the pay and conditions of service of all other staff.

(2) Subject to the responsibilities of the Corporation, the Principal shall be the Chief Executive of the institution, and shall be responsible for the following functions –

(a) making proposals to the Corporation about the educational character and mission of the institution and implementing the decisions of the Corporation;

(b) the determination of the institution's academic and other activities;

(I) preparing annual estimates of income and expenditure for consideration and approval by the Corporation, and the management of budget and resources within the estimates approved by the Corporation;

(d) the organisation, direction and management of the institution and leadership of the staff;

(e) the appointment, assignment, grading, appraisal, suspension, dismissal, and determination, within the framework set by the Corporation, of the pay and conditions of service of staff, other than the holders of senior posts or the Clerk, where the Clerk is also a member of the staff; and

(f) maintaining student discipline and, within the rules and procedures provided for within these Articles, suspending or expelling students on disciplinary grounds or expelling students for academic reasons.

(3) The Clerk shall be responsible for the following functions –

(a) advising the Corporation with regard to the operation of its powers;

(b) advising the Corporation with regard to procedural matters;

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21 SFC Corporations only

22 former voluntary controlled Colleges only

(I) advising the Corporation with regard to the conduct of its business; and

(d) advising the Corporation with regard to matters of governance practice.

General comments

Article 3 lies at the heart of the corporate governance framework of Colleges. That framework should ensure the strategic direction of the College, the effective monitoring of management by the Corporation and the accountability of Corporation members to the Corporation, to Parliament and to the wider community. In essence Article 3 seeks to ensure that the Corporation is responsible for setting the College's strategy (governance) while the Principal is responsible for implementing it (management). The concern of Corporation members should be to:

- set the College's strategy and business plan. These should reflect the five key outcomes for publicly funded skills provision identified in *College Governance: a Guide* issued by DBIS in August 2014 and accessible here:

  College Governance: A Guide

- monitor the performance of the Principal in implementing the College's strategy and business plan
- ensure through annual budgeting and planning processes that resources are used effectively and efficiently to support delivery of the strategy and business plan
- appoint, appraise and if necessary, dismiss the Principal and other senior post holders including determining appropriate levels of remuneration and succession planning
- ensure that robust management information is provided by the Principal and other senior managers to enable Corporation members to exercise oversight
- ensure that, in order to improve standards, key performance indicators and self-assessment procedures are carefully monitored

Within this framework, the Principal has overall responsibility for executive management, is personally accountable to the Corporation for the exercise of that function and should be allowed to manage freely and without interference. Thus, clear lines of accountability should exist between:

- first, the College's staff and the Principal
- second, the Principal and the Corporation as the Principal's employer and appraiser
- third, the Corporation and Parliament and the wider community

It is interesting to note that the allocation of responsibilities between the Corporation and the Principal conforms in general terms with *"best practice"* elsewhere. Thus, the G20/OECD report *Principles of Corporate Governance* (September 2015) states that it is *"considered essential for purposes of corporate governance"* for the Boards of publicly traded and non-traded companies and State owned enterprises to fulfil the following key functions:

"(1) Reviewing and guiding corporate strategy, major plans of action, risk management policies and procedures, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestitures.

(2) Monitoring the effectiveness of the company's governance practices and making changes as needed.

(3) Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession planning.

(4) Aligning key executive and board remuneration with the longer term interests of the company and its shareholders [in a College context for shareholders read beneficiaries].

(5) Ensuring a formal and transparent Board nomination and election process.

(6) Monitoring and managing potential conflicts of interest of management, Board members and shareholders, including misuse of corporate assets and abuse in related party transactions.

(7) Ensuring the integrity of the Corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control and compliance with the law and relevant standards.

(8) Overseeing the process of disclosure and communications."

Likewise, the UK Corporate Governance Code confirms that non-executive directors "*should constructively challenge and help develop proposals on strategy*." They should also "*scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance. They should satisfy themselves on the integrity of financial information and that financial controls and systems of risk management are robust and defensible. They are responsible for determining appropriate levels of remuneration of executive directors and have a prime role in appointing, and where necessary removing, executive directors and in succession planning*". Whilst the role of Corporation members is not the same as that of non-executive directors, there are similarities between the two.

Governance versus management

The distinction between a proper involvement by Corporation members in the College, its activities and life, e.g. attending College functions and participating in "link governor" programmes and informal meetings with students and staff, and the risk of "interfering" in management, e.g. Corporation members taking decisions which have been allocated to or should properly be taken by the Principal, can be a fine one. There have been many cases of serious governance problems in the further and higher education sectors which have resulted from the blurring of the roles of the Corporation and the Principal, and the failure to respect the demarcation between governance and management.

There have been cases where the Principal, acting alone or in conjunction with the Corporation Chair, has been allowed to dominate the decision-taking process, reducing the function of the Corporation to that of a *"rubber stamp"* when it should be acting as a *"critical friend"*, constructively challenging management. In other cases the Corporation has usurped the function of management.

Inspection reports emphasise the importance of Corporation members and the Principal having a clear understanding of and respect for each other's roles and responsibilities. The inspection report for York College in December 2013 stated that "*Governance is outstanding. Governors provide exceptionally rigorous challenge and support for the College's senior management team*." See also the inspection report for Exeter College in January 2014 which stated that "*Governors provide excellent support and challenge to senior leaders. They possess an exceptional wealth of relevant expertise and comprehensively represent the interests of the region and local community. Governors take a leading role in setting and reviewing the strategy, financial priorities and improvement objectives. They hold leaders to account and ensure that the College has the capacity to continue to improve*."

See also the inspection report for New College Pontefract from April 2014 which states that governors "*bring considerable, pertinent expertise to their roles and challenge managers appropriately. They use their skills effectively in overseeing self-assessment and strategic planning*."

Article 3 provides for a responsibility split between the Corporation and the Principal, and this division is reflected in the treatment of each specific decision taking function, e.g. in respect of character and mission, quality strategy, budget, assets and staff (see commentary below).

Allocation of responsibilities

Article 3 allocates responsibilities as between the Corporation, the Principal and the Clerk (in paragraphs (1), (2) and (3) respectively), establishing specific lines of responsibility for decision taking of further education Corporations between Corporation members and the Principal. These lines of responsibility are not intended to be confused or interchanged. The statutory allocation of responsibilities under Article 3 forms part of the framework of essential checks and balances – a

hedge against the abuse or misuse of privilege and power. To this extent, principles of "good governance" in the education sector are consistent with those in the private sector. For example, the *UK Corporate Governance Code* sets out as an important principle the requirement for there to be a "*clear division of responsibilities at the head of a company between the running of the board and the executive responsibility for the running of the Company's business. No one individual should have unfettered powers of decision*".

Responsibilities of the Corporation

Under Revised Schedule 4, the Corporation is responsible for:

- *"the determination and periodic review of the educational character and mission of the institution"*
- *"the oversight of the College's activities"*
- publishing arrangements for obtaining the views of staff and students on the determination of the College's educational character and mission and oversight of its activities. In other words, the Corporation must, under Revised Schedule 4, consult staff and students when determining and periodically reviewing the College's educational character and mission. The means of ensuring that the Corporation fulfils this responsibility is to require it to publish its arrangements for doing so
- the effective and efficient use of resources, the solvency of the College and the Corporation and safeguarding their assets

Each of these responsibilities of the Corporation is discussed in further detail below.

Article 4 permits the Corporation to delegate a number of its responsibilities to one or more of its committees, the Corporation Chair or the Principal. The responsibilities outlined above, however, are regarded as so important that they must not be delegated and have to be discharged by the full Corporation.

Note that Revised Schedule 4 simplifies the responsibilities of the Corporation essentially to those listed above which are those contained in Article 3(1)(a), (aa) and (c). This enables a Corporation to move to a strategic or *"Carver"* model of governance if it wishes to do so.

The Corporation could resolve to amend Article 3 to delegate to the Principal matters which were previously the responsibility of the Corporation but which Revised Schedule 4 no longer requires to be its responsibility. For example, it is possible to amend Article 3 to transfer away from the Corporation to the Principal or another senior post holder such as the Human Resources Director and/or the Finance Director responsibility for setting a framework for the pay and conditions of service of staff other than senior post holders. Nevertheless, as the Corporation retains responsibility under Revised Schedule 4 for the effective and efficient use of resources and for ensuring the solvency of the institution, even if it delegated responsibility for setting a framework for the pay and conditions of service of staff, it would need to ensure that the framework set does not jeopardise the solvency of the institution and is consistent with the effective and efficient use of resources.

On senior staff remuneration please see the amendments to the AoC's Code of Good Governance for English Colleges in May 2019:

https://www.aoc.co.uk/funding-and-corporate-services/governance/governance-resources/code-good-governance-english-colleges

Determination and periodic review of the educational character and mission of the institution

Encapsulated within this is responsibility for formulating the College's strategy and plan. The Corporation, having determined the educational character and mission of the Institution, should formulate a clear strategy and plan as to how the College's mission will be achieved.

Inspection reports place much emphasis on the role of the Corporation in setting strategy, having a clear picture of the College's strategic direction, setting measurable targets and monitoring strategic objectives. For example, Ofsted's March 2014 inspection report on Chichester College commented that:

"*the Principal, senior managers and governors have developed, and successfully communicated to staff and learners, a comprehensive and ambitious strategic vision and direction for the College*."

Yeovil College's October 2016 Ofsted inspection commented "*Governors, leaders and managers have set clear strategic priorities for the college in a three year strategic plan which places learners, and their success, at its heart. The plan clearly states how governors, senior leaders and stakeholders will be able to evaluate their success in meeting the strategic priorities.*"

See also the inspection report for New College Pontefract from April 2014 where the inspectors stated that "*Leadership and management are outstanding. The Principal, senior managers and governors have developed, and successfully communicated, a comprehensive and ambitious strategic vision and direction for the College. Strategic management and planning are highly effective and have resulted in very successful outcomes for students*."

Conversely, other reports have commented adversely on the lack of measurable targets and performance indicators and on the fact that members have not been presented with such information. See, for example, the comments of the FE Commissioner in his 2014 summary assessment of governance at Barnfield College. The report is accessible at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321375/Barnfield_College_-_Further_Education_Commissioner_assessment_summary.pdf

It is import to note the relationship between the make-up of the Corporation and strategy. In the FE Commissioner Assessment Summary into City College Coventry, it was noted that of a Corporation of 17, of whom 12 were independent governors, only two of those 12 were current leaders in private sector organisations, "*a balance in favour of public sector experience which is not a good match with the College's Strategic Objectives. The Board should therefore seek to rebalance its membership by recruiting senior executives from private-sector businesses relevant to the College curriculum.*"

Many Corporations hold annual residential conferences to develop strategic objectives. Such events are also opportunities for members to assess progress against strategic objectives, and the effectiveness of the Corporation itself which the English Colleges' Foundation Code indicates should be the subject of regular self-evaluation at least every three years (see sections 3.1 and 3.2 of the English Colleges' Foundation Code). See now also section 10 "Review of Governance Performance" in the *Code of Good Governance*:

https://www.aoc.co.uk/sites/default/files/Code%20of%20Good%20Governance%20for%20English%20Colleges%20FINAL.pdf

See also the LSIS document "The Effective College Board, Keeping fit for Purpose. A set of diagnostic tools for College governing bodies in the further education and skills sector" which is available at the Excellence Gateway, and which is designed to help Boards to "*evaluate their effectiveness and develop a rigorous governance quality improvement plan*". See:

http://www.excellencegateway.org.uk/content/etf78

The Corporation is also expected to demonstrate **leadership**, the last of the Nolan Principles of Public Life. Corporation members are custodians of the College's vision for the future and should lead by example in promoting and supporting the other six Nolan Principles of Public Life, i.e. Selflessness, Integrity, Objectivity, Accountability, Openness and Honesty. This theme of leadership is emphasised in the *English Colleges' Foundation Code* (in section 1.2) and in the Code of Good Governance which states that governors should provide "*strong leadership to both the senior team and the community the college serves.*"

Ofsted has issued a number of good practice examples that illustrate the value of strong leadership. The 2011 example of Richmond Adult and Community College

described the need for the governing body "*to have ambition and an ethos of high expectations … It sets, requires and embodies high standards … The governing body exercise their role of scrutiny, support and challenge exceptionally well*".

In *A Review of Further Education and Sixth Form College Governance* issued by DBIS July 2013, it was stated that "*a consistent characteristic of successful Colleges is strong leadership and management, and the importance of the governing body in achieving this cannot be overstated*." The Review emphasised this point by reference to Sir Michael Wilshaw who noted that strong

governance has never been more important and who said that "*whenever [Ofsted] finds success, good leadership is behind it*".

Under the May 2019 inspection framework Ofsted continue to make judgments on the effectiveness of leaders, managers and governors. The FE Commissioner seems to be taking a similar approach. See for example his comments in his 2014 summary assessment of governance at Stockport College accessible at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321389/Stockport_College_-_Further_Education_Commissioner_assessment_summary.pdf

In An Assessment of the Impact of Governance Reform in Further Education Colleges: A Review of Expectations, which was published by DBIS in March 2015, it is stated "*there is now a clear recognition among Governors that they are expected to challenge the performance of the College both to drive improvements in teaching, learning and educational standards, but also to encourage more innovative thinking within their Colleges*."

Publishing arrangements for obtaining the views of staff and students

Under Revised Schedule 4, the Corporation is responsible for publishing arrangements for obtaining the views of staff and students on the determination and periodic review of the College's educational character and mission and oversight of its activities. In other words, the Corporation must consult staff and students when determining and periodically reviewing the College's educational character and mission. The means of ensuring that the Corporation fulfils this responsibility is to require it to publish its arrangements for doing so.

Oversight by the Corporation of the College's activities

Oversight of the College's activities will involve:

- appointing, appraising and, if necessary, dismissing those who are directly accountable to the Corporation, namely the Principal, any other senior post holders and the Clerk
- monitoring the performance of the Principal and, subject to the Corporation's arrangements for delegation to the Principal, that of any other senior post holders in implementing the College's strategic plan
- exercising general oversight

The last of these is the hardest to pin down as there is no statutory or other guidance providing a definitive list of what the Corporation must do to be sure it is discharging its responsibility under Revised Schedule 4 to oversee the College's activities. While this is something of *"a moveable feast"* (see the commentary below regarding the increased emphasis on the Corporation being responsible for the quality of teaching and learning), the Corporation's responsibility for overseeing the College's activities certainly encompasses monitoring performance, quality and standards, complaints and compliance with statutory responsibilities.

Although the key responsibilities of the Corporation set out in Article 3 are (with the exception of the Corporation's increased responsibilities over the Clerk) largely unchanged from the Corporation's responsibilities at the time of incorporation (as per the 1992 Regulations), the way that members are expected to carry out these responsibilities has shifted somewhat. At the time of incorporation, business-led Corporations often focused on the financial and commercial health of the College, leaving academic matters to the Principal. Since then there has been a considerable shift, with members expected to take a much closer interest in the academic performance of the College, particularly the enrolment and retention of students and the results achieved they achieve.

The requirement for Colleges to have an Academic Board was removed as a result of the 2006 Order and therefore the Corporation and Principal are free to decide how best to monitor and ensure the success of a College's academic activities. Although no longer required to have an Academic Board, the Articles do not prevent the establishment of one and many Colleges continue to have an Academic Board to advise the Principal on curriculum developments and quality. The Principal does, however, retain responsibility for the determination of the College's academic activities (Article 3(2)(b)).

Monitoring **performance** includes setting targets and monitoring performance against these. FEFC Circular 00/01, for example, in guidance that is equally valid today, stated that it was expected that "*College Corporations, as part of their duties in respect of College performance and strategic planning, should have an influential role in agreeing targets and monitoring their College's progress towards achieving them*." The advice continues by stating that Corporations should "*explore thoroughly the proposed targets and the implications of acting to achieve them*" and that they should satisfy themselves that "*appropriate attention has been paid to setting targets for areas of poor performance and that adequate resources have been assigned to support their achievement*".

The FEFC's *College Governor*, published in March 2000, went further by setting out the Corporation's responsibilities for **quality**. In section C2 it states that "the governing body:

- must satisfy themselves that sound arrangements are in place to assure the quality and standards of the College's work
- should expect to monitor the College's performance and ensure that any changes necessary to bring about improvement are implemented
- would normally expect to approve a College policy for quality assurance
- should expect to take part in annual self-assessment and, where appropriate, any arrangements for inspection
- might wish to receive regular reports from the academic board, appropriate committee or management team on the outcomes of the quality assurance process …
- will be expected to consider and formally approve annual targets for student retention and achievement and monitor their College's progress towards achieving them …"

A report Raising Standards in Further Education: The Work of College Governors (FEFC Inspectorate 2000) identified good practice from Colleges which had received top grades for governance. The report emphasised the key role of Corporations in improving the quality of education and training. Annual reports by the Chief Inspector of OFSTED regularly underline this responsibility, and, as mentioned above, one of the primary aims of the 2013 LSIS document The Effective College Board, Keeping fit for Purpose was to assist Corporations in developing "*a rigorous governance quality improvement plan*."

The 2004 OFSTED report *Why Colleges Fail* (November 2004) states that in the 45 Colleges described as failing, much energy is spent by senior managers and Corporation members on developing strategic plans and developing structures and systems but "*they invariably fail to turn these plans into effective action*". The report points out that what is striking about inadequate Colleges is "*their singular failure to understand and focus on their primary purpose – the education and training of young people and adults*".

The companion OFSTED publication Why Colleges Succeed (November 2004) points out that in the 29 most successful Colleges, a key feature is their strong and effective governance. In each of the Colleges Corporation members "*play a significant role in providing strategic direction and monitoring the academic and financial performance of the College*." In all cases Corporation members are knowledgeable about the curriculum and are well informed about student achievements.

The 2011 LSIS report How One College Improved reinforced many of these messages. It concluded that the success of Riverside College, formed by the merger of Halton College and Widnes and Runcorn Sixth Form College, could be attributed to:

- leadership skills
- a shared and learner focused culture
- the right staff and physical resources and systems
- a curriculum pattern based on "right students; right courses"
- confidence of the local community that the College was meeting their needs

OFSTED reported similar findings in its reports *How Colleges Improve* (September 2008 and September 2012).

DBIS also commented in its July 2013 A Review of Further Education and *Sixth Form College* Governance, "*the governing body's ultimate accountability is to the students and wider community the College serves. To achieve this, the governing body must work in partnership with and support the Principal, but they must also be prepared to challenge the Principal and senior team, asking searching questions when necessary to maintain a rigorous focus on improving the standards and quality of delivery*."

Ofsted reported similar findings in its reports How Colleges Improve (September 2008 and September 2012).

The above observations remain as valid today as they have done in the years since they were published.

The primacy given to the quality of classroom teaching and learning is a cornerstone of the Ofsted inspection framework. Ofsted continues to see College leaders (defined as including governors "where appropriate") as being crucial in setting a vision of high aspiration and achievement and in monitoring the College's progress in achieving it. Under the inspection framework that applies from September 2019 inspectors will seek evidence of the impact of those responsible for governance and will determine whether they provide confident, strategic leadership and create strong accountability for, and oversight and assurance of, educational performance to ensure continuous and sustainable improvement. Further, the Handbook requires inspectors to consider whether those responsible for governance:

- know the provider and understand its strengths and weaknesses
- support and strengthen the provider's leadership and contribute to shaping its strategic direction
- ensure that the provider meets its statutory responsibilities
- provide challenge and hold senior leaders and managers to account for improving the quality of learning and the effectiveness of performance management systems.

The most recent Handbook also contains a note on the governance of College groups where there is an overall board and chief executive officer, or similar arrangement. It is noted that these individuals assume that some or all of the responsibilities formerly shouldered by the individual college's/provider's governing body. In these providers, inspectors will seek evidence of the impact of the overall board and its staff as well as the College's local board, committee or governing body, to which there are relevant delegated responsibilities.

Another vital area of oversight is the raising of standards of education provided at the College. Capacity to improve has continued to be a central part of the Education Inspection Framework. Under the Education Inspection Framework effective from September 2019 College leaders and managers will be expected to *improve staff practice and teaching, learning and assessment through rigorous performance management and appropriate professional development* and to *evaluate the quality of the provision and outcomes through robust self-assessment, taking account of users' views, and use the findings to develop capacity for sustainable improvement*.

Ofsted's June 2016 inspection report on Tyne Metropolitan College stated that "*Leaders and governors set high expectations and promote ambition for students. They work very effectively with partners to ensure that the college's curriculum addresses regional skills gaps and enables local people to gain employment*." Whilst in its February 2016 review of Leicester College Ofsted commented on standards of provisions for learners that "*Governors, leaders and managers have acknowledged these weaknesses, but the actions they have taken so far have not resulted in sufficient improvement*."

For helpful guidance on the Corporation's responsibility for quality and standards see College Governance: A Guide published by DBIS in August 2014:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/344615/BIS-14-1012-college-governance-a-guide.pdf

See also a report jointly published by the 157 Group and Ofsted, The leadership of teaching, learning and assessment by governors, May 2014:

https://www.aoc.co.uk/sites/default/files/157g%20leadershipofteaching.pdf

See also the criticism by the FE Commissioner of governors' lack of understanding of vocational education issues in his 2014 summary assessments of governance at Weymouth College accessible at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321392/Weymouth_College_-_Further_Education_Commissioner_assessment_summary.pdf

and at Liverpool College accessible at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321383/City_of_Liverpool_College_-_Further_Education_Commissioner_assessment_summary.pdf

See also the commentary on Article 4 for a description of the way in which some Corporations are using committee structures to oversee the quality of teaching and learning.

The Corporation should also exercise oversight by monitoring the College's complaints procedures to ensure they are fully effective. Increasing importance is attached to the effectiveness of complaints procedures as an aspect of accountability. See the guidance from Cabinet Office Customer Service Excellence:

http://www.customerserviceexcellence.uk.com/

According to the consultation paper Accountability in Further Education (DfEE 1998) complaints procedures "*are unlikely to be fully effective unless they are monitored by the governing body, which should ensure that they are clear and effective; are published and are readily available within the College; that complaints are considered reasonably quickly and fairly; and that reasons are given if a complaint is rejected*".

With regard to the compliance with statutory duties, the Corporation's responsibility for overseeing the activities of the College requires it ensure that the correct infrastructure and resources, policies and procedures, and training are in place to ensure that any statutory duties are observed. For a list setting out many of the large number of such statutory duties see:

https://www.aoc.co.uk/sites/default/files/Summary%20of%20Statutory%20Regulatory%20Requirements%20Relevant%20to%20College%20Governing%20Bodies_0.pdf

In particular the following examples of statutory duties should be noted:

- members of the Corporation have a responsibility under the Health and Safety at Work Act 1974 and associated legislation to ensure, as far as reasonably practical, the health and safety and welfare of students, staff, and volunteers on site and on off site visits and of visitors to the College

- under the Equality Act 2010, the Corporation is the "responsible body" which must eliminate discrimination and harassment on the grounds of certain protected characteristics (namely sex (including pregnancy and maternity leave), marriage and civil partnership status, race, disability, sexual orientation, religion or belief, age and gender reassignment). The duty placed on the Corporation is not simply to take steps to eliminate unlawful discrimination and harassment but also to actually promote equality

- since June 2004 the Corporation has had a specific duty to carry out its functions with a view to safeguarding and promoting the welfare of children pursuant to section 175 of the Education Act 2004. The DfE statutory guidance *Keeping children safe in education: statutory guidance for schools and Colleges* accessible at:

  https://www.gov.uk/government/publications/keeping-children-safe-in-education--2

  and which should be read alongside Working Together to Safeguard Children 2018:

  https://www.gov.uk/government/publications/working-together-to-safeguard-children--2

  It states that in respect of students aged under 18 years of age, the Corporation should ensure that the College has a child protection policy in place together with a staff behaviour policy, operates safe recruitment procedures, carries out checks on new staff and unsupervised volunteers and has procedures in place for dealing with allegations of abuse against members of staff. In addition, a senior member of staff should be designated to take lead responsibility for dealing with child protection issues and there should be training for key staff in child protection. Ensuring compliance with safeguarding duties is therefore an

additional responsibility for the increasing number of Colleges which are working with 14-16 year olds. For an example of a College being praised by Ofsted for excellence in safeguarding arrangements see the report on North East Surrey College of Technology (2010). Keeping Children Safe in Education and the Ofsted Handbook also make it clear that Ofsted inspectors "*will always report on whether or not arrangements for safeguarding children and learners are effective.*"

- Corporation members may be liable to be treated as "*senior officers*" of the College and so liable personally if they have consented to or connived in the commission of an offence by the College under the Bribery Act 2010

- Corporation members are liable to be treated as "*senior managers*" under the Corporate Manslaughter and Corporate Homicide Act 2007. Although this is a corporate offence and cannot be committed by individuals (who remain liable to be prosecuted for the common law offence of gross negligence manslaughter, the corporate offence can be committed if the way in which the organisation's activities are managed or organised by its senior management is a substantial element in the commission of a gross breach of a relevant duty of care, which breach causes the death of the deceased.

Corporations will not, of course, be involved in the day to day implementation of health and safety, equality and diversity, safeguarding, anti-bribery and other policies – this is the responsibility of management.

Whilst the division of responsibilities set out in Article 3 is essential to effective governance at the College, it is worth bearing in mind that Article 3(1) is not an exhaustive list of the Corporation's specific responsibilities. In addition, Corporations must remember the duties they owe as fiduciaries (see the commentary on Clause 11 of the Instrument), under the Funding Agreement and other ESFA requirements, and under legislation and case law.

Responsibilities of the Principal

Revised Schedule 4 simply requires a College's instrument to specify the responsibilities of the Chief Executive/Principal but does not itself prescribe them.

Paragraph (1)

Sets out the key responsibilities of the Corporation, some of which must not be delegated (Articles 9 and 10).

Sub-paragraph (1)(a)

According to the DIUS (as was) the requirement that the Corporation keeps under "*periodic review*" the College's educational character and mission "*reflects the expectation expressed in the FE White Paper that the Corporation will keep its mission under review*" (DIUS explanatory note, December 2007).

It used to be thought that:

- the **determination** of the educational character and mission of the College itself could not be delegated, being a non-delegable function of the Corporation under paragraph (a); whereas

- the **periodic review** of the educational character and mission of the College could be delegated, not being one of the non-delegable functions in paragraph (a)

Under Revised Schedule 4, however, the Corporation is responsible for both "*the determination*" and the "*periodic review of the educational character and mission of the institution*" which begs the question whether it is still permissible to delegate the periodic review. As Revised Schedule 4 no longer contains any list of non-delegable functions along the lines of Article 9 (just a requirement that the Instrument set out the respective functions of the Corporation, the Chief Executive and the Clerk), it would seem that a Corporation could task a committee or individual with undertaking the periodic review on its behalf but the Corporation would remain responsible for any decisions that body or person might take. In practice the results of such a strategic review would inevitably come back to Corporation in any event.

Sub-paragraph (1)(aa)

This provision was added by the 2012 Modification Orders to ensure that all Corporations complied with Revised Schedule 4. While it is believed that DfE were not expecting Corporations to create substantial new consultation mechanisms, Corporations should check that information regarding the arrangements referred to has been published, and, if they have not, ensure publication as soon as possible. In most cases this should simply involve producing a summary of the processes by which the views of students and staff on these matters are obtained.

Sub-paragraph (1)(b)

This function requires the Corporation to approve the College's *"quality strategy"*. The reason given by the DIUS for this change was "*to emphasise the importance of the quality strategy as a contributor to the overall performance of the institution and a driver for continuous improvement*" (DIUS explanatory note, December 2007). Surprisingly, there is no requirement on the Principal to propose the strategy (although this is probably implicit), and, since the function is not listed in Article 9, it is delegable, e.g. to a committee.

Note that under Revised Schedule 4, responsibility for approving the quality strategy of the institution is no longer required to rest with the Corporation. Article 3 could therefore be amended to delete sub-paragraph 1(b) although the Corporation will obviously wish to ensure that appropriate mechanisms are in place for ensuring the quality of teaching and learning.

Sub-paragraph (1)(d)

See below.

Sub-paragraph (1)(e)

Although Revised Schedule 4 no longer expressly requires that the Corporation to be responsible for the appointment, appraisal, suspension, dismissal and determination of the pay and conditions of service of the holders of senior posts and the Clerk, this is presumably because determination of the pay and conditions of service etc. of the Principal and any others who are directly accountable to the Corporation is plainly a Corporation matter and it would not be consistent with good governance for this responsibility to be delegated. Indeed, a key safeguard against the abuse or misuse of authority is the Corporation's responsibility for these matters.

If a Corporation resolves to remove senior post holder status (see commentary on Article 1(i)) then it could delegate to the Principal responsibility for determining these matters in respect of members of the senior management team (i.e. the Principal's direct reports) while retaining responsibility for determining the Principal's appointment, appraisal, remuneration and if, necessary dismissal. In that case, this sub-paragraph would need to be amended, as would the College's Scheme of Delegation, if it has one.

The Corporation is responsible for the appointment, dismissal and other conditions of service of the Clerk and where the Clerk is also a member of staff of the College this responsibility also applies to his/her appointment, dismissal and conditions of service as a staff member. The DfES Guidance confirmed that the Clerk could not be line managed by the Principal in his/her capacity as clerk (although s/he can be in relation to any other role in which the Clerk is employed).

The appointment of the Principal, other senior post holders and the Clerk are so important that they could not, under the 2008 Instrument, be delegated (Article 9(d) and (e)) although see the commentary on Articles 9(d) and (e) for an update on the position under Revised Schedule 4.

Likewise consideration of the case for the dismissal of the Principal, other senior post holders and the Clerk, and determination of any appeals against dismissal may not be delegated by the Corporation other than to a committee of members of the Corporation (Article 10).

The Corporation may decide to delegate responsibility to a Remuneration Committee to advise on the issue of pay and conditions of service of the Principal, other senior post holders and the Clerk (see general commentary on Article 4).

All Corporation members should be made aware of the arrangements for the regular appraisal of senior post holders and the Clerk.

Sub-paragraph (1)(f)

See below.

Paragraph (2)

Under paragraph 2 the Principal is established as the Chief Executive of the College (but see commentary on Clause 1(a) of the Instrument regarding the possibility of Corporations splitting the role of Principal and Chief Executive into two separate roles undertaken by two separate individuals).

Revised Schedule 4 simply requires a College's Instrument to specify the responsibilities of the Chief Executive/Principal and does not itself prescribe them. It is, therefore, possible to amend Article 3(2) provided that the amended Clause is consistent with the requirements of Revised Schedule 4 regarding those responsibilities reserved to the Corporation.

Under the 2008 Instrument, any of the Principal's functions other than the management of budget and resources and any functions delegated to the Principal by the Corporation may be delegated by him/her to a senior post holder (Article 11). With the introduction of the new governance freedoms, Article 11 could be amended:

- to permit the Principal to delegate responsibility for the management of budget and resources, e.g. to the Finance Director (although the Principal's responsibilities as Accounting Officer cannot be delegated)
- to permit delegation to individuals other than senior post holders, e.g. to a suitable senior manager

A Corporation making changes to the responsibilities of the Principal (or the designation of senior postholders) and the extent of permitted delegation will wish to give the matter very careful consideration to ensure that responsibilities are appropriately allocated and that overall accountability is maintained. Any changes will need to be reflected in the College's Scheme of Delegation (if it has one). Where the Corporation is considering the possibility of splitting the role of Principal into two, e.g. to provide for the appointment of a Chief Executive, to whom the holder of the role of Principal would report, it will be important to ensure that responsibility for the role of Accounting Officer is clearly and appropriately identified. Discussion of the proposal with the ESFA is advisable. See also the comments of the FE Commissioner in relation to financial accountability at Barnfield College where his summary assessment of governance noted that the Principal was not the Accounting Officer. The report is accessible at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321375/Barnfield_College_-_Further_Education_Commissioner_assessment_summary.pdf

See also the commentary on Article 9 (Delegable and non-delegable functions).

It is helpful to consider (as we do below) how the respective responsibilities of the Corporation and the Principal interact and complement each other. In each case it is important to identify in the Corporation's role the key functions of strategic direction and oversight, and in the Principal's role the key function of executive management.

Sub-paragraphs (1)(a) and (2)(a)

The Principal proposes the educational character and mission of the College, the Corporation determines the educational character and mission, and the Principal then implements the Corporation's determination. An example of how these important responsibilities interact has been the formulation and annual review of the College's Strategic Plan, in respect of which the National Audit Office has identified a number of weaknesses including:

- targets which are unrealistic or unrelated to the College's mission or strategic aims
- a lack of costing
- a lack of involvement by the Corporation in discussing or approving such plans
- a frequent lack of any formal mechanism for monitoring and reviewing such plans

As part of the implementation of the Labour Government's *"Success for All"* reform strategy (DfES, November 2002) all SFCs were required to review their education and training missions. Under the

then Labour Government the College's ability to determine its own strategic destiny was constrained by the YPLA's responsibility for ensuring that provision within a particular area is co-ordinated, integrated and responsive to the particular needs of the community. However, since then focus has been on funding good quality financially sustainable provision with greater reliance being placed on the market and the views of students and employers, and on accountability to local communities as recommended in the report by Baroness Sharp, A dynamic nucleus, Colleges in their local communities, published by the Association of Colleges, 157 Group and NIACE in November 2011. DBIS (as was), working with DfE, has however provided a framework for Colleges considering making major changes to their operation in the form of a College Structure and Prospects Appraisal (which further education Colleges must comply with, but which is not mandatory for SFCs). See Annex A to New Challenges, New Chances published by DBIS in November 2011. See also the 2012 report by LSIS, Thinking Outside the College and also the comment of the FE Commissioner in his 2014 summary assessment of governance at LeSoCo College that governors lacked input from local stakeholders when making strategic decisions. The report is accessible at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321387/LeSoCo_College_-_Further_Education_Commissioner_assessment_summary.pdf

Sub-paragraphs (1)I and (2)(d)

Whereas the Corporation's function is to ensure the effective and efficient use of resources, the solvency of the College and the safeguarding of assets, the Principal's role is to organise, direct and manage the College and lead the staff. Inspection reports regularly draw attention to the need to ensure that Corporation members receive accurate and timely information on finances and take steps to ensure sound financial judgement. One inspection report in 2012 criticised the members of the Corporation for not "*not having sufficiently held the College to account for its academic or financial performance*".

Sub-paragraphs (1)(d) and (2)I

Under the 2008 Articles the Principal prepares annual estimates of income and expenditure, the Corporation considers and approves such estimates and the Principal then manages the budget and resources of the College within the estimates approved by the Corporation. It is important to note that although the Corporation has responsibility for the financial health of the College, in accordance with the Conditions of Funding Agreement (and OfS Funding Agreement if relevant) it is the Principal who is expected to be the accounting officer and therefore it would be the Principal rather than the Chair who would be invited to give evidence to the Committee of Public Accounts alongside the Secretary of State on matters relating to funds made available to the College by the ESFA and/or OfS and the use made by the College of such funds (see the general commentary on Clause 2 of the Instrument).

Sub-paragraphs (1)(f) and (2)(e)

Under the 2008 Articles the Corporation is responsible for *"setting a framework"* for the pay and conditions of service of all staff, i.e. establishing a structure for promotions, pay bands and so forth, the Principal within that framework appoints, appraises, determines the pay and conditions, dismisses and generally manages the individual staff of the College (other than senior post holders).

Note, however, that under Revised Schedule 4, the responsibilities of the Corporation need not include *"setting a framework"* for the pay and conditions of service of all staff. As referred to above, the Corporation could resolve to amend Article 3 to transfer away from the Corporation (for example to the Principal or another senior post holder such as the Human Resources Director and/or the Finance Director) responsibility for setting a framework for the pay and conditions of service of staff other than senior post holders. However, even if it did so, as the Corporation retains responsibility under Revised Schedule 4 for the effective and efficient use of resources and for ensuring the solvency of the institution, it would need to ensure that the framework set does not jeopardise the solvency of the institution and is consistent with the effective and efficient use of resources.

Under Revised Schedule 4, Article 3(2)(e) could be amended to make the Principal responsible for selecting for appointment senior post holders (as well as being responsible for appointing all other staff as is already the case under Article 3(2)(e) of the 2008 Instrument). Corporations may, however, wish to retain responsibility for appointing senior post holders.

Under Article 11 of the 2008 Instrument the Principal could delegate responsibility for appointing, appraising, suspending, dismissing and determining, within the framework set by the Corporation (although see the commentary on Article 3(1)(f)), the pay and conditions of staff (other than senior post holders or the Clerk) to the holder of any other senior post. For example, the Principal could delegate to the Finance Director responsibility for appointing, appraising, suspending, dismissing and determining, within the pay and conditions of members of the Finance team. Under Revised Schedule 4, Article 11 could be amended to permit the Principal to delegate this function to a suitable member of staff who is not a senior post holder. See the commentary on Article 11.

Sub-paragraphs (1)(a) and (2)(b) and 2(f)

The Corporation is responsible for the oversight of all the College's activities (no activities being excluded). Subject to that oversight, the Principal determines the College's academic and other activities and maintains student discipline (Articles 3(2)(b) and 3(f)).

The Corporation is free to determine how it should fulfil its responsibility to oversee the College's activities. The primary way in which the Corporation exercises its responsibilities for oversight will be at scheduled meetings of the Corporation when Corporation members have the opportunity to request and receive information and to examine that information critically.

The Corporation should also exercise oversight by monitoring the College's complaints procedures to ensure that they are fully effective. Increasing importance is attached to the effectiveness of complaints procedures as an aspect of accountability (see the ESFA's Procedure for Dealing with Complaints about Providers of Education and Training:

https://www.gov.uk/government/organisations/education-and-skills-funding-agency/about/complaints-procedure

Another vital area of oversight is the raising of standards of education provided at the College. This was a key part of the Labour Government's policy set out in *"Success for All – reforming further education and training"* (DfES, November 2002). Capacity to improve continued to be a central part of the inspection framework under successive governments. See for example the comment *"the pace of improvement has been rapid and recovery from the College's previously very weak position is notable"* (Great Yarmouth, inspected March 2012). Under the Education Inspection Framework effective from September 2019, College leaders and managers will be expected to *improve staff practice and teaching, learning and assessment through rigorous performance management and appropriate professional development* and *evaluate the quality of the provision and outcomes through robust self-assessment, taking account of users' views, and use the findings to develop capacity for sustainable improvement*.

For more in relation to what responsibility for overseeing the activities of the College requires see the General comment above.

Reference should also be made to the Conditions of Funding Agreement which reinforces the allocation of responsibilities between the Corporation, the Principal and the Clerk. In addition, the OfS Terms and Conditions of Funding specifies responsibilities of both the governing body and the accounting officer in respect of higher education funding.

Paragraph (3)

Was introduced by the 2007 Order and sets out the main functions of the Clerk. According to the DBIS (explanatory note, December 2007) this addition was made "*in response to representations made by Clerks who observed that the Clerk was the only officer in the Corporation whose responsibilities were not reflected in the Articles and felt that this impacted on the status with which the role was regarded in some Colleges*". The importance status of the role of Clerk was stressed in An Assessment Of The Impact Of Governance Reform In Further Education Colleges: A Review of Expectation (March 2015) which stated "*the relationship between the Chair of Governors, the Clerk and the Principal is fundamental to strong governance. The Clerk's role in strong Colleges is independent, high-status, and based on the concept of the 'professional adviser' to the Governing Body*." The report is accessible here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408178/bis-15-136-an-assessment-of-the-impact-of-governance-reform-in-further-education-colleges-a-review-of-expectations.pdf

The LSC Financial Memorandum (LSC, December 2006) set out (at paragraph 16) the LSC's expectation of a Clerk's role as follows:

"The clerk is responsible for the administrative support for the governing body's work, for advising on proper procedure and for intervening when the clerk considers that the governing body is acting inappropriately or beyond its powers, in which case the clerk may need to seek external advice. College governing bodies are advised to agree procedures they would expect the clerk and the governing body to follow if there were difficulties in this area. The LSC would not consider that action within such procedures should provide grounds for disciplinary action or the suspension of the clerk."

There themes were also echoed in the 2013 LSIS *publication Clerking in the new area: implications for college governance:*

https://www.aoc.co.uk/sites/default/files/Clerking%20in%20the%20new%20era%20full%20report.pdf

There is no reason to think that ESFA would take a different view, although there is no specific provision in the Conditions of Funding Agreement, probably as part of its concern to remove material that was adequately dealt with elsewhere, including the Instrument and Articles.

Similarly, Revised Schedule 4 simply requires a College's Instrument to specify the responsibilities of the Clerk and does not itself prescribe them, but there is no doubt from public pronouncements, e.g. at the February 2012 AoC *"Summit"* conference on the new governance freedoms, that DfE includes the Clerk in the *"Triumvirate"* (with the Chair and Principal) of key personnel upon whom much of the success of the College depends.

Please also refer to commentary on Clause 7 of the Instrument and Article 17, to the Eversheds Sutherland Procedure for Obtaining Independent Professional Advice and to the guidance on statutory powers in Part Two, paragraph 1.1 and Appendix 1. Note that in 2015 the Association of Colleges issued an updated version of its College Governance: A Guide for Clerks, first issued by the FEFC in 1996 now entitled The Effective Clerk: Creating Excellence in College Governance (March 2015) accessible here:

https://www.aoc.co.uk/sites/default/files/The%20Effective%20Clerk%20-%20March%202015_1.pdf

4. The establishment of committees and delegation of functions generally

(1) The Corporation may establish committees for any purpose or function, other than those assigned in these Articles to the Principal or Clerk and may delegate powers to –

(a) such committees;

(b) the Chair, or in the Chair's absence, the Vice-Chair; or

(c) the Principal.

(2) The number of members of a committee and the terms on which they are to hold and to vacate office, shall be determined by the Corporation.

(3) The Corporation may also establish committees under collaboration arrangements made with other further education institutions or maintained schools (or with both), and such joint committees shall be subject to any regulations made under section 166 of the Education and Inspections Act 2006 governing such arrangements.

General comments

Revised Schedule 4 contains no requirement that the Corporation establish committees. Corporations are therefore free to make procedures allowing such delegation to committees, individual members or the Principal as they think fit, provided that the Corporation complies with its obligations under law and regulation. In particular, ACOP sets out the mandatory audit arrangements for further education colleges, including those relating to the Audit Committee.

For a summary of the changes introduced by the JACOP/ACOP please see Part Two, Appendix 3, the commentary on Article 6 below and on Articles 20, 21 and 22.

The Corporation could therefore sweep away all committees other than the Audit Committee and indeed, some Corporations which have moved towards a strategic or *"Carver"* model of governance, have done exactly this following the introduction of the governance freedoms. For examples of where Corporations of successful Colleges have reduced the number of committees, see the examples of Newcastle College and West Herts College quoted in *Case Studies of Governance Arrangements in the Further Education Sector* issued by LSIS in 2011. Any Corporation taking this approach must amend its Articles and Standing Orders to reflect the disbanding of committees.

Where delegation is increased it will be even more important than previously for the Corporation to approve and keep under review a comprehensive scheme of delegation.

For Colleges which do not make any changes, under the updated 2008 Articles only Search and Audit Committees are required (Articles 5 and 6). Corporations, however, will wish to consider carefully the need to ensure effective arrangements for determining the pay and conditions of senior staff. For example, remuneration committees have been strongly supported by the Cadbury and Greenbury Codes and form part of the UK Corporate Governance Code. Most public limited companies have them in place. It is good practice to establish a remuneration committee to ensure that the pay and conditions of senior post holders are dealt with in a structured and disciplined way. In addition, the existence of a finance committee may enable the Corporation to carry out its responsibilities more efficiently by delegating certain functions, especially those of an advisory or monitoring nature.

Whatever committee structure is adopted, the Corporation should ensure that delegation strengthens its internal system of checks and balances so that authority is not delegated to the

same group of Corporation members. The UK Corporate Governance Code stresses the value of ensuring that "*committee membership is refreshed and that undue reliance is not placed on particular individuals [and that this] should be taken into account in deciding chairmanship and membership of committees*".

Historically, members of the Audit Committee have not been members of the Finance Committee, as was originally specified in the Audit Code of Practice. Currently ACOP does not contain this bar but it is submitted that the restriction remains valid. There may be strong arguments for delegating to the Remuneration Committee an advisory function only and to another group of Corporation members, including the Chair, the power to determine the pay and conditions of senior post holders, acting on the advice of the Remuneration Committee. In this way, the skills and experience of individual Corporation members can be harnessed to different but complementary functions within the College, ensuring that there is a genuine sharing of responsibility and the avoidance of "Corporation cabals". The Corporate Governance Code takes a different stance, recommending that the Remuneration Committee should have *"delegated responsibility for setting remuneration of all executive directors and the chair, including pension rights and any compensation payments"*. College governance should be as participative as possible in the sense of engaging all Corporation members in the direction and oversight of the College's activities.

Membership of the Search Committee (if one is retained – see commentary on Article 5) should be more broadly *"representative"* of the Corporation membership and community interests than the Audit Committee or Finance Committee (if there is a Finance Committee).

As referred to in the commentary on Article 3 above, one area of oversight on which increasing attention has focused in recent years is the responsibility for improving standards, and this has resulted in many Corporations setting up committees to monitor their self-assessment procedures and the range of College performance indicators. Under the inspection regime introduced by the Learning and Skills Act 2000, what takes place in the classroom and how students perform is the key indicator of how the College and the Corporation are performing, and quality and success was, of course, a key cornerstone of the Labour Government's *"Success for All"* Strategy (Success for All – Reforming Further Education and Training, DfES, November 2002). The primacy given to the quality of classroom teaching and learning is also a cornerstone of the new inspection framework introduced by Ofsted from September 2012 and updated in September 2019. While the new framework no longer assigns a separate grade to governance Ofsted continues to see College leaders (defined as including governors *"where appropriate"*) as being crucial in setting a vision of high aspiration and achievement and in monitoring the College's progress in achieving it. The establishment of Standards Committees is an important development of good practice outside the framework of mandatory committees – see letter dated 9 February 1999 from Baroness Blackstone, Minister for Further and Higher Education, to Corporation Chairs:

"all governing bodies at the very least [should designate] a specific governor who will have responsibility for pursuing standards issues; although you may consider that it would be even better to establish a "standards committee" along the lines of existing financial committees, to reflect the importance of this issue."

OFSTED reports have paid less attention to committee structures and have emphasised the need for stretching performance targets, robust quality assurance processes, detailed performance data and accurate and objective self-assessment. See for example: "*The Principal, senior managers and governors work well together and monitor performance and standards rigorously. They have a clear strategic vision and plan. The self-assessment process is comprehensive and the self-assessment report is broadly accurate*." (PETROC, inspected March 2012.) Contrast the recommendations of the SFC Commissioner in his 2014 summary report on Prior Pursglove College that *"the Governing Body should carry out regular, formal reviews of their performance and their capacity in terms of skills and knowledge. They should establish their own forward plan on membership replacement and training."*

See also the general commentary on Article 3.

Some Corporations have set up committees or working groups on a range of subjects including human relations, personnel, estates, strategic planning and health and safety. Such committees or working groups are seen as helping to involve members more fully into the work of the College. By contrast, some Corporations choose to have no committees or working groups outside those which are required by statute, preferring to hold more frequent meetings of the full Corporation. If committees and/or working groups are established, the Corporation should ensure that:

- these help the Corporation in carrying out its responsibilities and do not diminish its responsibilities
- they are fully and properly accountable to the Corporation
- membership is approved by the Corporation. Although Article 4 allows any member to be appointed to any committee, best practice and guidance might determine otherwise. For example, ACOP states that the Chair of the Corporation and the Principal should not be a member of the Audit Committee and that the Committee "*has a responsibility to maintain its independence in appointing members*"
- they operate within procedures, rules and bye-laws which have been specifically authorised by the Corporation and cover such matters as membership, quorum, frequency and the calling of meetings and Chairship
- there are terms of reference which make it clear whether a committee or working group exercises an advisory or decision-taking function – see further under paragraph 1 below
- only delegable powers are delegated, i.e. any decisions taken by committees do not fall within the list of *"reserved matters"* being responsibilities which must not be delegated, see Article 9) and their delegation is first approved by the Corporation
- reporting arrangements are in place to ensure that the Corporation is kept fully informed of any advice given and decisions taken by committees and working groups
- there is regular assessment of the contribution of committees
- membership and terms of reference of committees and/or working groups is kept under periodic and critical review by the Corporation. On the occasion of each such review, the Corporation should ask itself whether its scheme of delegation could be made more effective.

Paragraph (1)

This is an important provision. The Corporation may exercise its functions in three key ways:

- directly by decisions taken at properly convened and quorate meetings on a simple majority vote
- by any other means, e.g. written resolutions, if the Corporation agrees to amend the Articles accordingly
- by delegating its functions to other people

The principle is that Corporation members have no inherent power to delegate their powers and duties (entrusted to them by Parliament) and may only do so to the extent which is authorised under the Instrument and Articles.

Any act which is carried out in the name of the Corporation, but which has not been legally delegated, may result in personal liability for the person or persons, e.g. Corporation members, who were responsible for the unauthorised act. They will be liable to make good any loss suffered by the Corporation as a consequence, although the Corporation may be able to argue that the unauthorised act is void so far as third parties are concerned because the act was undertaken without the necessary power. Note, however, the valuable statutory protection introduced by section 145 of the Learning and Skills Act 2000, which gives Corporation members the right to apply to the Court for relief from actual or potential liability if they have acted honestly and reasonably.

The issue of personal liability is complicated. For an examination of the issue and how Corporations may address it, see the Eversheds Sutherland briefing 04/14 Personal Liability of Governors accessible on the Governance extranet.

It should be noted that the legal principles regarding personal liability of members have not been affected by the Education Act 2011 changes, although it is possible that if a Corporation decides to use the freedoms given by the 2011 Act in certain ways the potential for personal liability may increase.

It should also be mentioned that the Government has introduced a statutory insolvency regime for further education and sixth form colleges, including the introduction of a Special Administration

Regime. The regime includes potential governor liability for fraudulent and wrongful trading. The insolvency regime came into force on 31 January 2019. Further information about governor liability in the context of the college insolvency regime can be found in Further Education Bodies: Insolvency guidance (January 2019)

https://www.gov.uk/government/publications/further-education-bodies-insolvency-guidance

The functions which the Corporation may decide to delegate are not only those important responsibilities allocated to it by Article 3(1) (other than those which are non-delegable – see Article 9), but include any other "purpose or function", such as:

- making rules and procedures for staff and students (Articles 14, 16(1) and 18(3))
- hearing appeals from staff against dismissal or notices of dismissal, under disciplinary procedures made in accordance with Article 16
- approving the constitution of any students' union (Article 18(1)) and deciding a policy for determining tuition and other fees (Article 19)

Although the Corporation is the sovereign decision taking body of the College, it may not delegate powers which have been assigned by the Articles to the Principal (see Article 4(1)), or those powers which are not capable of delegation (Articles 9 and 10 and see commentary below). It is noteworthy that, in addition to Article 9, Article 10 states that the Corporation may only delegate its powers to dismiss or determine appeals against dismissal in connection with the Principal, Clerk or other senior post holders to a committee consisting solely of Corporation members.

In drafting committee terms of reference it is important to distinguish delegated powers which are advisory from powers to determine matters on behalf of the Corporation (from which legal and other consequences arise).

In the absence of any enabling power in Article 4, committees of the Corporation have no authority to delegate functions to sub-committees. It follows that it is incorrect to describe committees of the Corporation as *"sub-committees"* (which is a mistake made at some Colleges). Of course under Revised Schedule 4, the Corporation could amend Article 4 to enable the Corporation to delegate functions to sub-committees, although it is debatable whether any Corporation would wish to do this as it may lead to an over-developed and cumbersome committee structure which may in turn lead to inefficiencies. Further the Corporation may not be able to exercise sufficient oversight because it has become too removed from the activities of those to whom responsibilities are delegated.

It is also important to note that, although the Corporation may delegate its responsibility to a committee, the Chair or Principal, this does not absolve the Corporation of that responsibility. If, for example, the Corporation delegates to its Quality Committee oversight of the College's academic performance, and standards fall, the Corporation cannot claim that as the matter has been delegated it is no longer its responsibility. It is important that when the Corporation does delegate a matter, this is properly recorded in the minutes and that procedures are in place for setting out how decisions are reported back to the Corporation.

Paragraph (2)

In addition to determining the composition arrangements for committees, which is dealt with in this paragraph, the Corporation must also determine committee terms of reference and other matters (see general commentary above) and carry out a periodic review of the composition and remit of each committee.

Paragraph (3)

The 2007 Order added this provision to make explicit the Corporation's power to establish external committees, and by implication to delegate certain functions to them. Paragraph (3) facilitated other powers introduced in the Education and Inspections Act 2006 which permitted Colleges to form and participate in external committees for the purpose of collaboration with other FE institutions and maintained schools. See also Part Two, paragraph 1.2 and appendix 2.

5. The Search Committee

(1) The Corporation shall establish a committee, to be known as the "search committee", to advise on –

(a) the appointment of members (other than as a parent, staff or student member); and

(b) such other matters relating to membership and appointments as the Corporation may ask it to.

(2) The Corporation shall not appoint any person as a member (other than as a parent, staff or student member) without first consulting and considering the advice of the search committee.

(3) The Corporation may make rules specifying the way in which the search committee is to be conducted. A copy of these rules, together with the search committee's terms of reference and its advice to the Corporation, other than any advice which the Corporation is satisfied should be dealt with on a confidential basis, shall be published on the institution's website and shall be made available for inspection at the institution by any person during normal office hours.

(4) The Corporation shall review regularly all material excluded from inspection under paragraph (3) and shall make any such material available for inspection where it is satisfied that the reason for dealing with the matter on a confidential basis no longer applies, or where it considers that the public interest in disclosure outweighs that reason.

General comments

Although the 2008 Articles required Corporations to set up Search Committees, under Revised Schedule 4 there is no longer a requirement for the Corporation to have such a committee. A Corporation could therefore resolve to cease operating its Search Committee as Corporations moving towards a strategic or *"Carver"* model of governance have done. In that case, the Corporation would need to amend its Articles (to remove Article 5) and its Standing Orders.

The establishment of Search Committees was, however, recommended by the Nolan Committee as an important mechanism to ensure a rigorous and open method of selecting members based on merit. The Corporate Governance Code also requires publicly listed companies to have a Nomination Committee, the majority of whose membership should be independent non-executive directors, to lead the process for board appointments and make recommendations to the board and for there to be a "*formal, rigorous and transparent procedure for the appointment of new directors to the board*".

Whether the Search Committee is retained or not, in practice the Corporation will continue to need to make suitable arrangements for:

- determining the selection criteria which set out the skills and experience required of new members
- identifying new members, having regarding not only to the skills and experience required of new members but also to the need to achieve a balance amongst the membership of the Corporation as regards gender, race, age, religion, sexual orientation, disability etc. Many Corporations have strengthened their Search Committees by appointing a significant proportion of non-governors (say, up to one third of the total committee membership). This practice can help the Search Committee to be more representative of the wider community and, by introducing an independent element into the Search Committee's own membership, can operate as a check against elitism

– obtaining independent advice on the suitability of prospective members of the Corporation

If a Search Committee is retained then the Corporation is not obliged by the Articles to consider its advice before appointing staff, student and parent members. This is because such members have been duly elected and the Corporation can only decline to appoint them if they are otherwise ineligible. The grounds for declining to appoint are set out in Clause 5(3) of the Instrument. Please see also the commentary on Clause 5(3) regarding the ability of the Corporation to use the Education Act 2011 governance freedoms to provide an additional power enabling it to decline to appoint a person as a parent, staff or student member if it considers that it is not in the best interests of the Corporation for the elected member to be appointed.

Although the Corporation is not obliged by the Articles to consider the advice of the Search Committee before appointing elected members, i.e. staff, student and parent members, it is of course free to seek its advice in relation to the appointment of elected governors which it may wish to do if there is a question as to whether there are circumstances justifying a refusal to appoint the nominee under Clause 5(3).

For a discussion as to whether the Search Committee (or the Corporation) can and should ask potential members and existing members who may be re-appointed to serve another term to declare certain political affiliations (for example Britain First) please see the general commentary on Clause 8 of the Instrument.

Paragraph (3)

This paragraph specifies that any rules of procedure together with the Search Committee's remit and its advice to the Corporation must be made available for public inspection and be published on the College's website. In other words, the Search Committee must operate openly and transparently, to ensure that the Corporation is properly responsive to stakeholder interests in respect of its composition arrangements.

Care must be taken by the Search Committee in minuting its advice to the Corporation to avoid referring to the merits or shortcomings of individual candidates. The Clerk to the Corporation should also be careful that in publishing the minutes of the Search Committee the Corporation is not processing personal data relating to an individual without that individual's consent and therefore potentially in breach of the DPA.

Paragraphs (3) and (4)

There is explicit provision for the exclusion from publication of any advice which the Corporation is satisfied should be dealt with on a confidential basis, and for such excluded material to be regularly reviewed (see commentary on Clause 17(4) of the Instrument).

6. The Audit Committee

(1) The Corporation shall establish a committee, to be known as the "audit committee", to advise on matters relating to the Corporation's audit arrangements and systems of internal control.

(2) The audit committee shall consist of at least three persons and may include members of staff at the institution with the exception of those in senior posts, and shall operate in accordance with any requirements of the [EFA[23]].

General comments

Under the 2008 Articles the Corporation is required to establish an audit committee. The remit for the Audit Committee is described in Article 6 as matters *"relating to the Corporation's audit arrangements and systems of internal control"*. Article 6 also states that the Committee should operate *"in accordance with"* any requirements of the [EFA[24]] (now the Secretary of State). Although Revised Schedule 4 does not require there to be an Audit Committee, an Audit Committee continues to be a requirement of the Conditions of Funding Agreement and ACOP.

ACOP sets out the Audit Committee's duties and minimum terms of reference. A summary of the requirements of ACOP is set out in Part Two, appendix 4. It is essential for all Audit Committees to be familiar with the provisions of ACOP and to review their audit arrangements to ensure that they comply with these provisions.

Paragraph (1)

ACOP should be read alongside Article 6(1). ACOP sets out minimum terms of reference for audit committees and confirms that the Committee must:

- *"assess and provide the Corporation with an opinion on the adequacy and effectiveness of the College's assurance arrangements, framework of governance, risk management and control processes for the effective and efficient use of resources, solvency of the institution and safeguarding of its assets"*
- *"advise the Corporation on the appointment, reappointment, dismissal and remuneration of the external auditor, reporting accountant and other assurance providers (if applicable) and establish that all such assurance providers adhere to relevant professional standards"*
- *"inform the Corporation of any additional services provided by the external auditor, reporting accountant and other assurance providers and explain how independence and objectivity were safeguarded"*
- *"monitor, within agreed timetables, the implementation of recommendations arising from any reports of audit and assurance providers"*
- *"oversee the Corporation's policies on fraud, irregularity and whistleblowing"*
- *"produce an annual report for the Corporation summarising the committee's activities relating to the financial year under review …"*

See also the Financial Reporting Council's Guidance on Audit Committees published in April 2016 which echoes these themes:

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23 "YPLA" in updated 2008 Articles

24 See note 6

https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Final-Draft-Guidance-on-Audit-Committees-2016.pdf

It should also be noted that the introduction of regularity audit by the LSC extended the auditor's duty of care over regularity audit to the funding body in addition to the Corporation, and ACOP continues this. For the regularity audit, the Audit Committee may choose to review the accuracy of the self-assessment that is prepared by the College, which will be the basis of the work of the regularity auditors.

Corporations may add to the minimum terms of reference provided that any such additional terms do not require the Audit Committee to adopt an executive role.

Audit Committees have in the past often been confused about their remit, particularly where there is also a Finance Committee. It is no longer mandatory for Colleges to submit an annual Financial Management Control Evaluation ("FMCE"). FMCE had been part of the Framework for Excellence return process however, the EFA announced (in its 29 June 2012 e-bulletin) that in future SFCs would not be required to submit the annual return. Note that Colleges might wish to undertake the exercise internally as part of its self-assessment process. ESFA can, however, still require an evaluation of financial management control, e.g. where a College has failed an inspection.

Where there are two committees which look at the financial statements, they are often not clear as to the different purposes for which they should consider them. A persuasive view is that while audit committees may consider the financial statements their primary focus is on receiving the financial statements as a context to understanding the work of their auditors, challenging judgements and policy decisions etc. The auditing standards require the external auditor to comment on those areas in their reporting. Approving the financial statements is not normally in the Audit Committee's terms of reference – albeit they may resolve that no material issues arose from their work that indicated the accounts should not be approved.

The LSC Audit Code of Practice stated that committee members have the right to hold a *"closed"* meeting with both the external and internal auditors, but no staff, present at least annually. Although ACOP no longer contains this detailed provision, such meetings are often valuable and not only in the unlikely event that committee members may wish to draw attention to possible internal irregularity. More generally it gives an opportunity to mention any more routine issues they may wish to raise, e.g. where they do not feel that staff have adequately explained financial matters to them, and/or to ascertain whether auditors have experienced any potential issues or have any concerns regarding the actions or conduct of management. Closed meetings should therefore be built in to the committee's cycle of work. The Financial Reporting Council's guidance on the audit committee states "*The audit committee should at least annually meet the external and internal auditors, without management, to discuss matters relating to its remit and any issues arising from the audits*."

Paragraph (2)

Membership of the Audit Committee is set as being at least three persons. Historically member of the Audit Committee have not been members of the Finance Committee, although ACOP does not currently contain such a bar. Nevertheless, it is submitted that the restriction remains valid. The current edition also states that corporations should consider whether appointing a staff-governor would meet good practice standards of independence and objectivity. In order to maximise the Audit Committee's independence ACOP confirms that neither the Chair of the Corporation nor the Principal should be a member of the committee, and state that a majority of its members must be governors. The FRC guidance also recommends a membership of three who should be independent non-executive directors.

It is a requirement of ACOP that the Audit Committee should include individuals with an appropriate mix of skills and experience and collectively have "*recent, relevant experience in risk management, finance and audit and assurance*". Senior post holders are not mentioned by ACOP, but it would be inappropriate for them to be members. The FRC guidance also recommends that "*members should bring an independent mind-set to their committee role. Independent thinking is critical in assessing the work of management and the assurance provided by the internal and external audit functions*."

The LSC Audit Code of Practice stated that "*the clerk to the Corporation should normally be the clerk to the Audit Committee. Where the clerk to the Corporation is a senior manager at the College or has significant responsibility, another individual should act as clerk to the Audit*

Committee so as to protect the independence and objectivity of the Audit Committee." Although not a requirement of ACOP, this remains good practice.

The importance of having a rigorous and effective Audit Committee within an institution cannot be overstated. Following a number of well publicised accounting scandals in the US, the Financial Reporting Council set up an independent group, chaired by Sir Robert Smith, to clarify the role and responsibilities of such committees. The key recommendations of the report Audit Committees: Combined Code Guidance were reflected in the LSC Audit Code of Practice and the principles remain in the ACOP. These include:

- the committee should consist of at least three members who hold a range of skills and experience in relation to risk, governance and control
- its responsibilities should be set out as terms of reference and should include, as a minimum:
  - the right to investigate any activity within its terms of reference
  - the right to access all the information and explanation it considers necessary, from whatever source, to fulfil its remit
  - a minimum membership of three a majority of whom must be governors but must not include the Chair of the Corporation or the Principal
  - a responsibility to maintain its independence in appointing members
  - a responsibility to include individuals with an appropriate mix of skills and experience to allow it to discharge its functions effectively. Collectively, members of the committee should allow it to discharge its duties effectively. Collectively, members of the committee should have recent, relevant experience in risk management, finance and audit and assurance
  - a restriction not to adopt an executive role

The Committee must produce an annual report for the Corporation and Principal before the annual financial statements are signed. The report should summarise the work of the Committee, set out any significant issues raised during the financial year including any significant matters of internal control included in the reports of the audit and assurance providers, the Committee's view of its own effectiveness and how it has fulfilled its terms of reference, and it must include the Committee's opinion on the adequacy and effectiveness of the College's arrangements for audit, governance, risk management and control and its processes for securing economy, efficiency and effectiveness.

7. Composition of committees

Any committee established by the Corporation, other than the committee referred to in Article 10, may include persons who are not members of the Corporation.

General comments

Any committee set up by the Corporation (save for one set up under Article 10(1))) may include people who are not Corporation members. It is important, however, to emphasise that only the Corporation has the power to establish committees and therefore to authorise the appointment of non-Corporation members, and it is implicit that every decision taking committee of the Corporation should comprise a majority of Corporation members, and this should be reflected in the rules relating to quorum. In the absence of a requirement that for a committee meeting to be quorate a majority of persons who are Corporation members must be present, there is the danger that delegated decisions could be taken on behalf of the Corporation by non-governors. This would be an unacceptable practice. However, the appointment of persons who are not Corporation members may be a valuable method of resolving a skills or experience deficiency, e.g. ensuring that there is a member of the Audit Committee who has an appropriate accountancy or financial background and broadening the range of experience on the Search Committee (see commentary on Articles 5 and 6). Moreover, with regard to the composition of committees which are advisory only, there may be circumstances where it would be appropriate for a majority of members to be non-governors, e.g. to strengthen a Corporation's self-assessment arrangements.

Revised Schedule 4 says nothing about the composition of committees so it would be possible for a Corporation to set up committees with a majority of non-Corporation members if it wished. While this may be beneficial in broadening the range of skills and experience available to the Corporation, and where the Corporation would benefit from independent advice, e.g. in relation to self-assessment, it would be unwise for the Corporation to delegate decisions to committees composed of a majority of non-Corporation members for the reasons described above.

8. Access to committees by non-members and publication of minutes

The Corporation shall ensure that –

(a) a written statement of its policy regarding attendance at committee meetings by persons who are not committee members; and

(b) the minutes of committee meetings, if they have been approved by the Chair of the meeting,

are published on the institution's website and made available for inspection at the institution by any person, during normal office hours.

General comments

It is suggested that, as a minimum, all Corporation members should be entitled to attend committee meetings as observers but should only participate in discussion if invited by the committee Chair to do so. Non-Corporation members who are involved as members of staff or consultants in the preparation of papers may be invited to attend a committee meeting for the purpose of presenting their paper. For reasons of commercial sensitivity or to ensure the security of personal information relating to individuals it would not be usual for members of the public to be allowed to attend committee meetings.

Minutes of committee meetings must be approved by the Chair of the meeting before publication, and second, the Corporation's written policy regarding attendance by non-members at committee meetings and the publication of minutes of committee meetings must be published on the College's website. This is intended "*to increase the level of openness and understanding around the operation of College committees and so increase the level of accountability to stakeholders*" (DIUS explanatory note, December 2007).

Corporations have the freedom under Revised Schedule 4 to dispense with these provisions, although Corporations should be mindful of the possibility that requests for information will be made under the Freedom of Information Act 2000 if committee minutes are not published.

Please refer also to the commentary on Clause 17 of the Instrument.

9. Delegable and non-delegable functions

The Corporation shall not delegate the following functions –

(a) the determination of the educational character and mission of the institution;

(b) the approval of the annual estimates of income and expenditure;

(c) the responsibility for ensuring the solvency of the institution and the Corporation and for safeguarding their assets;

(d) the appointment of the Principal or holder of a senior post;

(e) the appointment of the Clerk (including, where the Clerk is, or is to be, appointed as a member of staff the Clerk's appointment in the capacity as a member of staff); and

(f) the modification or revocation of these Articles.

General comments

Although effective governance is nothing to do with serving on committees, governance cannot be effective unless Corporation members understand how efficiency can be improved by delegating certain responsibilities to committees. Article 9, however, specifies that some responsibilities under Article 3(1) are so crucial that they must not be delegated. These are often called *"reserved responsibilities"*.

Paragraphs (a), (b), (c) and (f)

Revised Schedule 4 no longer contains any list of non-delegable functions along the lines of Article 9 – just a requirement that the Instrument set out the respective functions of the Corporation, the Chief Executive and the Clerk and that the Corporation is responsible for:

- the determination and periodic review of the educational character and mission of the institution
- the oversight of the College's activities
- publishing arrangements for obtaining the views of staff and students on the determination of the College's educational character and mission and oversight of its activities
- the effective and efficient use of resources, the solvency of the College and the Corporation and safeguarding their assets

Revised Schedule 4 also stipulates that the Instrument must specify how the Corporation may modify or replace the Instrument and Articles of Government.

Implicitly Revised Schedule 4 pares back the list of non-delegable duties, in effect to those in Article 9 paragraphs (a), (c) and (f). Corporations could therefore resolve to amend Article 9 to provide that the responsibilities in paragraph (b) may be delegated, e.g. to the Finance Committee (if there is one) or the Finance Director.

Paragraph (a)

It used to be thought that:

- the determination of the educational character and mission of the College itself could not be delegated, being a non-delegable function of the Corporation under paragraph (a); whereas
- the periodic review of the educational character and mission of the College could be delegated, not being one of the non-delegable functions in paragraph (a)

Under Revised Schedule 4, however, the Corporation is responsible for both *"the determination"* and the *"periodic review of the educational character and mission of the institution"* which begs the question whether it is still permissible to delegate the periodic review. As Revised Schedule 4 no longer contains any list of non-delegable functions along the lines of Article 9 (just a requirement that the Instrument set out the respective functions of the Corporation, the Chief Executive and the Clerk), it would seem that a Corporation could task a committee or individual with undertaking the periodic review on its behalf. Nevertheless, the Corporation would remain responsible for any decisions that body or person might take. In practice the results of such a strategic review would inevitably come back to Corporation in any event.

See also the commentary on Article 3(1)(a).

Paragraph (d)

In relation to paragraph (d), some Corporations may wish to cease to designate any posts as senior ones (see the commentary on Article 1(i)), in which case Article 9(d) will need to be amended to refer to the Principal only. Even if the Corporation wishes to continue with the concept and designation of senior post holders, it may wish to amend paragraph (d) to provide that the appointment of senior post holders other than the Principal may be delegated, e.g. to the Principal or to committee of Corporation members. See further the commentary on Article 12.

Paragraph (e)

Likewise, the Corporation could amend paragraph (e) to provide for the appointment of the Clerk to be delegated to a committee of Corporation members excluding the Principal (rather than this appointment being made by the full Corporation). It would, however, not be consistent with good governance for the appointment of the Clerk to be delegated to anyone other than such a committee. In particular, it would not be appropriate for responsibility for this appointment to be delegated to the Principal, any other senior post holder (if any) or another senior manager. Please refer to the commentary on Clause 7 of the Instrument regarding the independent role of the Clerk.

If no changes are made then under the 2008 Articles, the responsibility for the appointment of a senior post holder (not just for the Principal and Clerk) cannot be delegated (paragraph (d)). The provision prohibiting the delegation of the Corporation's responsibility for the appointment of the Clerk covers the Clerk's appointment as a member of staff where relevant (paragraph (e)).

There is no reason why Corporations should not add to the list of reserved responsibilities, e.g. in Standing Orders.

10. Delegable and non-delegable functions

(1) The Corporation may not delegate:

(a) the consideration of the case for dismissal, and

(b) the power to determine an appeal in connection with the dismissal

of the Principal, the Clerk or the holder of a senior post, other than to a committee of members of the Corporation.

(2) The Corporation shall make rules specifying the way in which a committee having functions under paragraph (1) shall be established and conducted.

General comments

Revised Schedule 4 does not require that this provision is retained. The Corporation could therefore resolve to transfer the content of Article 10 to the Corporation's Standing Orders. With regard to amending the substance of Article 10 (whether it remains within the Articles or is transferred to Standing Orders) see below for commentary on the changes which could be made.

Paragraph (1)

Prohibits the Corporation from delegating its power to consider the case for dismissal and to determine appeals against dismissal in relation to the Principal, Clerk or other senior post holder, subject to one exception. The Corporation may delegate such power to *"a committee of members of the Corporation"*. Article 7 makes it clear that non-members may not be appointed to such a committee.

Responsibility for considering the case for dismissal of the Principal and others directly accountable to the Corporation, i.e. senior post holders, and determining any appeal against dismissal by these post holders is plainly a Corporation matter which could not be delegated other than to a committee of the Corporation. Indeed, it is advisable for consideration of the case for dismissal in respect of these individuals to be delegated to a committee of the Corporation in order to preserve some members of the Corporation who have had no previous involvement with the matter who may hear any appeal against dismissal brought by the Principal/other senior post holders (as the case may be). We do not, therefore, anticipate that many Corporations will amend the substance of Article 10 in so far as it relates to the Principal and any senior post holders (if this designation is retained).

Responsibility for considering the case for dismissal of the Clerk and determining any appeal against dismissal by the Clerk is also a matter, which as a matter of good governance is a Corporation matter which should not be delegated other than to a committee of the Corporation. In particular, it would not be appropriate for responsibility for the dismissal of the Clerk to be delegated to the Principal, any other senior post holder or another senior manager. Therefore, here again, we do not anticipate that many Corporations will amend the substance of Article 10 so far as it relates to the Clerk. Please refer to the commentary on Clause 7 of the Instrument regarding the independent role of the Clerk.

As noted in the commentary to Article 1(k), Revised Schedule 4 does not require that the Corporation designate posts as senior ones and it could therefore resolve to remove senior post holder status, although see the commentary on Article 1(k) for the legal risks of doing so. If the Corporation resolves to remove senior post holder status Article 10 would need to be amended to delete the references to holders of senior posts. In this case, the Corporation could delegate to the Principal responsibility for considering the case for dismissal of any member of the senior management team, i.e. the Principal's direct reports, although appeals would still need to be determined by the Corporation or a committee of the Corporation.

Paragraph (2)

Under this paragraph Corporations need to make rules that specify the way in which any appeals committee will be established and conducted. The rules should include how many Corporation members should sit on such a committee and which Corporation members should be excluded. For example, in line with Clause 14 of the Instrument, it would be inadvisable for a student member or staff member, holding a position junior to the position of the employee whose appeal is to be heard, to sit on an appeals committee.

11. Delegable and non-delegable functions

The Principal may delegate functions to the holder of any other senior post, other than –

(a) the management of budget and resources; and

(b) any functions that have been delegated to the Principal by the Corporation.

General comments

Article 11 permits the Principal to delegate functions to senior post holders other than:

- any function that has already been delegated to the Principal by the Corporation
- responsibility for the management of budget and resources

Revised Schedule 4 does not require instruments to retain this provision or indeed that the Corporation designate posts as senior ones. Delegation by the Principal could, therefore, be to a suitable senior manager even though that person's post is not designated as a senior one.

Paragraph (a)

Although Revised Schedule 4 requires the instrument to make provision about the responsibilities of the Principal, it does not specify what these responsibilities are; nor does Revised Schedule 4 contain a list of non-delegable functions. The management of budget and resources could, therefore, be delegated, e.g. to the Finance Director, although the Principal's responsibilities as Accounting Officer cannot be delegated. In relation to the possibility of splitting the role of Principal and Chief Executive see the commentary on Article 3(2) above.

Paragraph (b)

While technically Article 11 could be amended to enable the Principal to delegate to someone else functions which have been delegated to him/her by the Corporation, it is hard to see why such an amendment would be desirable or indeed consistent with good governance. If the Corporation delegates to the Principal responsibility for a particular matter or function, this is presumably because the Corporation wishes the Principal to be personally responsible for the matter in question. If the Principal is not the most appropriate person to take charge of the particular function or the matter, the Corporation should delegate it directly to the most appropriate person or committee. Otherwise the chain of delegation becomes extended and there is a risk of a loss of responsibility and accountability.

12. Appointment and promotion of staff

(1) Where there is a vacancy or expected vacancy in a senior post, the Corporation shall

(a) advertise the vacancy nationally; and

(b) appoint a selection panel consisting of –

(i) at least five members of the Corporation including the Chair or the ViceChair or both, where the vacancy is for the post of Principal; or

(ii) the Principal and at least three other members of the Corporation, where the vacancy is for any other senior post.

(2) The members of the selection panel shall –

(a) decide on the arrangements for selecting the applicants for interview;

(b) interview the applicants; and

(c) where they consider it appropriate to do so, recommend to the Corporation for appointment one of the applicants they have interviewed.

(3) If the Corporation approves the recommendation of the selection panel, that person shall be appointed.

(4) If the members of the selection panel are unable to agree on a person to recommend to the Corporation, or if the Corporation does not approve their recommendation, the Corporation may make an appointment itself of a person from amongst those interviewed, or it may require the panel to repeat the steps specified in paragraph (2), with or without first readvertising the vacancy.

(5) Where there is a vacancy in a senior post or where the holder of a senior post is temporarily absent, until that post is filled or the absent post holder returns, a member of staff –

(a) may be required to act as Principal or in the place of any other senior post holder; and

(b) if so required, shall have all the duties and responsibilities of the Principal or such other senior post holder during the period of the vacancy or temporary absence.

(6) The Corporation shall seek the Secretary of State's consent before making any temporary appointment to the post of Principal or any other senior post, where it is intended that such a post holder will not have a contract of employment with the Corporation.

General comments

The selection of a new Principal is one of the most important roles of Corporation members. The Articles lay down a framework for the execution of this role and the role of appointing senior post holders generally. The framework distinguishes between the role of the Corporation and of the Selection Panel and details the involvement of the Principal, Chair and Vice-Chair. The Selection Panel, like the Corporation, needs to act in a corporate manner. Thus, the Selection Panel can determine arrangements for selecting applicants for interview (the shortlisting process) but they cannot delegate their functions of interviewing candidates and recommending a selected candidate to the Corporation because the Articles give no power of delegation. Similarly, the Corporation is

prohibited by Article 9(d) from delegating its power to appoint the Principal or holder of a senior post.

The provisions of Article 12 are not carried over into Revised Schedule 4. The Corporation could therefore delete Article 12 in its entirety and provide for the College's appointment and promotion arrangements simply to be recorded in approved procedures outside the Instrument and Articles.

Note that Article 12(6) (need for the Secretary of State's consent before making a temporary appointment to a senior post with the post holder having a contract of employment with the Corporation) was deleted from all College's Instruments with effect from 31 March 2012 by the 2012 Modification Order.

A number of Colleges have subsequently used the governance freedoms to amend Article 12:

- some have swept away the prescriptive detail of Article 12 and substituted for it some very general wording which reserves to the Corporation a very wide discretion to put in place an appropriate recruitment process for filling vacant senior posts
- other Colleges have decided to retain Article 12 but amend it to modernise and expedite the recruitment process
- in the case of Corporations which resolve to abolish senior post holder status altogether, Article 12 becomes redundant and such Corporations should put in place (whether in the Articles or the Corporation's Standing Orders) replacement procedures to ensure that the recruitment process is carried out in accordance with good governance and the requirements of employment and charity law
- finally a small number of Colleges have made time limited amendments to Article 12 for particular purposes

If a Corporation is proposing to amend Article 12, it is important that, whatever amendments are made, the process adopted in filling the post of Principal and any senior posts must comply with the provisions of the general law as regards equality and diversity, charity law and the requirements of good governance. The process must be open and transparent.

As regards charity law, neither the Charities Act 2011 nor the common law impose any specific obligations on the Corporation in relation to the recruitment of the Principal and/or senior post holders (if any). However, in considering whether to amend Article 12, members of the Corporation need to be mindful of their charity law duties generally. The key duties here are as follows:

- to act in the best interests of the beneficiaries. In deciding whether to make any amendments to Article 12, members of the Corporation should consider whether the proposed amendments are in the best interests of students – in particular, whether they will mean the College is better able to achieve its charitable purposes. If the purpose of the proposed amendments is to enable the Corporation to move more quickly to appoint suitably qualified candidates, and reduce the risk of losing good candidates to competitors who are more fleet of foot, then there is an argument that the amendments would enable the Corporation to better achieve its charitable purposes
- the duty to act collectively. Members of the Corporation have a duty to act collectively but they may delegate to committees if the governing document allows. If it is proposed to delegate responsibility for appointing the Principal or any senior post holder (as to which, see below) then the Instrument will need to be amended to expressly provide for this. As a general point, charity law requires that following delegation the delegates must report back to the Corporation at the earliest opportunity

Paragraph (1)

In the interpretation provisions set out in Article 1(i) a senior post is defined as *"the post of Principal and such other senior posts as the Corporation may determine for the purposes of these Articles"*. There is no official guidance as to how many or which posts (in addition to the Principal) should be senior posts. This is a matter for each Corporation to decide. To designate a position as a senior post (or to remove that designation) requires a simple decision of the Corporation. It is essential, however, that where there is someone in that role at the time of designation (or removal of designation) the employment ramifications of changing an individual's contract of employment are addressed, e.g. the individual's express agreement to the changes is sought). See also the

commentary on Article 1(i). Once a post has been designated as a senior post specific provisions apply including those relating to appointment to the post and disciplinary and dismissal procedures (see Article 16).

Where the Corporation decides to designate a position a senior post and that post is filled at the time of designation, the advertisement and selection provisions set out in paragraphs (1) to (6) need not be followed as technically there is no vacancy in a senior post. Care, however, should be taken to ensure that the spirit of Article 12 is complied with not just the wording. Assuming a College retains its senior post holder designation and Article 12 as currently drafted, it would not be appropriate to, with the deliberate intention of avoiding the provisions of Article 12, appoint someone to a non-designated post and immediately afterwards designate it as a senior post; or, when a senior post becomes vacant, remove its designation as a senior post, only to re-designate it as a senior post once the vacancy has been filled internally, i.e. without a national advertisement. If Colleges wishes to gain more flexibility, Article 12 should be amended.

Paragraph (1) makes it mandatory to advertise a vacancy in a senior post nationally. Corporation members are advised to interpret this as meaning throughout Britain. The Article does not require the placing of an advertisement in a national newspaper, but it is hard to see how the requirement could be fulfilled without this step. The intention is to create openness and fairness and to ensure that Corporations make a wide search in appointing to senior posts.

Under Revised Schedule 4, the Corporation could cease the designation of senior posts altogether (although see the commentary on Article 1(i) for the legal risks and implications of doing so) in which case the entirety of Article 12 would become redundant. In that case, Article 12 could either be deleted (but see above regarding the implications of deleting it) or would need to be amended to make it clear which posts (if any) it applied to. For example, the Corporation could resolve that Article 12 would, post de-designation of senior posts, apply to the Principal only or to the Principal and members of the SMT.

In terms of other changes which could be made to paragraph (1) using the governance freedoms:

- The requirement of national advertising could be removed. This could be done, e.g. to enable vacant senior posts to be filled internally where appropriate without first going to national advertisement. The Corporation may decide to draw a distinction here, maintaining mandatory national advertising in respect of the key post of Principal but in respect of other senior/SMT posts making national advertising optional. This would enable SMT roles to be reserved as progression opportunities for existing members of staff (as most businesses do) but would provide flexibility for the Corporation to go to national advertisement to fill a vacant senior post if there were no suitable internal candidates.

  In relation to the post of Principal, the Corporation may feel that maintaining mandatory national advertising is the right approach the Corporation may consider it essential always to look both internally and externally and to conduct a wide ranging, transparent and open recruitment search before filling this key post to ensure that the best available candidate is appointed. Placing a national advertisement may go a long way towards protecting the Corporation from allegations that it has not undertaken such a search.

  If the Corporation does not wish to be bound by Article 12 to advertise the vacant post of Principal nationally and therefore resolves to remove the requirement to do so, then on each occasion it is necessary to recruit to this role, the Corporation should consider carefully the most appropriate process to adopt. Any such process must optimise the prospects of appointing the best candidate for the role, drawing on an appropriately wide pool of talent, and complying with equality and diversity obligations. A careful audit trail should be maintained to protect the Corporation in case any appointment is subsequently challenged.

  If removing the requirement of national advertising, the Corporation's approach may need to be explained carefully to staff and trade union representatives. Assurances may need to be given that the Corporation will nevertheless be mindful of the need to comply with the general law, including the requirements of equality and diversity and charity law and the principles of good governance.

- Responsibility for appointing the Selection Panel could be delegated to the Chair or in his/her absence the Vice Chair. This would enable a Selection Panel to be constituted immediately upon the incumbent's resignation rather than being delayed until the next regular meeting of the Corporation or requiring alternative arrangements to be made to appoint the Selection

Panel between regular meetings, e.g. the calling of a Special Meeting or the appointment of the Selection Panel by written resolution if permitted by the Instrument.

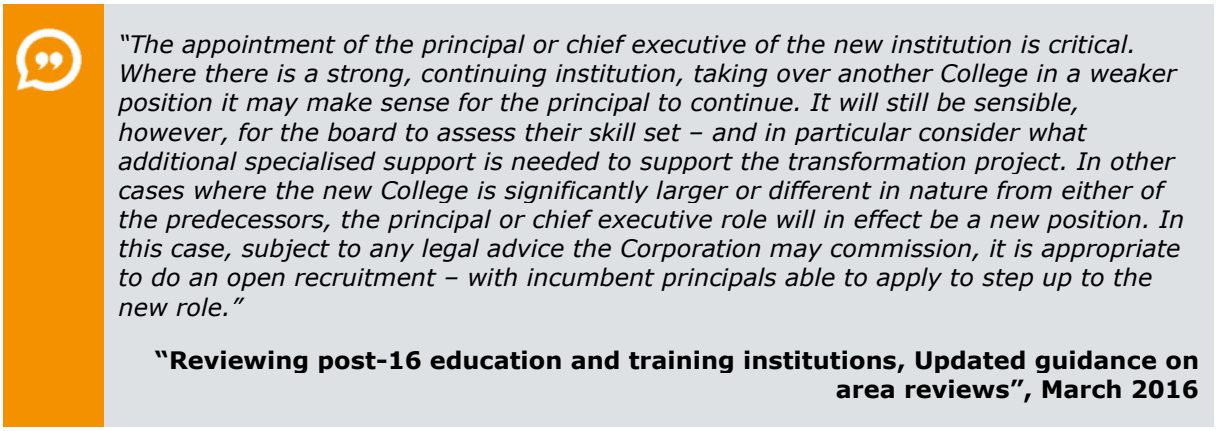
- Amendments could be made to both the size and composition of the Selection Panel. If the size of the Selection Panel is reduced, it will be important to ensure that the general board continues to have a sufficient oversight of and input into the recruitment process. Reducing the number of independent members of the Selection Panel to fewer than three is unlikely to be appropriate and a panel of five is preferable. It is likely to be appropriate for the Chair and/or the Vice Chair to continue to be involved in the selection process of the Principal, and for the Principal to be involved in selecting senior post holders/SMT members who will, after all, be his or her direct reports. Reducing the size of the Selection Panel for senior post holders while retaining the involvement of the Principal would enable the Principal to have a greater say in establishing his or her own direct reports and is what would happen in most private businesses.

Note that there is nothing in paragraph (1) to prohibit the existing Principal, if they are a Corporation member, from serving on the Selection Panel to appoint their successor. This contrasts with the former version in the 1992 Regulations which prevented a Principal from serving on such a Selection Panel. There has, however, been some debate as to whether it is appropriate for the outgoing Principal to sit on the Selection Panel for their successor. Whilst they may have valuable insights to bring to the process, some take the view that the outgoing Principal should take no part, or should do no more than advise the Selection Panel as an observer or in some other consultative capacity, and that there should be very cogent reasons for any departure from this principle. The rationale for this is that the authority and status of the outgoing Principal may mean that they hold a great deal of sway (whether intentionally or not) and may therefore erode the critical independence of the Selection Panel.

There is nothing in Article 12 or elsewhere in the Instrument and Articles of Government which prohibits staff and student members from sitting on the Selection Panel. Although Clause 14(5)(d) provides that staff members can be required to withdraw by a resolution of the other members present when a matter relating to members of staff senior to them is being discussed and under clause 14(9) a student cannot take part in the consideration of or vote on the appointment of a prospective member of staff. The provisions of Clause 14 apply to meetings of the Corporation or one of its committees: the Selection Panel is not a committee of the Corporation. It is, therefore, a matter of judgement as to whether the Corporation considers it appropriate for staff and student members to sit on the Selection Panel. Given the prohibition under Clause 14 on student members voting on staff matters at committee and Corporation meetings it would seem odd to task a student member with the crucial task of formally advising the Corporation on the appointment of, e.g. the Principal. It is also putting a member of staff in a potentially difficult position if they are asked to interview for the appointment of their ultimate line manager who will also have important public responsibilities as Accounting Officer. For these reasons, Corporations may consider it appropriate to include in their Standing Orders a provision that staff and student members (and perhaps the outgoing Principal) will not normally be eligible for appointment to the formal Selection Panel unless authorised by a resolution of the Corporation. This is not to say that staff, students and other stakeholders cannot be involved in and make a valuable contribution to the less formal aspects of the interview process such as the pre-interview evaluation of candidates.

Where a vacancy in a senior post arises on a merger, e.g. where on a Model A merger the senior posts of the new Corporation, of necessity, are unfilled or on a Model B merger a new senior post in the continuing Corporation is created or a post falls vacant, and there are applicants from existing members of staff (who are already senior post holders), it is open to the Corporation to adopt an internal or ring fenced selection process. In order to avoid the need to advertise nationally it will now be necessary for a Corporation to resolve to amend paragraph (1)(a). Without that step there would be a technical breach which could jeopardise the validity of the appointment. Given the possible objections that may be raised by staff and/or their representatives it would be prudent to obtain legal advice before taking this step, and any amendment must be within the bounds of Revised Schedule 4.

As discussed, careful consideration must be given to the implications of dis-applying Article 12 to the appointment of the Principal, including in a merger situation. Even if, as a matter of strict employment law, the post of Principal does not become vacant on a Model B merger, it may still be appropriate to consider undertaking an open recruitment process in these circumstances, as a matter of good governance. In the context of merger arising out of the strategic area review process, DBIS advised as follows:



"The appointment of the principal or chief executive of the new institution is critical. Where there is a strong, continuing institution, taking over another College in a weaker position it may make sense for the principal to continue. It will still be sensible, however, for the board to assess their skill set – and in particular consider what additional specialised support is needed to support the transformation project. In other cases where the new College is significantly larger or different in nature from either of the predecessors, the principal or chief executive role will in effect be a new position. In this case, subject to any legal advice the Corporation may commission, it is appropriate to do an open recruitment – with incumbent principals able to apply to step up to the new role."

"Reviewing post-16 education and training institutions, Updated guidance on area reviews", March 2016

The Corporation may choose, in some situations, to dis-apply the national advertising requirements for a time limited period, e.g. for the purpose of filling, in connection with a merger, vacant senior posts.

Paragraph (2)

It is important to note that under the 2008 Instrument the Selection Panel does not have the power to make the appointment but only to recommend the Corporation to do so. Under Revised Schedule 4, the Corporation could resolve to amend paragraph (2) to provide for the Selection Panel to make the appointment (rather than the Selection Panel making a recommendation on the appointment with the Corporation making the decision to appoint[25]). If made, this amendment may assist in speeding up the recruitment process, i.e. it avoids the need to wait for the next regular meeting of the Corporation to resolve to make a formal appointment, having to make arrangements for a special meeting to be convened for this purpose or for a written resolution to be passed (if the making of decisions by written resolution is permitted by the Instrument).

If amending Article 12 there maybe merit in drawing a distinction, between *"ordinary"* senior post holders and the Principal, with authority being delegated to the Selection Panel to appoint *"ordinary"* senior post holders but reserving the decision on the appointment of the Principal to the Corporation unless the Corporation specifically chooses to delegate the decision to the Selection Panel. It should be borne in mind that the appointment of the Principal is likely to be the most important decision that the Corporation will make.

There is no requirement on the Selection Panel to make a recommendation if they do not consider that any candidate is suitable. In these circumstances, provided that the arrangements which they have made for selecting applicants for interview allow the Selection Panel to choose applicants who respond to the advertisement but who were not selected initially, they can interview more candidates before reporting back to the Corporation. However, if the arrangements do not allow this, the Selection Panel must report to the Corporation so that the Corporation can decide to re-advertise, possibly through different media or with a changed advertisement.

The requirement on members of the Selection Panel to interview selected applicants is clearly stated in paragraph (2)(b). This means that all Panel members must carry out the interview, and there is no scope for the Corporation to determine a procedure to avoid this. This may cause practical problems: what, for example, happens if one of the Selection Panel members becomes ill or unavailable for some reason part way through the process? It is submitted that in this case the Corporation would need to appoint a new panel member. This could be inconvenient and cause delays. One practical solution, therefore, would be for the Corporation to delegate to the Chair, when it is appointing the Selection Panel in the first place, the power to co-opt to the Panel an additional member in the event of a vacancy arising.

The issue of quorum does not apply since the Selection Panel is not a committee, and the Corporation is not empowered to make rules for its operation but only to select the membership of the Panel.

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25 Note that under the 2008 Instrument, it is not clear on what basis the Corporation could overturn a recommendation of the Selection Panel, having not been involved in short-listing and interviewing candidates.

Finally, unless Article 12 is amended by the Corporation to delegate authority for making the appointment to the Selection Panel, it is important that the Selection Panel, if they ask the selected applicant whether or not s/he will accept the job if it is offered, do not suggest that they have the power to make such an offer or are in fact doing so. It should be made clear to the candidates that the Panel is only empowered to make a recommendation and that only the Corporation can make the job offer and agree a contract.

In making a recommendation, the Panel which has carried out the interview must ensure fairness and probity. The Selection Panel should not put forward the name of more than one candidate to the Corporation for approval.

If the Corporation does not approve the selected candidate, then it should invite the Panel to carry out a second round of interviews although see the comment above regarding it not being clear under the 2008 Instrument on what basis the general board could overturn a recommendation of the Selection Panel, having not been involved in short-listing and interviewing candidates.

Paragraph (4)

Deals with the circumstances where the Selection Panel cannot agree on a person to recommend to the Corporation (the wording of paragraph (4) implies that agreement must be unanimous). Two circumstances could trigger the application of paragraph (4). First, the Panel may be divided. Second, they may agree that none of the candidates are suitable. In either event (subject to any provision which the Panel may have made for drawing up a second short list from those who applied initially) the Panel needs to report to the Corporation. At this juncture the Corporation may:

- ask the Panel to repeat the process set out in paragraph (2). The Corporation decides at this point whether or not to re-advertise. Similarly, if the Corporation rejects the recommended appointee, they can ask the Panel to go through the process again, based on responses to the initial advertisement, or to do so after the post has been re-advertised

- the Corporation could make an appointment itself of a person from among those interviewed where the Selection Panel members cannot agree or where their recommendation is not approved. This power allows the Corporation to take appointments out of the hands of a Selection Panel in defined circumstances. From a *"best practice"* point of view and of particular relevance in discrimination cases, it is difficult to envisage a situation where the Corporation, without interviewing the applicants, and contrary to the outcome of any scoring under selection criteria, will be able to justify exercising this power simply because they do not approve the recommendation of the Panel. It is more likely to be appropriate where the Panel cannot agree over two applicants, in which case the Corporation might cast the deciding vote

The circumstances envisaged in paragraph (4) are likely to be very rare. It is possible that increasing the size of the Panel for the appointment of a Principal may increase the likelihood of the Panel failing to agree on one candidate, but the stronger possibility is that they may agree that no candidate is suitable. Equally, it would be rare for a Corporation to reject the recommendation of a Panel. If it does so, it must act reasonably and is advised to minute carefully its reasons for taking the decision to refer back the recommendations or to appoint another applicant. Special care should be taken by the Corporation (and the Selection Panel) to avoid accusations of bias or discrimination (direct or indirect) in respect of the characteristics protected by the Equality Act 2010 including age, race, sexual orientation, gender, pregnancy or maternity, religion or philosophical belief or disability. The requirement of unanimity (which applies to the Selection Panel) does not apply to the Corporation in dealing with the Panel's recommendation (see the provisions for majority voting in Clause 14(1) of the Instrument).

Paragraph (5)

This provision is intended to legitimise interim arrangements to deal with the circumstances of a vacancy or long term absence of the Principal or other senior post holder. Most Corporations provide for a specific senior post holder, such as one of the Vice-Principals, to assume the duties of Acting Principal. Paragraph (5) also makes it clear that whenever an *"acting up"* situation occurs, the member of staff concerned takes on the powers and responsibilities of the person for whom they are deputising. This gives comfort to the Corporation by allowing, not only continuity, but the security of knowing that someone has charge of the main executive duties in the College and can be held responsible for them. If the Corporation does not deal with this through an *"acting up"* clause in the contract of employment of the deputising member of staff, the Corporation should

meet to determine the matter as soon as the emergency is known in order to approve (with the consent of the individual who is to *"act up"*) a variation in his or her contract of employment. The variation should be time-limited or expressed to terminate on the resumption by the Principal of his or her duties or, as the case may be, the appointment of a new Principal. It can be dealt with by a letter to amend/vary the existing contract and does not necessarily require a new contract to be drawn up.

Paragraph (6)

It may be necessary to make an external appointment of an acting Principal or other senior post holder, e.g. a Finance Director. Paragraph (6) allows Corporations to make interim arrangements to cover a temporary absence or vacancy, which can include appointing a person who will not be an employee, e.g. an external consultant. Paragraph 6 requires that the Secretary of State must consent to the arrangement. This is no longer possible and therefore Corporations should consider amending the Article by deleting this requirement.

13. Appointment and promotion of staff

The Principal shall have responsibility for selecting for appointment all members of staff other than –

(a) senior post holders; and

(b) where the Clerk is to be appointed as a member of staff, the Clerk in the role of a member of staff.

General comments

Article 3(2) makes the Principal responsible for selecting for appointment all members of staff (other than appointments to senior posts and the Clerk), and they should be able to delegate this function to any senior post holder (Article 11). Under Revised Schedule 4 Article 11 could be amended to permit the Principal to delegate this function to a suitable member of staff who is not a senior post holder – see the commentary on Article 11. Likewise, under Revised Schedule 4, Article 3(2)(e) could be amended to make the Principal responsible for selecting for appointment senior post holders (as well as being responsible for appointing all other staff as is already the case under Article 3(2)(e) of the 2008 Instrument) but not the Clerk who should continue to be appointed by the Corporation.

For the definition of *"staff"* (by reference to staff members who have a contract of employment with the institution), see Article 1(j) and the related commentary. It is important to note that a contract of employment can be made orally, i.e. is made by the original words of the engagement, and does not have to be in writing to have legal effect. Hence, when a manager on behalf of the Corporation makes an unconditional offer of employment which is accepted, this commits the Corporation to a legally binding contract provided, of course, that the manager making the offer had the authority (actual or ostensible) to do so. The Corporation should, therefore, have a procedure for the appointment of staff which makes it plain who is empowered to offer an appointment and who should sign the letter of appointment and contract on behalf of the Corporation. The procedure should cover both full-time and part-time staff, and *"permanent"* and *"temporary"* employees.

Whilst the contract of employment does not have to be in writing to be legally binding, in the interests of certainty and fairness it should always be reduced to writing. In addition, sections 1 and 2 of the Employment Rights Act 1996, as amended by the Employment Act 2002, require that employees, during the first two months of their employment, must be issued with a written statement of the terms and conditions under which they are to be employed including specifying the relevant disciplinary and dismissal procedures. A financial penalty can now be imposed by the employment tribunal for failure to issue such a written statement. This is not a standalone claim and can only be brought where other proceedings are issued. A contract of employment should be distinguished from a contract for services (which will be appropriate, e.g. for someone who provides services to the Corporation but remains self-employed).

Although a member of staff may have a contract of employment with an institution, which for the most part will be the Corporation, in some cases individuals (including members of College staff and/or Corporation members) may be pursued personally by an employee who alleges that discrimination has occurred. Those individuals could include Corporation members who sit on the Selection Panel for the appointment of senior post holder vacancies (Article 12) or who hear staff appeals under procedures made in accordance with Article 16. Individuals should therefore take care not to discriminate unlawfully against members of staff or students of the College.

Article 13 complements the provisions regarding senior post holders (Article 12) by specifying that, in the case of selecting for appointment all other staff, although the Corporation is the employer, the Principal substitutes for the Corporation. This is a wide responsibility and requires careful execution bearing in mind that the Corporation has to set a framework of conditions of service for staff who are not senior post holders (Article 3(1)(f)). The Principal is not in the same position as the Selection Panel is in for senior post holders. Thus, the Principal is empowered to **select for**

appointment, i.e. to make the appointment on behalf of the Corporation, whereas the Selection Panel, when recruiting to senior posts, is only authorised to **select for recommendation** to the Corporation which in turn formally makes the appointment (although see the commentary on Article 12).

It is interesting that Article 13 is silent on how the Principal should proceed when selecting staff. It does not require the involvement of a Corporation member. It is for the Principal to choose whether or not to involve a Corporation member in the appointment of senior staff (who are not to be designated as senior post holders). Some may regard the involvement of Corporation members in the appointment of senior staff who are not to be designated as senior post holders as excessive involvement of the Corporation members in the executive management of the College, blurring the boundary between governance and management (see the general commentary on Article 3).

Corporations may feel it appropriate to establish, perhaps in Standing Orders, their expectations regarding how non-senior post holder appointments will be effected, including a process of advertising, shortlisting and interviewing. Issues of probity have arisen here, and therefore another element of good practice would be for Principals and other staff not to be involved in staff selection where a relative or friend is a candidate.

Paragraph (b)

This reflects the provision in Article 3(1)(e) which extends the responsibilities of the Corporation towards the Clerk to include the appointment, dismissal and determination of the conditions of his or her service as a member of staff, where appropriate. See the commentary on Article 9(e) and Clause 7 of the Instrument regarding the independent role of the Clerk.

14. Rules relating to the conduct of staff

After consultation with the staff, the Corporation shall make rules relating to their conduct.

General comments

Under Revised Schedule 4, the making of rules relating to staff conduct is no longer expressly a responsibility of the Corporation. Even if it is implicitly a Corporation responsibility (e.g. by virtue of the Corporation's responsibility under Revised Schedule 4 for overseeing the activities of the institution, which arguably includes ensuring compliance with the general law including employment law), Revised Schedule 4 does not contain a list of non-delegable functions along the lines of Article 9. Responsibility for making rules relating to staff conduct could, therefore, be delegated, e.g. to the Principal and/or the Human Resources Director. If it is so delegated, this would need to be reflected either in the Articles (either by deleting or amending Article 14) or in the Corporation's Standing Orders.

If Article 14 is retained all Corporations should review (or arrange for a review of) their disciplinary and grievance processes and all connected policies and procedures (e.g. conduct, performance management, ill health policies) to ensure they comply with the overarching requirements of Article 16 and the minimum requirements laid down by the Employment Rights Act 1996, the Employment Relations Act 1999 and the ACAS Code of Practice on Disciplinary & Grievance Procedures (as revised in March 2015).

In all cases it will be vital for the Corporations to ensure that up to date and effective HR policies are maintained so as to manage employment risks. It will also be important to ensure that any restrictions on powers to suspend, dismiss and hear appeals that may have remained in procedures over time and which reflect old provisions of previous versions of the Instrument and Articles are renewed and updated – see further the commentary on Article 16.

If retained, this Article imposes a duty on the Corporation to make (and publish) rules of staff conduct. The Article implies that the Corporation should draft rules and circulate them to all the staff for comment. Clearly any established consultation practices including consultation with trade unions should also be adhered to.

15. Academic freedom

In making rules under Article 14, the Corporation shall have regard to the need to ensure that academic staff at the institution have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without putting themselves at risk of losing their jobs or any privileges which they may enjoy at the institution.

General comments

The right to freedom of speech within a College is an important check on impropriety, since it is within a culture of secrecy that the abuse or misuse of authority often finds nourishment. Article 15 continues the tradition of valuing academic freedom and emphasises the need not to regard the business of conducting a College as identical in all respects with directing a profit making organisation. Colleges are academic institutions and, as Sir Michael Davies observed in his report on University College Swansea (quoted with approval in the Second Report of the Nolan Committee), when drawing the line between the exercise of proper academic freedom and unacceptable dissent "*the fact that it is a line to be drawn in an adult academic world and not in a commercial jungle is of profound significance*".

The principle of academic freedom was reinforced by the enactment of the Human Rights Act 1998 which incorporates the rights enshrined in the European Convention of Human Rights into UK domestic legislation. Colleges are regarded as *"public authorities"* covered by the provisions of the Human Rights Act 1998, which include important protections including the rights to:

- a fair and public hearing (Article 6)
- family and private life (Article 8)
- freedom of thought, conscience and religion (Article 9)
- freedom of expression (Article 10)
- peaceable assembly and association (Article 11)

Although untested at present, the effect of the Human Rights Act may be to extend the provisions of Article 15 from academic staff to all staff at the College. It is also worth noting that Article 10 of the European Convention on Human Rights is wider than the provisions on academic freedom set out in Article 15 in that this right includes the *"freedom to hold opinions and to receive and impart information and ideas"*.

In addition to the requirements to protect academic freedom and its obligations under the Human Rights Act, the Corporation is required by section 43 of the Education (No 2) Act 1986 to issue and keep up to date a Code of Practice on Freedom of Speech. A clear well publicised Code which is implemented consistently and fairly can help with the smooth functioning of the College, to minimise potential conflicts, and to promote equal opportunities. For further information, see the Eversheds Sutherland Code of Practice on Freedom of Speech and Expression (September 2018). Note that the model code has been revised in the light of the duty on Corporations, and other specified public bodies, to have regard to the need to prevent people being drawn into terrorism. This duty was created by s.21 of the Counter Terrorism and Security Act 2015 and brought into force for Colleges and universities from 18 September 2015. See the government's statutory guidance:

Prevent duty guidance - GOV.UK (www.gov.uk)

In addition to the template code of practice on freedom of speech, Eversheds Sutherland also produce a background note on the law and a list of policies that may need amendment in the light of the Prevent duty.

Revised Schedule 4 does not carry over this provision, perhaps on the basis that the obligation to protect freedom of speech is already provided for in the Education (No.2) Act 1986, s.43. However, that provision addresses the separate, though related, issue of freedom of speech rather than academic freedom. Any Corporation considering removing Article 15 should therefore take legal advice.

As a check against impropriety Article 15 was also strengthened by the enactment of the Public Interest Disclosure Act 1998 (amended from 25 June 2013 by the Enterprise and Regulatory Reform Act 2013) which makes available to victimised whistleblowers important statutory protection, and encourages institutions to adopt public interest disclosure codes and procedures (see also general commentary on Article 16).

The 1999 Direction substituted the words *"which they may enjoy at the institution"* for the former version *"they may have at the institution"*. Although this seems in the nature of a tidying up amendment, it could be regarded as emphasising that these privileges are to be positively enjoyed (rather than passively accepted) if the tradition of freedom of speech is to continue. Hence, the Corporation should not allow the establishment of rules which inhibit the right of academic staff to challenge customary beliefs or ways of doing things. Similarly, there should be no restraint on their ability to propose new ideas, controversial views or unpopular opinions. The overriding caveat is that these *"freedoms"* have to be exercised within the law. The Corporation is not expected to forego disciplinary sanctions aimed at preventing staff from making sexist or racist remarks for example. The Nolan Committee has extended the caveat by recommending that institutions should make it clear that they permit staff to speak freely and without being subject to disciplinary sanctions or victimisation about academic standards and related matters *"provided that they do so lawfully, without malice, and in the public interest"*. Academic freedom is not a principle which should be abused by staff.

Article 15 is broad in character and should be taken to apply to staff in the execution of their teaching and learning roles (i.e. their professional capacity), in their role as members of staff commenting on the operation of the College and in their role as representatives or appointees (e.g. as members of the Corporation or of committees or of any Academic Board which may have been established).

16. Grievance, suspension and disciplinary procedures

(1) After consultation with staff, the Corporation shall make rules setting out:

(a) grievance procedures for all staff;

(b) procedures for the suspension of all staff; and

(c) disciplinary and dismissal procedures for

(i) senior post-holders, and

(ii) staff other than senior post-holders

and such procedures shall be subject to the provisions of Articles 3(1)(e), 3(2)(e), 9(d), 9(e), 10(1) and 17.

(2) Any rules made under paragraph 1(b) shall include provision that where a person has been suspended without pay, any appeal against such suspension shall be heard and action taken in a timely manner.

(3) Any rules made under paragraph (1)(c)(i) shall include provision that where the Corporation considers that it may be appropriate to dismiss a person, a preliminary investigation shall be conducted to examine and determine the case for dismissal.

General comments

The pre-2008 Instrument and Articles set out detailed provisions for dealing with suspension, dismissal and grievance procedures for staff and senior post holders and highly prescriptive procedures for the proposed dismissal of senior post holders. These provisions were significantly relaxed under the 2008 Instrument and Articles (which took effect on 1 January 2008) with the detailed and highly prescriptive procedures referred to above being removed.

It is important to note, however, that the version of Article 16 contained in the 2008 Instrument did not enable Corporations to simply rewrite existing procedures. The introduction of new procedures with provisions which are different from those previously prescribed by the Articles requires *"consultation with staff"* (see commentary on paragraph (1) below).

Revised Schedule 4 has given Corporations even greater freedom. It requires only that *"an instrument makes provision about the procedures of the body and the institution"* but it does not prescribe what these procedures are or how they should be made. Article 16 could, therefore, be amended provided that the revised version makes provision for there to be procedures at the College. If new procedures have not been prepared since 2008 or if the opportunity is not taken now to create revised procedures it is potentially arguable that the procedures set out under the 2008 Instrument and Articles may continue to apply. Legal advice may be needed on individual College circumstances.

Some changes which Corporations may wish to make to Article 16 include those listed below:

- re-allocating responsibility for making rules regarding discipline, dismissal, grievances and suspension of staff (other than senior post holders if this designation is being retained) from the Corporation to, e.g. the Principal and/or the Human Resources Director and/or to the SMT, possibly in consultation with the Clerk as regards senior post holders (if this designation is being retained)
- under Revised Schedule 4, none of the matters referred to in sub-paragraphs (a),(b) and (c) above are expressly responsibilities of the Corporation; they could, therefore, be delegated

as suggested above. If it is so delegated, this would need to be reflected either in the Articles (by deleting or amending Article 16) or in the Corporation's Standing Orders

- note that the Corporation would retain responsibility for making rules regarding discipline, dismissal, grievances and suspension of senior post holders and the Clerk as these post holders are accountable to the Board

- changing the requirement to consult with *"staff"* to a requirement to consult with representatives of recognised unions, employee representatives or directly with staff as appropriate. See further the commentary on paragraph (1) below

- removing the content of Article 16(2) altogether, but see the commentary on paragraph (2) below

- transferring the content of Article 16(3) to Standing Orders and/or the disciplinary policy, but see the commentary on paragraph (3) below

In connection with the disciplinary procedure, the power to dismiss need no longer be reserved to senior post holders. Whilst this restriction can be maintained, a number of Corporations will want to allow other senior managers to have the power to dismiss, e.g. so that the Principal and other senior post holders (if this designation is to be retained, as to which see the commentary on Article 12(1)) can be reserved to hear appeals against dismissal, thereby preventing members of the Corporation from having to hear such appeals. This would be on the basis that the hearing of appeals is very much an *"operational"* rather than a strategic matter and therefore not business with which members of the Corporation should have to concern themselves, save where the appellant is a senior post holder. If a Corporation proposes to widen the pool of those authorised to effect dismissals to include members of senior management (who are not senior post holders) then disciplinary policies will need to be revised to implement this change and regard had to any related impact on the hearing of appeals. Appropriate training should be given to anyone who will in future be authorised to effect dismissals.

Paragraph (1)

"Consultation with staff" is recognised as meaning discussions with a view to reaching agreement and the Corporation must be willing to seek the views of staff and show a willingness to amend the proposed procedures in light of feedback received during the course of consultation. From a practical point of view, Corporations are likely to have consultation mechanisms already in place with recognised trade union and/or employee representatives. Strictly consultation with such representatives may not meet the requirements of Article 16 which appears to require direct consultation with individual staff members. Corporations wishing to take a cautious approach may wish to publish draft procedures, after consultation with trades unions and other representatives as appropriate, and invite comments from staff before issuing the final version of the procedures. This will, however, often present significant practical difficulties. A more pragmatic solution may be to amend Article 16(1) to provide that the Corporation shall make rules relating to discipline, grievances and suspension after consultation with staff or their recognised or elected representatives.

It is also important to note in making any new procedure that the contents of other relevant Articles are incorporated and borne in mind in the drafting. For example:

Accountability to the Corporation

- Article 3(1)(e) makes the Corporation responsible for the appointment, grading, suspension, dismissal and determination of the pay and conditions of service in relation to senior post holders and the Clerk including, where the Clerk is, or is to be appointed as, a member of staff, the Clerk's appointment, grading, suspension, dismissal and determination of pay in the capacity of a member of staff. See, however, the commentary on this Article

- Article 9(d) provides that the Corporation shall not delegate the appointment of the Principal or a holder of a senior post, although see the commentary on this Article regarding the greater scope for delegation under Revised Schedule 4, and the commentary on Article 1(e) on the issue of whether the designation of senior post holders is to be retained

- by Article 10(1) the Corporation must not delegate the consideration of the case for dismissal or the power to determine an appeal in connection with dismissal of the Principal, Clerk, or holder of a senior post, other than to a committee of members of the Corporation, although see the commentary on this Article regarding the possibility of the Corporation delegating to

the Principal consideration of the case for dismissal of the members of the SMT if the Corporation resolves no longer to use senior post holder designation

– Article 17 emphasises that if the Clerk is a member of staff, they should be regarded as a senior post holder for the purposes of dismissal and also, significantly, that the suspension or termination of a Clerk's contract of employment as a member of staff is a separate issue from his or her role as Clerk

These provisions ensure that all senior post holders, including the Principal, will remain accountable to the Corporation.

Responsibilities of the Principal

– Article 3(2)(e) provides that the Principal should be responsible for the appointment, assignment, grading, appraisal, suspension, dismissal and determination, within the framework set by the Corporation, of the pay and conditions of service of staff, other than the holders of senior posts or the Clerk, where the Clerk is also a member of staff (but see the commentary on this Article)

– Article 11 allows the Principal to delegate to the holder of a senior post any of these functions **other than** the management of budget and resources, and any functions that have been delegated to the Principal by the Corporation. See the commentary on Article 11, however, regarding the possibility of amending Article 11 to permit the Principal to delegate to suitable senior manager(s) even though their post(s) may not be designated as senior posts.

Paragraph (2)

In practical terms, one of the most significant changes made to Article 16 when the 2008 Instrument and Articles came into force was that the restrictive rules in the pre-2008 Articles regarding suspension were in the main removed. The only one of these rules which was carried over to the 2008 Articles was the rule providing for an appeal against suspension where an individual is suspended without pay. In the rare event of suspension without pay (which must also be permitted by the contract of employment), this Article allows for there to be an appeal against suspension which should be heard, and action taken, in a timely manner.

Revised Schedule 4 does not require the Articles to provide for an appeal against suspension without pay. In principle therefore this Article could be amended. However, no amendments should be made to Article 16(2) without:

– first considering whether the right to appeal against suspension without pay has carried across from the Articles into other documents regulating the employment relationship (such as the disciplinary policy and/or contracts of employment). If the proposed new procedures override terms in contracts of employment, wider issues of contract variation must be considered

– secondly, consulting recognised representatives, e.g. representatives of recognised unions or employee representatives, if necessary

Generally within the workplace most suspensions of staff in an employment context will be suspensions with pay to enable a thorough and appropriate investigation to be carried out. Suspension with pay to enable an investigation to take place is not regarded as a disciplinary penalty under the ACAS Code.

Suspension without pay to facilitate an investigation should not be contemplated unless provided for in the contract of employment and may, in any event, be regarded as a disciplinary penalty in itself.

Paragraph (3)

Provides that where the Corporation considers that it may be appropriate to dismiss a senior post holder, a preliminary investigation shall be conducted to examine and determine the case for dismissal. This makes it clear that the Corporation is still responsible for considering cases for the potential dismissal of senior post holders.

Paragraph (3) reflects good employment law practice since a decision to dismiss should not be taken without first undertaking an investigation to examine the potential case for dismissal. A

decision to dismiss an individual without an appropriate investigation may result in a dismissal being regarded as unfair under the provisions of the Employment Rights Act 1996 and the ACAS Code.

Revised Schedule 4 does not expressly require the Articles to contain wording to the effect of paragraph (3). Revised Schedule 4 stipulates that *"an instrument must make provision about the procedures of the body and the institution"* but it does not stipulate what the provisions of the procedures should be. Therefore, in principle the wording of paragraph (3) could be transferred into the Corporation's Standing Orders/bye laws and/or the disciplinary policy.

Any changes to existing College procedures should not generally be made without first consulting with staff and/or their representatives. There may also be consultation protocols under JCC arrangements or collective agreements which will need to be complied with.

Again it is important to note the comments made earlier in relation to Article 16 and proposed changes to existing procedures.

17. Suspension and dismissal of the Clerk

(1) Where the Clerk is also a member of staff at the institution, the Clerk is to be treated as a senior post holder for the purposes of Article 16(1)(c).

(2) Where the Clerk is suspended or dismissed under Article 16, that suspension or dismissal shall not affect the position of the Clerk in the separate role of Clerk to the Corporation.

General comments

Paragraph (1)

Provides that, where the Clerk is also a member of staff of the institution, the Clerk should be treated as a senior post holder for the purposes of Article 16. It does not indicate, as former Article 14(1) did, that references in those Articles to the suspension or dismissal of the Clerk only apply to his or her suspension or dismissal as a member of staff. This could cause confusion where a Clerk was employed as a member of staff in his or her capacity as Clerk.

Paragraph (2)

Article 17(2) simply provides that any suspension or dismissal in accordance with procedures made under Article 16 does not affect the Clerk's separate role as Clerk. This makes it clear that where a Clerk has a dual role in a College, although the Clerk may be suspended or dismissed from the other role, they will continue, unaffected, in the separate role of Clerk. This safeguards the position of the Clerk as an independent officer of the Corporation.

It may be helpful to look at three different categories of Clerk and to examine how the provisions for dismissal and suspension apply to each:

- an external Clerk who is appointed by the Corporation to provide clerking services but who is not an employee of the College, i.e. they are not a member of staff. When terminating such a Clerk's appointment the Corporation will have to do so in accordance with the terms of their contract but will not need to follow the procedures made in accordance with Article 16 for senior post holders, because the Clerk will not be a member of staff of the institution
- a person who is employed by a College on a full or part-time basis as the Clerk but who is not employed in any other capacity. Such a clerk will be treated as a senior post holder and the provisions of Article 16 will apply in the event of their suspension and/or dismissal as a member of staff (Article 17(1))
- a person who is appointed by a College as the Clerk but who is also employed in a separate role, for example, as Director of Estates. Such a person will be treated as a senior post holder when it comes to their dismissal or suspension as a member of staff (Article 17(1)). However, Article 17(2) provides that if the employee is suspended or dismissed as Director of Estates, under paragraph (2) this will not affect their position as Clerk which will continue until that office is suspended or terminated, either under the disciplinary procedures made in accordance with Article 16 where the Clerk is employed in that capacity, or under a separate agreement if they are not employed in that capacity but is appointed under a separate Clerk's contract. Where the Clerk is employed as a member of staff in another capacity, it is likely that they would also be deemed to be employed in their capacity as Clerk and any different arrangement, i.e. to the effect that they are not an employee for the purposes of the clerkship, would need to be very carefully expressed in writing

This Article is not carried over into Revised Schedule 4. Given the importance of ensuring the independence of the Clerk, Corporations may wish to retain the protection for the Clerk afforded by Article 17.

18. Students

(1) Any students' union shall conduct and manage its own affairs and funds in accordance with a constitution approved by the Corporation and no amendment to, or rescission of, that constitution, in part or in whole, shall be valid unless approved by the Corporation.

(2) The students' union shall present audited accounts annually to the Corporation.

(3) After consultation with representatives of the students, the Corporation shall make rules concerning the conduct of students, including procedures for their suspension and expulsion (including expulsion for an unsatisfactory standard of work or other academic reason).

General comments

This Article needs to be considered in the context of the general law. While Colleges are under no legal obligation to have a students' union, it is a simple matter for a group of students to come together for the purposes of representing students generally. Such a group is likely to be a students' union within the meaning of the Education Act 1994. If a students' union is established, the best view is that it will have a separate legal identity from that of the College. Its legal status will be that of an unincorporated association, i.e. similar to a club, and it will be regarded as a charity. As a consequence, officers of the students' union will be trustees of any property held for the purposes of the union under the Charities Act 2011. Please note that under the Charities Act 2011 (which consolidated the 1993 and 2006 Charities Acts) students' unions, although not previously required to register with the Charity Commission, have since 1 June 2010 been required to do so if their annual income exceeds the threshold for registration of excepted charities (i.e. £100,000 gross income). The Charity Commission has not issued any timetable for the introduction of the requirement to register excepted charities with annual income below the £100,000 threshold.

Compliance with charity law by Colleges is now monitored more systematically through designation of a Principal Regulator of charity law compliance. The Principal Regulator of SFC Corporations is the Secretary of State for Education.

The Education Act 1994 has imposed extensive duties on the governing bodies of colleges in regard to students' unions, in particular the responsibility under section 22 of the 1994 Act to take *"such steps as are reasonably practicable to secure that any students' union for students at the establishment operates in a fair and democratic manner and is accountable for its finances"*. The Corporation is required to have, and periodically review, a code of practice setting out how these responsibilities are discharged. The students' union's constitution must be in writing and approved by the Corporation, and reviewed at intervals of not more than five years. The NUS and AoC have approved a model constitution for student unions in colleges. There is a raft of other statutory requirements, e.g. relating to the election process for appointment to *"major union offices"*, the right of students to opt not to be a member of the union and the requirements relating to a complaints procedure for students. The Corporation must also ensure that the union's financial affairs are properly conducted and that appropriate arrangements exist for the Corporation to approve the union's budget and to monitor its expenditure. If the Corporation fails to discharge its statutory responsibilities in relation to the students' union, especially in respect of a union which is in financial difficulties, it is possible that the Corporation itself may be sued on the basis that the Corporation has assumed liability for the debt. The Corporation's role is, therefore, more far reaching than Article 18 would suggest.

The principle behind Article 18 is to establish lines of accountability for any students' union, and allocate responsibilities between the Corporation, and the Principal for the operation of procedures relating to students. The Article does not, however, address the need for Colleges to establish complaints procedures or for Corporations to monitor carefully complaints made under those

procedures to promote accountability and raise standards by setting appropriate performance indicators (see also commentary on Article 3(1)(a)).

Revised Schedule 4 does not carry over this provision. While it stipulates that *"an instrument must make provision about the procedures of the body and the institution"* it does not stipulate what the provisions of such procedures should be, although the provisions of the Education Act 1994 in relation to students' unions will still apply. The Corporation could, therefore, in theory delegate responsibility for making rules concerning the conduct of students to the Principal or another senior post holder or appropriate senior manager (if, for example, senior post holder designation is not to be retained). Case law has, however, indicated that the courts may strike down a decision taken by a public body where the decision maker was responsible for both the making of policies and rules and their application. Accordingly, where the Corporation has delegated the making of student disciplinary rules to the Principal it would be advisable for the Principal to delegate responsibility for enforcing them to another senior post holder/manager, e.g. a Deputy or Vice Principal/Director of Student Affairs or similar. Such a change should not however be made without first consulting student representatives.

Revised Schedule 4 does require the Corporation to publish details of its arrangements for obtaining the views of students on matters within the Corporation's responsibilities. It would be prudent to assume that this is wide enough to include rules concerning student conduct.

Paragraph (1)

A College may have more than one students' union (e.g. in respect of different campuses) or none at all. There is no requirement to establish a students' union. If one does exist, then the union must *"conduct and manage its own affairs and funds"* but in accordance with the constitution which the Corporation has approved and on the basis of audited accounts presented annually to the Corporation. Generally these accounts should not be consolidated with the College accounts. These provisions encapsulate the more important requirements of the Education Act 1994 (see general commentary above). The constitution should make it clear that for any amendment or rescission to be effective the Corporation must first give its approval.

Paragraph (3)

The starting point is the Principal's responsibility for maintaining student discipline and, within the rules and procedures made by the Corporation under this paragraph, suspending or expelling students on disciplinary grounds (Article 3(2)(f)). The Corporation exercises its *"oversight"* responsibility by making the rules (which are then implemented by the Principal) after consulting with representatives of the students. Although there is no longer a requirement for Colleges to consult the Academic Board or indeed even have an Academic Board, at some colleges the Academic Board is responsible for advising the Principal on the procedures for expulsion of students for academic reasons. This may need to be reviewed following the removal of the requirement for colleges to establish an Academic Board (see commentary on Article 3). Making rules for students, therefore, should be a participative process involving the Corporation, the Principal, any Academic Board (if applicable), and representatives of the students themselves.

Student disciplinary rules satisfy the principles of natural justice, in particular the principles that every student has the right to a fair hearing before an impartial adjudicator and has the right to be accompanied by somebody who can assist the student in making representations. Disciplinary rules should include the right of appeal to a person or persons who were not involved in the disciplinary process at an earlier stage. If the rules provide for the Principal to hear student appeals, it is important for the Principal to delegate his/her first instance power to take disciplinary action, including the power to suspend or expel, to another senior post holder (under Article 11) or, if senior post holder designation is not being retained, to another appropriately senior manager.

Although not specifically referred to in Article 18(3) or elsewhere in the Articles, the Corporation should ensure that complaints procedures for students are in place. A student dissatisfied with the way that the College has dealt with their complaint may be able to complain to the ESFA. For how to make complaints to the ESFA seethe ESFA's complaints procedure:

https://www.gov.uk/government/organisations/education-and-skills-funding-agency/about/complaints-procedure

Also, any College providing higher education under a franchise agreement should be aware that the Higher Education Act 2004 gives such higher education students the right to complain to the Office of the Independent Adjudicator in relation to any act or omission of the higher education provider

when they have exhausted the internal complaints procedures of that franchisor higher education provider.

If a Corporation takes advantage of the freedom under the Revised Schedule 4 to cease to designate posts as senior ones (see comment on Article 11) it will be necessary to amend the College's procedures for expulsion of students since these will currently provide that such decisions must be taken by a senior post holder in accordance with Article 11.

19. Financial matters

The Corporation shall set the policy by which the tuition and other fees payable to it are determined, subject to any terms and conditions attached to grants, loans or other payments paid or made by the ESFA[26].

General comments

The Corporation retains the power to set the policy by which tuition and other fees are determined. It should be noted that the FEFC *"requested"* Corporations to charge employed students 25 percent of fees for attending College courses. The Corporation could ignore this *"request"* since they retain the power to set fees, although as provided in Article 19, there are qualifying words stating that this power is *"subject to any terms and conditions attached to grants, loans or other payments paid or made by the ESFA"*. Logically, Article 19 belongs to the list of responsibilities of the Corporation appearing in Article 3(1). Under the Higher Education Act 2004 any further education College which is providing higher education courses on a franchise basis and which wishes to charge over the basic tuition fee must do so in accordance with a plan (known in practice as an access agreement) approved by the OfS. Financial sanctions will apply if such a College charges fees which have not been so approved and/or which exceed the maximum tuition fee.

The Corporation's role is to decide the overarching policy within which the tuition and other fees are determined by the Principal as part of his or her responsibilities as Chief Executive. This is another example of the College's system of checks and balances: the Corporation sets the policy, the Principal implements it and the Corporation monitors the implementation of the policy. Similar principles apply to the allocation of staffing responsibilities in respect of which the Corporation is responsible for *"setting a framework"* for the pay and conditions of staff and the Principal then determines the pay and conditions within that framework – see Articles 3(1)(f) and 3(2)(e). Article 19 draws attention to the authority of the ESFA, as custodian of the public purse, to impose a check on the policy making powers of the Corporation by attaching terms and conditions to the grant of public funds to the College (under section 101 of the Apprenticeship, Skills, Children and Learning Act 2009).

Revised Schedule 4 did not carry over this provision. The Corporation will, however, retain responsibility for the effective and efficient use of resources, solvency of the institution and safeguarding of its assets and it is hard to see how it can do so without setting the policy on the determining of fees (although not necessarily their actual level). Certain fee levels (e.g. those for undergraduate degree courses) raise major policy and strategic issues because of the legal implications (e.g. the need for an agreement with OfS), as well as the College's position in the market place.

26 YPLA in the original 2008 Articles.

20. Co-operation with the YPLA's[27] Auditor

The Corporation shall co-operate with any person who has been authorised by the ESFA[28] to audit any returns of numbers of students or claims for financial assistance and shall give any such person access to any documents or records held by the Corporation, including computer records.

General comments

Article 20 requires the Corporation to co-operate with those appointed by the ESFA to audit such records and claims for financial assistance ("the funding auditor"). The introduction of plan-led funding in 2004/05 for SFCs, however, brought with it the end for those Colleges of the annual external audit of their funding claims (and the potential retrospective claw back of funds where there has been under delivery). The ESFA's key assurance on the use of ESFA funds by such Colleges is now mainly provided by regularity audit, with periodic funding audits performed by auditors. This framework was created by the LSC Audit Code of Practice (LSC Circular 04/07) and continued with the publication of JACOP and, from March 2017, ACOP. For more information regarding audit arrangements see Part Two, Appendix 4 of this Commentary.

It will be recalled that one of the reasons for the creation of the AoC's English Colleges' Foundation Code of Governance and latterly the Code of Good Governance was the hope that its adoption by Colleges would encourage Government to reduce controls in relation to matters such as the Financial Memorandum, the Financial Management Control Evaluation and audit. Such reduction of controls was achieved with the coming into force from 1 August 2013 of JACOP (now ACOP). This followed the announcement by SFA and ESFA that Colleges which commit to the English Colleges' Foundation Code together with its annex on audit and accountability will not in addition have to commit to the Financial Reporting Council's UK Corporate Code of Governance. On this see now the ESFA Accounts Direction for the Annual Financial Statements:

https://www.gov.uk/government/publications/college-accounts-direction

Following the announcement by the ESFA that SFCs would no longer be required to submit to internal audit, Part 2 of JACOP extended this exemption to further education Colleges from 1 August 2013. Corporations do, however, still have to satisfy themselves that they are provided with adequate assurance of the robustness of their financial controls.

Revised Schedule 4 does not deal explicitly with audit requirements, presumably leaving this to the requirements of the funding body as set out in the Conditions of Funding Agreement with the Corporation and ACOP. It would therefore be possible to remove Article 20 if a Corporation wished to do so.

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27 YPLA's auditor in the original 2008 Articles, now ESFA.

28 See note 6.

21. Internal audit

(1) The Corporation shall, at such times as it considers appropriate, examine and evaluate its systems of internal financial and other control to ensure that they contribute to the proper, economic, efficient and effective use of the Corporation's resources.

(2) The Corporation may arrange for the examination and evaluation mentioned in paragraph (1) to be carried out on its behalf by internal auditors.

(3) [The Corporation shall not appoint persons as internal auditors to carry out the activities referred to in paragraph (1) if those persons are already appointed as external auditors under Article 22.[29]]

General comments

Under the Conditions of Funding Agreement the College is required to arrange internal and financial statements and regularity audit *in accordance with the ACOP and any best practice guidance drawn up and published by the ESFA in consultation with colleges*. JACOP confirmed that it was not mandatory for any college Corporation to have to appoint an internal audit service. It is for each college Corporation, on the advice of its audit committee, to determine for itself how best to fulfil its obligations to secure the proper, economic, efficient and effective use of resources and to safeguard the college's assets.

JACOP originally stated that there was to be no general legal restriction on qualified financial statements auditors also providing internal audit services, or on internal audit service providers undertaking the financial statements audit where they are qualified to do so. However, where a college decided to appoint one firm as both financial statements and internal auditors, it confirmed that they must establish and maintain appropriate safeguards to ensure relevant professional and ethical standards were met.

Please also see the commentary on Paragraph (3) below. Please also see Part Two, Appendix 4 for a summary of the key changes introduced by ACOP.

Paragraph (3)

Confirms that the external auditors of the College could not be appointed as the internal auditors. This mirrors Article 22(4). JACOP removed this prohibition from 1 August 2013. A Corporation wishing to appoint one firm to provide both financial statements audit and internal audit will need to resolve to delete Article 21(3). It would, however, be prudent before doing so to discuss the position with both the internal and external auditors. It may be inappropriate for an external auditor to undertake the role of internal auditor where this results in the issue of an overall opinion on controls and systems. It might be appropriate for an external auditor to undertake agreed procedures in respect of certain areas but this would be subject to relevant professional ethical guidance. Accordingly, a Corporation should consider this question in the context of its own financial regulations and developing risk management/assurance framework.

29 This paragraph can be deleted in the light of the ESFA announcement regarding internal audit discussed in the General comment above.

22. Accounts and audit of accounts

(1) The Corporation shall –

(a) keep proper accounts and proper records in relation to the accounts; and

(b) prepare a statement of accounts for each financial year of the Corporation.

(2) The statement shall –

(a) give a true and fair account of the state of the Corporation's affairs at the end of the financial year and of its income and expenditure in the financial year; and

(b) comply with any directions given by the ESFA[30] as to the information to be contained in it, the manner in which the information is to be presented, the methods and principles according to which it is to be prepared and the time and manner of publication.

(3) The accounts and the statement shall be audited by external auditors appointed by the Corporation in respect of each financial year.

(4) [The Corporation shall not appoint persons as external auditors in respect of any financial year if those persons are already appointed as internal auditors under Article 21.[31]]

(5) Auditors shall be appointed and audit work conducted in accordance with any requirements of the ESFA[32].

(6) The "financial year" means the first financial year and, except as provided for in paragraph (8), each successive period of twelve months;

(7) The "first financial year" means the period from the date the Corporation was established up to the second 31st July following that date, or up to some other date which has been chosen by the Corporation with the ESFA's[33] approval.

(8) If the Corporation is dissolved –

(a) the last financial year shall end on the date of dissolution; and

(b) the Corporation may decide, with the ESFA's[34] approval, that what would otherwise be the last two financial years, shall be a single financial year for the purpose of this article.

General comments

For the Corporation to be publicly accountable, it must keep proper accounts and accounting records and prepare in respect of each financial year a statement of accounts. Although reliance will be placed on the College's external auditors (now generally referred to as financial statements auditors) and accounts staff, it is the primary responsibility of the Corporation to ensure that

30 YPLA in the 2008 Articles as modified by the 2011 Modification Order, but Corporations are at liberty to substitute EFA.

31 This clause may now be deleted following the EFA announcement in relation to internal audit from 1.8.12. See comment on article 21(3) above.

32 See note 8.

33 See note 8.

34 See note 8.

Article 22 is complied with. Under s.172 of the Charities Act 2011 Corporations are under a duty to supply a copy of their most recent accounts to any member of the public on request.

These provisions allow the ESFA to agree a different financial year for a College, e.g. following a merger (Article 22(7)) and for the financial year to end on the date of dissolution of the College (Article 22(8)).

Paragraphs (1) and (2)

In accordance with its statutory duties the ESFA is responsible for determining what is contained in the College's statement of accounts and the other matters relating to the statement referred to in paragraph (2)(b).

In this regard colleges need to have regard to their Conditions of Funding Agreement and the relevant provisions of ACOP and the College Accounts Direction as amended from time to time.

Paragraphs (3) and (5)

Require the Corporation to arrange external (i.e. financial statement) audits in accordance with the requirements and guidance published by the ESFA (i.e. in ACOP and any related guidance). ACOP does not require Corporations to commission internal audit services provided that they ensure they have adequate assurance over the College's internal controls.

Under the ACOP the ESFA is a party to the engagement of the financial statements auditor. As a party to the engagement, the ESFA is able to set standards for regulatory audit work and monitor compliance with those standards. ACOP sets out (Annex A) Terms of Engagement between a Colleges and its external auditors. If a College or audit firm wish to use alternative wording this must be agreed with the ESFA.

Paragraph (4)

This mirrors Article 21(3) and confirms that the internal auditors of the College cannot be appointed as external (or financial statement) auditors. JACOP removed this prohibition from 1 August 2013 and it has not been reintroduced since. See the comment on Article 21(3) above.

23. Rules and bye-laws

The Corporation shall have the power to make rules and bye laws relating to the government and conduct of the institution and these rules and bye laws shall be subject to the provisions of the Instrument of Government and these Articles.

General comments

This Article gives the Corporation the power to make its own *"secondary legislation"* in the form of rules and bye-laws provided that they do not conflict with the Instrument or Articles. Interestingly, although in the private sector, company Boards have the power to make bye-laws, the power is seldom exercised in practice. This is largely because the standard form of Articles of Association of a company limited by shares are very detailed and comprehensive as a result of a series of Companies Acts going back almost 150 years. By contrast the Instrument and Articles are relatively simple and non-prescriptive. For this reason it is important for the Corporation, acting on the advice of its Clerk, to consider carefully whether the Instrument and Articles should be reinforced by rules and bye-laws.

Article 23 enables the Corporation to supplement the provisions of the Instrument and Articles by rules and bye-laws. Standing Orders may be (and are commonly) made supplementing the relevant provisions of the Instrument and Articles in relation to, e.g. how meetings of the Corporation and of its committees are to be conducted (Clauses 12, 13, 14 and 15 of the Instrument), committee terms of reference (Articles 4, 5, 6 and 7), rules relating to claims by Corporation members for reimbursement of expenses (Clause 18 of the Instrument), rules relating to terms of office of Corporation members (Clause 9(1) of the Instrument), policies relating to access to information (Clause 17 of the Instrument), access to committees by non-members and publication of committee minutes (Article 8), any rules adding to or elaborating the list of non-delegable responsibilities (Articles 9, 10 and 11), and procedures relating to the modification or replacement of the Instrument and Articles (Article 25).

Any such rules and bye-laws must be consistent with the provisions of the Instrument and Articles. Thus, the Corporation may make a standing order to the effect that Corporation members who disclose an interest under Clause 11(2) of the Instrument may be required by the Corporation to withdraw from the part of the meeting at which the relevant matter is to be considered, but the Corporation may not make a standing order which allows a Corporation member to vote on the matter in question. A Standing Order which purports to allow a Corporation member to vote in such circumstances would be ineffective since it would contravene the requirements of the Instrument. Subject to the need for consistency, rules and bye-laws may add to the provisions of the Instrument and Articles but not subtract from them.

In the interests of openness, transparency and accessibility, all rules, bye-laws, policies and procedures of the Corporation should be assembled in a handbook for Corporation members (or equivalent document or collection of documents). The handbook should be regularly reviewed and updated and given to each Corporation member on appointment as part of the College's induction process.

Revised Schedule 4 does not deal specifically with bye-laws, leaving this to the Corporation in accordance with its power to set down appropriate procedures for the College.

24. Copies of Articles of Government and rules and bye-laws

A copy of these Articles, and of any rules and bye-laws, shall be given free of charge to every member of the Corporation and at a charge not exceeding the cost of copying or free of charge, to any other person who requests a copy and shall be available for inspection at the institution upon request, during normal office hours, to every member of staff and every student.

General comments

See general commentary on Clause 19 of the Instrument. It should be noted that the requirement relating to making a copy of the Articles available for inspection by members of staff and students extends to rules and bye-laws made under Article 23.

This provision is carried over into Revised Schedule 4 to the extent that the Instrument and Articles are concerned, but not with regard to College rules and procedures. Details of rules and procedures could, however, be requested under the Freedom of Information Act 2000 so it would seem sensible to make them available on the same basis as before. This is required by the English Colleges' Foundation Code (section 2.5), which provides that:

"The board should conduct its affairs as openly and transparently as possible; consulting fully on its plans and delivery. The general principles and requirements of the Freedom of Information Act must apply, so that staff and students have access to all appropriate information about the board's proceedings."

The Code of Good Governance also states at section 10.5 that "the Board should set out in writing and regularly review agreed governance procedures often described as Standing Orders. These should include levels of delegated authority and any sub-delegation."

See also the general commentary on Clause 19 of the Instrument.

25. Modification or replacement of the Instrument and Articles of Government

(1) Subject to paragraph (2), the Corporation may by resolution of the members modify or replace its instrument and articles of government, [after consultation with any other persons who, in the Corporation's view, are likely to be affected by the proposed changes[35]] [only with the consent of the trustees of the relevant sixth form College[36]].

(2) The Corporation shall not make changes to the instrument or articles of government that would result in the body ceasing to be a charity.

General comments

Article 25 was inserted by the 2012 Modification Orders to ensure that all Corporations were able to take advantage of the ability under s.22 FHEA 1992 (as substituted by the Education Act 2011) to amend their Instrument and Articles.

Paragraph (1)

In order to comply with this paragraph it will be important that Corporations comply with the requirements of natural justice and fairness. Considerable case law has developed around the requirements of fair consultation, e.g. the consultation must be real and not a mere token exercise. Guidance on consultation on significant changes to College governance is available to Colleges purchasing Eversheds Sutherland's Education Act Toolkit.

Paragraph (2)

This paragraph as well as being necessary to ensure that the Articles of all Colleges comply with Revised Schedule 4 is a useful reminder to Corporation members of the charitable nature of SFC Corporations. Clerks may wish to ensure that some explanation of the duties of charity trustees is contained in members' induction training. Any proposed amendment to the Instrument and Articles must be examined to ensure compliance with charity law and legal advice obtained if necessary.

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35 SFCs subject to Modification Order 2012 No. 1.

36 Former voluntary controlled SFCs subject to Modification Orders 2012 Nos. 3-5.

26. Dissolution of the Corporation

The Corporation may by resolution dissolve itself and provide for the transfer of its property, rights and liabilities.

General comments

Article 26 was inserted by the 2012 Modification Orders in order to ensure that all Corporations were able to take advantage of the ability under 33N FHEA 1992 (as inserted by the Education Act 2011) to self-dissolve.

The Education Act 2011 removed the power of the Secretary of State to dissolve SFC Corporations and transferred the power to Corporations themselves. The Secretary of State retains the power under FHEA 1992 s.56E to require a Corporation to resolve to dissolve itself in an intervention situation. It appears from New Challenges, New Chances, issued by DBIS in November 2011, that use of the statutory intervention power will be reserved for exceptional cases of poor educational or financial performance, the ESFA will normally be able to manage poor performance situations using their power to attach conditions of funding. DBIS and DfE indicated, however, in *Rigour & Responsiveness in Skills*, issued in April 2013, that where intervention is required it will be swift and incisive, being overseen by the FE Commissioner. See now *College Oversight: Support and Intervention (DfE October 2020)* which sets out the DfE's strengthened college oversight regime with its stated aim to "*improve financial resilience and quality by incentivising and supporting college leaders to recognise issues and take early action, we before colleges get into serious difficulty*."

https://www.gov.uk/government/publications/college-oversight-support-and-intervention

In relation to dissolution of a Corporation the following points should be noted:

- before resolving to dissolve the Corporation should ensure that ESFA is satisfied with the process it has used to reach this conclusion. It should be noted that in the case of further education Colleges, it is expected that the Corporation will undertake the Structure and Prospects appraisal set out in Annex A to *New Challenges, New Chances* issued by DBIS in November 2011. This entails an open and competitive process for choosing any new delivery model and/or partner. New Challenges, New Chances was a DBIS rather than a DfE document and the 2014 DBIS guidance on intervention states that "*although the Structure and Prospects Appraisal process does not explicitly apply to sixth form colleges we would expect that many of the same issues will be considered by sixth form colleges considering significant structural change*."

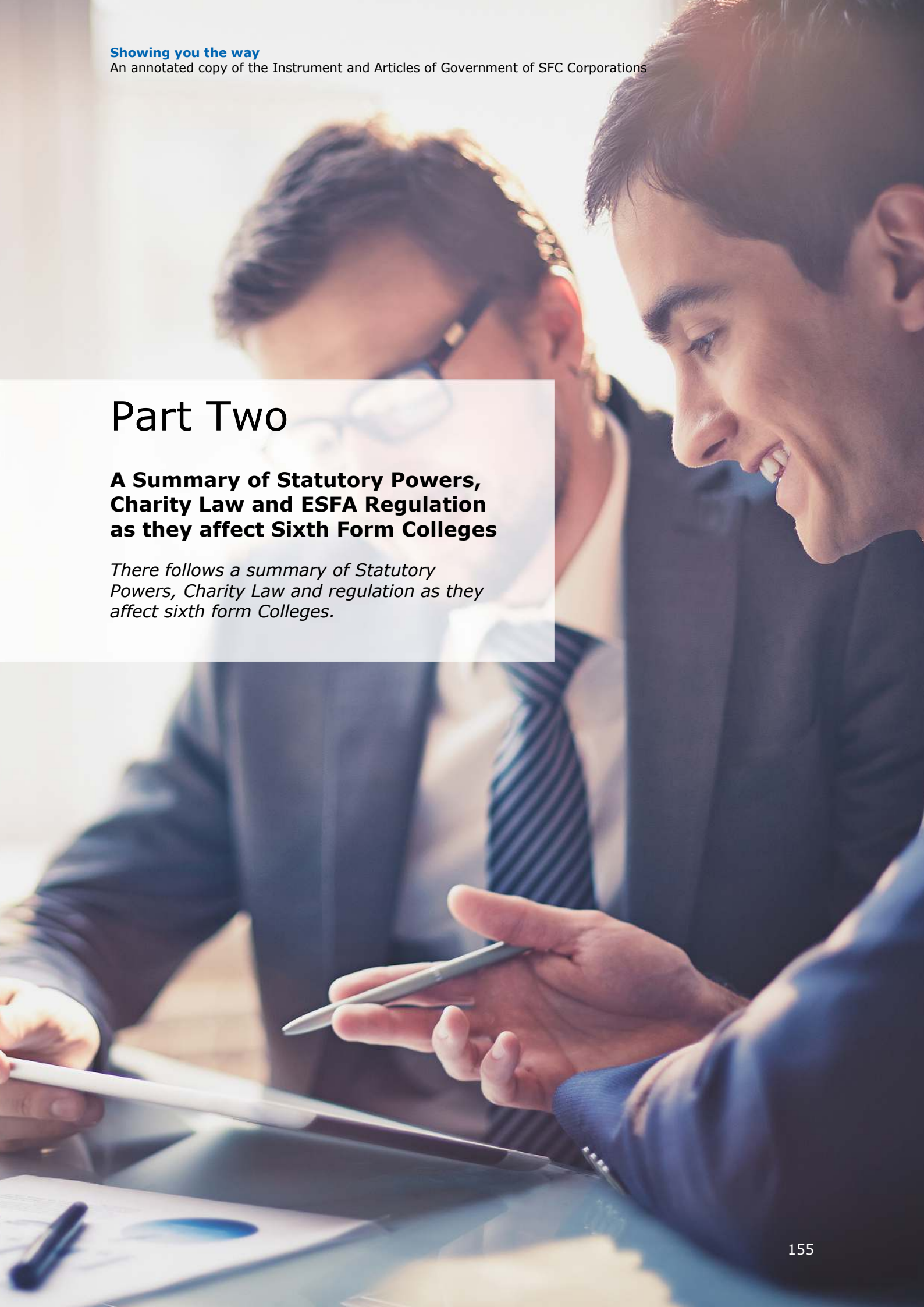
  More recently DfE issued guidance that applies to both further education and sixth form colleges in respect of *Further Education Commissioner-led structure and prospects appraisals: June 2018:*

  https://www.gov-.uk/government/publications/fe-commissioner-led-structure-and-prospects-appraisals-spa

- the Corporation will need to follow the procedure set out in the relevant regulations (the SFC Corporations (Publication of Proposals) (England) Regulations 2012) and resolve to transfer its assets and liabilities immediately prior to dissolution in accordance with the Dissolution of Further Education Corporations and Sixth Form College Corporations (Prescribed Bodies) Regulations 2012, which set out the bodies which can receive such assets and liabilities.

- the Corporation will need to ensure that the transfer is undertaken as if it were a normal transfer of an undertaking, i.e. with both Colleges undertaking suitable due diligence inquiries of the other and with the transfer being subject to appropriate documentation. The transfer will almost certainly amount to the transfer of an undertaking for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006, triggering duties to inform and (potentially) consult with employee representatives

– accordingly both Colleges will need to be advised by suitably experienced law firms.



Part Two

A Summary of Statutory Powers, Charity Law and ESFA Regulation as they affect Sixth Form Colleges

There follows a summary of Statutory Powers, Charity Law and regulation as they affect sixth form Colleges.

Index

1. Statutory Powers

1.1 Further and Higher Education Act 1992 ("FHEA")

It is important to realise that, unlike a natural person who may do anything which s/he pleases provided that it is not unlawful, a SFC Corporation may only lawfully exercise those powers it has been specifically granted. SFC Corporations were incorporated by order of the Secretary of State under the FHEA and, as statutory Corporations, their powers to act are limited to those set out in the FHEA (as amended by the Learning and Skills Act 2000 ("LSA")), the Further Education and Training Act 2007 ("FETA"), the Apprenticeship, Skills, Children and Learning Act 2009 (ASCLA) and the Education Act 2011).

(1) Sections 33E and 33F of the FHEA set out the principal and supplementary powers of a SFC Corporation (see Appendix 1). These sections broadly give Corporations power to provide education and training and to do things necessarily incidental to that. Where a Corporation is considering undertaking activities which might be regarded as not providing education or training, or which are not necessarily incidental to that, they should take legal advice. If a Corporation exceeds or otherwise abuses these powers, e.g. Corporation members authorise a transaction which is outside the powers specified in the FHEA, the transaction will be void (also known as "ultra vires"). This may result in:

- personal liability for Corporation members who were a party to it, since they "warranted" that the Corporation had a power which it does not in fact possess. It should be noted that under section 145 LSA a member of a governing body of a SFC Corporation may apply to the Courts to be relieved fully or partially from actual or potential personal liability if the Court finds that the Corporation member has acted "honestly and reasonably." This relief applies only to civil not criminal liability

- a danger of losses for the other party to the transaction because it is unenforceable.

The reasons behind the statutory restrictions on a Corporation's powers are twofold. First, the Corporation should not exercise powers which are greater than those which have been specifically delegated to it by Parliament (as the ultimate sovereign body). Second, the restrictions are intended to curb against the improper use of the Corporation's assets and funds.

(2) **Section 33I FHEA also imposes on SFC Corporations an Instrument and Articles of Government which govern the internal structure of the Corporation,** setting out, for example, the constitution of the governing body and the exercise of authority within the College, in much the same way as the Memorandum and Articles of Association of a company do. The form of the Instrument and Articles was prescribed until 31 March 2012, in accordance with the wordingprescribed by ministerial Order in 2008 as amended by Modification Orders made by the YPLA in 2011 and 2012. From 1 April 2012 Corporation have had the power to amend the Instrument and Articles provided they comply with the requirements set out in the Revised Schedule 4 as substituted by the 2011 Act. The Instrument and Articles of Government must be complied with but are ultimately subservient to the powers set out in sections 33E and 33F FHEA.

The instrument of government of former voluntary controlled Colleges which are also governed in accordance with a trust deed must contain provisions to ensure that the majority of governors are appointed to ensure the preservation and development of the established character of the College and that it is governed in accordance with the trust deed: s.33J.

(3) **The ability of Corporations to amend the Instrument and Articles** is set out in section 33L of FHEA (as substituted by the 2011 Act) and article 25 (inserted by the 2012 Modification Order). Amendments must be within the parameters set out in the Revised Schedule 4. Section 33L requires that where a SFC has trustees their consent is needed to changes to the Instrument and Articles.

Consent of the Secretary of State to amendments is no longer required but note that the consent of the Secretary of State is needed with regard to the following provisions in the standard form Instrument and Articles:

- change of the name of the College: see Clause 20 of the Instrument. This provision is required by FHEA and therefore could not be deleted by a Corporation
- acquisition by a member of an interest in any property held or used for the purposes of the institution (Clause 11(1) of the Instrument). This provision is not required by FHEA and therefore could be deleted by a Corporation, although the requirements of charity law would still need to be satisfied
- temporary appointment of the Principal or senior post holder without a contract of employment with the Corporation (Article 6). This provision is not required by FHEA and therefore could be deleted by a Corporation.

While Revised Schedule 4 requires that the Instrument must set out the procedure for making amendments to the Instrument and Articles, unless the Corporation decided otherwise the procedure will be the same as for any other decision of the Corporation. Corporations should consider whether any special rules should be introduced in order to ensure that changes are thoroughly considered. For example, it might be appropriate to require that changes are considered at a face to face meeting of the Corporation (if alternative methods of decision making are allowed). There could also be a requirement for a change to require more than a bare majority, on the analogy of the 75% majority required for a special resolution to change a company's articles of association. Alternatively, or in addition, the quorum requirement could be increased in relation to such decisions.

1.2 Promotion of well-being of local area

The Apprenticeships, Skills, Children and Learning Act 2009 added a new section 33H to the 1992 Act (see Appendix 1). This required SFC Corporations when exercising their functions under sections 33E and 33F to have regard, amongst other things, to the objective of promoting the economic and social well-being of the local area, and in doing so, to have regard to any guidance issued by the Secretary of State. This provision was repealed from 1 April 2012: the coalition government felt that it was unnecessary for there to be legal compulsion to require Colleges to do what they would do in any event.

1.3 Federation and Collaboration

(1) The possibility of establishing federations and collaborations between SFC Corporations and schools is just one area where it is crucial to understand the extent of the powers of a SFC Corporation. Whereas the FHEA previously gave Corporations no powers in this area, the LSA amended the FHEA to give them the power to provide secondary education (as defined), provided that they consult relevant local education authorities before doing so (see sub-sections 33E(1) and (2) FHEA set out in Appendix 1). Until September 2013 there was no funding mechanism in place to enable a SFC to recruit students aged 14-16 directly, rather than under collaborative arrangements with schools or local authorities. However, DBIS announced in December 2012 that from September 2013 funding arrangements would be put in place to enable Colleges to undertake direct recruitment of such students, provided a range of conditions is met, such as the creation of a discrete 14-16 centre. See DfE guidance on Full time enrolment of 14-16 year olds in FE and SFCs:

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(2) It is also important to understand what statutory restrictions are placed on schools in this area. Under the Education and Inspections Act 2006 ("EIA") school governors have to consider whether delivery of the curriculum entitlement should involve collaboration with other schools or Colleges at the fourth key stage and, where relevant, in respect of pupils aged 16 to 18 (section 74) Delivery may be facilitated by collaboration with other schools or colleges. In addition, there is a general power in the EIA for maintained schools and further education bodies to collaborate (section 166, see appendix 2). This is intended to facilitate the creation of federations for provision of education and training to those aged 14-19. The preferred, although not prescribed, vehicle for such collaborations is a joint committee. With effect from 25 May 2007 the operation of these collaborative arrangements is governed by The Collaborative Arrangements (Maintained Schools and Further Education Bodies) (England) Regulations 2007 (SI 2007/1321).

(3) Note also that under the Further Education and Training Act 2007 the range of intervention situations was broadened to include a power to give a direction to a SFC Corporation to make

collaboration arrangements with another school or College (within the meaning of section 166 EIA). Intervention powers have under the 2011 Act reverted to the Secretary of State.

1.4 Companies and Charitable Incorporated Organisations ("CIOs")

(1) A Corporation may wish to form or participate in the forming of a company for many reasons. It may wish to undertake non-charitable activities such as the provision of full cost recovery training exclusively benefitting a particular employer; or it may wish to undertake a joint venture with another College or private training provider, especially where the venture involves a degree of risk. In such cases legal advice should be obtained on the choice of legal structure. At one time there were some doubts as to whether a College could lawfully participate in a guarantee company but these were resolved by an amendment to FHEA 1992 in the Further Education and Training Act 2007 (FETA) since when it has been clear that Colleges can participate in both companies limited by shares and those limited by guarantee. The latter is the most commonly used form of corporate charitable vehicle. Where the company was to be used for the purpose of running an educational institution or to provide publicly funded education the consent of the local authority was required under s.33G FHEA 1992. However, the 2011 Act repealed s.33G from 1 April 2012 so consent to use a company for the conduct of an educational institution or for provision of publicly funded education is no longer needed (though see further section (3) below).

(2) It should therefore be noted that a SFC Corporation should only participate or create companies as long as the Corporation is satisfied, with the benefit of legal advice, that:

- participation in that company is within the powers of a college Corporation as set out in sections 33E and 33F of the FHEA as amended

- any investment by the college in the company is in accordance with the requirements of charity law (see below)

- the requirements of the ESFA in terms of oversight of the company by the Corporation of the college are met. On this see the SFA guidance *Consent for Further Education Colleges to Invest in Companies: June 2011.* This guidance is no longer mandatory as consent is now longer needed, but other aspects of the guidance are still relevant.

(3) The position will be the same where a Corporation wishes to participate in or create a charitable incorporated association ("CIO"). The CIO was a new structure introduced under the Charities Act 2006 and now provided for in the Charities Act 2011). It is designed to provide for the benefits of a legal entity with limited liability without the drawbacks of having to comply with regulation by both Companies House and the Charity Commission, as CIOs only have to register with the Charity Commission. Further information is available from the Charity Commission website and see the Eversheds Sutherland briefing Charitable Incorporated Organisations.

(4) In terms of the powers of schools to participate in guarantee companies, section 11 Education Act 2002 gives schools the power to participate in companies for the benefit of schools, so any such collaboration with a college must provide some benefits to the school(s) concerned and not merely to the partner college.

1.5 Special Educational Needs (SEN)

It should be noted that the Children and Families Act 2014 introduced from 1 September 2014 a duty on colleges, schools and academies to cooperate with local authorities regarding SEN and to use their best endeavours to ensure that the assistance stated to be needed in the student's Education, Health and Care Plan (EHC, replacing Statements of Special Educational Needs) is provided. See 2014 DfE guidance for Colleges (updated in March 2015) on implementing the new 0-25 special needs system accessible at:

https://www.gov.uk/government/publications/implementing-the-0-to-25-special-needs-system-further-education

2. Charity Law

2.1. Section 33M FHEA states that **SFC Corporations are exempt charities**. Charity law lays down a parallel set of rules which must be complied with in addition to sections 33E and 33F FHEA.

2.2. An exempt charity is a charity at law but it is exempt from the supervisory powers of the Charity Commissioners and is not registered as a charity on the Charity Commission's Register of Charities. The effect of exempt charitable status is that the majority of the regulatory provisions of the Charities Act 2011 ("CA") do not apply. Until recently the rationale for this has been that SFC Corporations have adequate regulation elsewhere (e.g. through the ESFA and the DfE). However, the Charities Act 2006 (now subsumed into the Charities Act 2011) introduced new arrangements for exempt charities to have their compliance with charity law monitored by "principal regulators" which now require exempt charities to demonstrate compliance with charity law, rather than this simply being presumed. For SFC Corporations, the principal regulator from 1 August 2011 is the DfE. In practice, however, Colleges are likely to find significant overlap between the requirements of charity law, the Instruments and Articles of Government and the principles of good governance generally.

2.3. It is important to realise that those who are trustees of the charity have common law duties under charity law which they owe to the charity. The CA refers to charity trustees being "*persons having general control and management of the administration of the charity*". This definition captures directors of charitable companies and the management committees of unincorporated associations. Governors of SFCs are probably not trustees in a strict sense but are likely to be regarded as quasi-trustees by the courts and so must adhere to the duties imposed on charity trustees by common law. These duties are well described in the Charity Commission publication The Essential Trustee, available on its website at:

https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3

The duties include the obligations to:

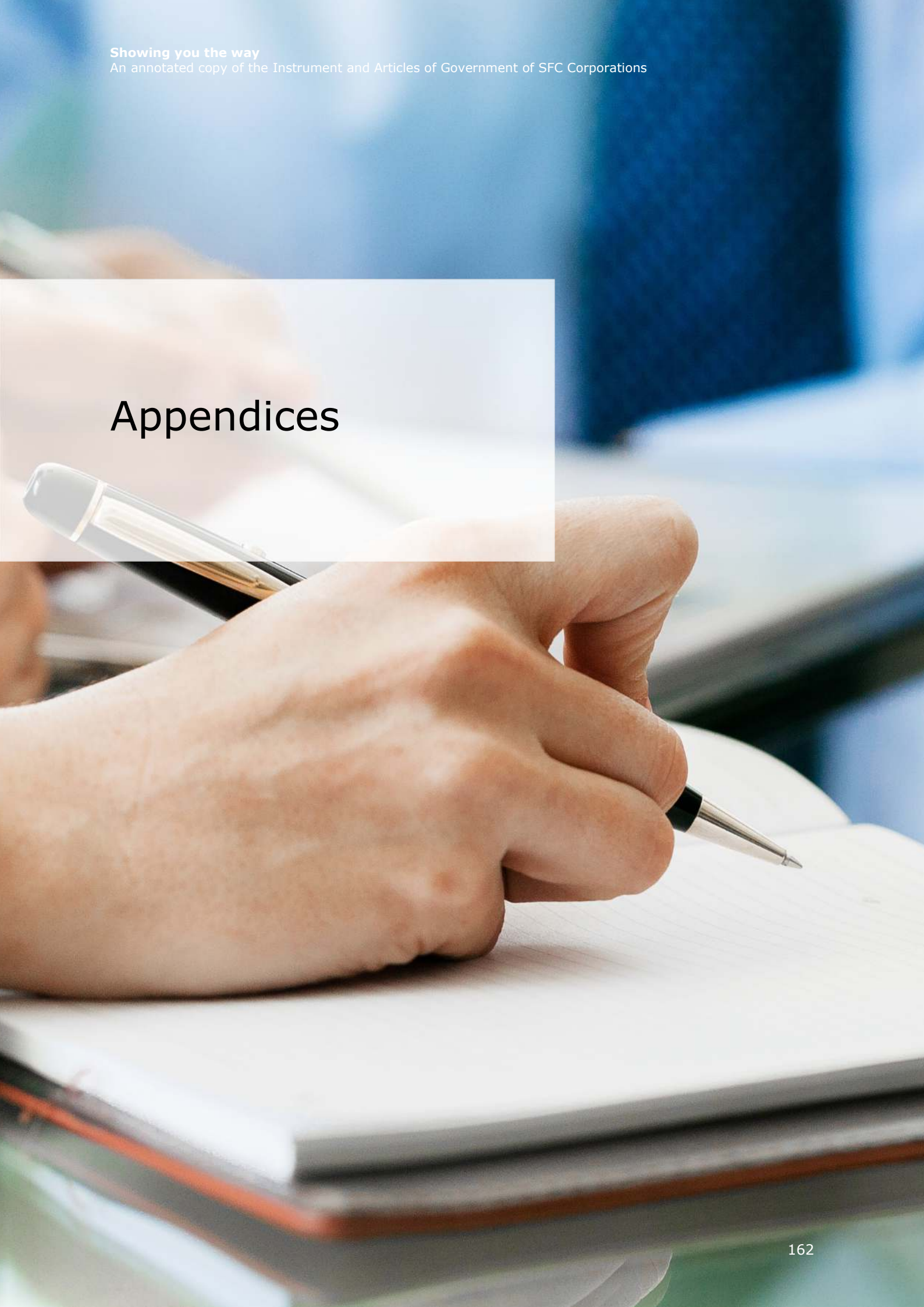
- act reasonably and prudently in all matters relating to the charity
- always act in the best interests of the charity
- apply the income and property of the charity only for it charitable purposes, which for a further education Corporation are its powers set out in sections 33E and 33F FHEA
- protect the property of the charity
- invest the funds of the charity only in accordance with powers of investment. Under the Trustee Act 2000 trustees have a statutory duty of care to "*exercise such care and skill as in reasonable in the circumstances*" having regard to "*any special knowledge or experience that the trustee has or holds himself out as having, and if the trustee acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession*"
- regularly review the effectiveness of the charity
- ensure an efficient, economic and effective use of resources and realise a commercial rate of economic return

3. Regulation By The Education and Skills Funding Agency ("ESFA")

3.1. SFCs are subject to a wide array of bodies providing regulation and guidance. However, their main regulator is the ESFA. As the principal funder of most Colleges, the most important regulatory mechanism used by the ESFA is through its conditions of funding, set out in its Funding Agreement with Colleges. A brief summary appears as Appendix 3.

3.2. The ESFA also has detailed requirements in respect of audit, internal controls and accounts. See the commentary on Articles 20, 21 and 22. The legacy bodies of the ESFA issued ACOP to replace JACOP from March 2017. ACOP is applicable for periods commencing after 1 August 2016. A note on the ACOP appears as Appendix 4.

Appendices



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Appendix 1 – Sections 33E and 33F of the Further and Higher Education Act 1992

The principal and supplementary powers of a further education Corporation are set out in sections 33E and 33F of the Further and Higher Education Act 1992 as amended by the Learning and Skills Act 2000, the Education Act 2002, the Further Education and Training Act 2007, the Apprenticeships, Skills, Children and Learning Act 2009 and the Education Act 2011. Sections 33E and 33F of the 1992 Act are set out below. Note that the 2011 Act has added a new section 33E(1A) which ensures that former voluntary controlled SFC Corporations conduct their College in a way that secures that the established character of the College is preserved and developed and that any trust deed is complied with.

Principal Powers

Section 33E

(1) A sixth form College Corporation may do any of the following –

(a) provide further and higher education,

(b) provide secondary education suitable to the requirements of persons who have attained the age of 14,

(c) provide education which is secondary education by virtue of section 2(2B) of the Education Act 1996,

(d) participate in the provision of secondary education at a school,

(e) supply goods or services in connection with their provision of education.

(2) The powers conferred by subsection (1) are referred to in section 33F as the Corporation's principal powers.

(3) A sixth form College Corporation may not provide education of a kind specified in subsection (1)(b), (c) or (d) unless they have consulted such [local authorities] as they consider appropriate.

(4) For the purposes of subsection (1), goods are supplied in connection with the provision of education by a sixth form College Corporation if they result from –

(a) their provision of education or anything done by them under this Act for the purpose of or in connection with their provision of education,

(b) the use of their facilities or the expertise of persons employed by them in the fields in which they are so employed, or

(c) ideas of a person employed by them, or one of their students, arising out of their provision of education.

(5) For the purposes of subsection (1), services are supplied in connection with the provision of education by a sixth form College Corporation if –

(a) they result from their provision of education or anything done by them under this Act for the purpose of or in connection with their provision of education,

(b) they are provided by making available their facilities or the expertise of persons employed by them in the fields in which they are so employed, or

(c) they result from ideas of a person employed by them, or of one of their students, arising out of their provision of education.

Supplementary Powers

Section 33F

(1) A sixth form College Corporation may do anything (including in particular the things referred to in subsections (2) to (6)) which appears to the Corporation to be necessary or expedient for the purpose of or in connection with the exercise of any of their principal powers.

(2) A sixth form College Corporation may conduct an educational establishment for the purpose of carrying on activities undertaken in the exercise of their powers to provide further or higher education.

(3) In particular, a sixth form College Corporation may conduct the relevant sixth form College as from the date specified in the order designating or establishing the Corporation as a sixth form College Corporation.

(4) A sixth form College Corporation may provide facilities of any description 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.

(5) The facilities include –

(a) boarding accommodation and recreational facilities for students and staff, and

(b) facilities to meet the needs of students with learning difficulties.

(6) A sixth form College Corporation may –

(a) acquire and dispose of land and other property,

(b) enter into contracts, including in particular –

(i) contracts for the employment of teachers and other staff for the purposes of or in connection with carrying on any activities undertaken in the exercise of their principal powers; and

(ii) contracts with respect to the carrying on by the Corporation of any such activities,

(c) form, participate in forming or invest in a company,

(d) form, participate in forming or otherwise become a member of a charitable incorporated organisation (within the meaning of Part 11 of the Charities Act 2011),

(e) borrow such sums as the Corporation think fit for the purposes of –

(i) carrying on any activities they have power to carry on, or

(ii) meeting any liability transferred to them under sections 23 to 27,

(f) in connection with their borrowing, grant any mortgage, charge or other security in respect of any land or other property of the Corporation,

(g) invest any sums not immediately required for the purpose of carrying on any activities they have power to carry on,

(h) accept gifts of money, land or other property and apply it, or hold and administer it on trust for, any of those purposes,

(i) 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.

(8) For the purposes of this section a person has a learning difficulty if –

(a) the person has a significantly greater difficulty in learning than the majority of persons of the same age, or

(b) the person has a disability which either prevents or hinders the person from making use of facilities of a kind generally provided by institutions within the further education sector for persons of the same age.

(9) But a person is not to be taken to have a learning difficulty solely because the language (or form of language) in which the person is or will be taught is different from a language (or form of language) which has at any time been spoken in the person's home.

(10) A reference in this section to investing in a company includes a reference to becoming a member of the company and to investing in it by the acquisition of any assets, securities or rights or otherwise.

(11) A sixth form College Corporation may provide advice or assistance to any other person where it appears to the Corporation to be appropriate for them to do so for the purpose of or in connection with the provision of education by the other person.

……

Section 33H

Duty in relation to promotion of well-being of local area

Repealed by Education Act 2011.

Appendix 2 – Section 166 of the Education and Inspections Act 2006

Collaboration arrangements: maintained schools and further education bodies

(1) Regulations may enable:

(a) the governing body of a maintained school, whether alone or together with other such governing bodies, to make collaboration arrangements with one or more further education bodies;

(b) a further education body, whether alone or together with other further education bodies, to make collaboration arrangements with the governing body of a maintained school or the governing bodies of two or more such schools;

(c) a further education body to make collaboration arrangements with one or more further education bodies.

(2) "Collaboration arrangements" are arrangements for any of the functions of any of the bodies who make the arrangements ("the collaborating bodies") to be discharged jointly or by a joint committee of those bodies.

(3) Regulations may make provision as to:

(a) the establishment by the collaborating bodies of a joint committee of those bodies for the purposes of discharging any functions in pursuance of collaboration arrangements made by them ("a joint committee");

(b) the appointment of persons to serve on a joint committee (including provision as to the restrictions or other requirements relating to any such appointments) and their removal from office;

(c) the appointment of a clerk to a joint committee (including provision as to the restrictions or other requirements relating to any such appointment) and his removal from office;

(d) the appointment by a joint committee of one of their number to act as clerk for the purposes of a meeting where the clerk fails to attend;

(e) rights of persons to attend meetings of a joint committee;

(f) restrictions on persons taking part in proceedings of a joint committee;

(g) other matters relating to the constitution or procedure of a joint committee.

(4) Regulations may make provision as to:

(a) the functions of collaborating bodies which may or may not be discharged jointly, or by a joint committee, in pursuance of collaboration arrangements;

(b) the manner in which such functions are to be discharged jointly, or by a joint committee, in pursuance of collaboration arrangements;

(c) any other matters which are relevant to the discharge of functions by the collaborating bodies jointly, or as the case may be, by a joint committee in pursuance of such arrangements.

(5) Regulations may provide that any enactment relating to:

(a) the functions of the collaborating bodies which are to be discharged in pursuance of collaboration arrangements, or

(b) the governing bodies, or as the case may be the further education bodies, by whom those functions are to be discharged, is to have effect subject to all necessary modifications in its application in relation to those functions and the bodies by whom they are to be discharged.

(6) In this section – "further education body" means:

(a) a further education Corporation (as defined by section 17(1) of the Further and Higher Education Act 1992), or

(aa) a sixth form College Corporation (as defined in section 90 of that Act), or

(b) the governing body of a designated institution (as defined by section 28(4) of that Act) which is a body incorporated by virtue of section 143(4) of the Learning and Skills Act 2000 (c. 21);

"maintained school" means a community, foundation or voluntary school, a community or foundation special school or a maintained nursery school;

"regulations" means regulations made by the Secretary of State (in relation to England) or the Assembly (in relation to Wales).

……

Note: section 166 was brought into force on 25 May 2007 by statutory instrument (SI 2007/1321). The statutory instrument makes provision for the practical workings of joint committees comprising representatives of the governing bodies of one or more maintained schools and one or more further education bodies, for the purpose of collaboration.

Appendix 3 – Summary of ESFA's College Funding Framework

1. The lead funding body for SFCs is the ESFA. In 2020 to 2021 SFC funding will be contract under the new contract framework.

2. The purpose of the new framework is to:

2.1 reduce the number of separate agreements that providers will hold with ESFA;

2.2 ensure consistency across ESFA agreements; and

2.3 update the contracts with the latest commercial best practice.

3. The framework will be used for all FE funding except for levy apprenticeships and European Social Funds.

4. The ESFA started to roll out the framework in May 2019 with the Advanced Learner Loans and add further allocated funding for the 2019 to 2020 funding year. It also moved the procured AEB and non-levy apprenticeships funding across to this framework in the summer of 2019.

5. The agreements are formed of a main terms and conditions document and schedules. Further information about the new framework can be accessed here:

   https://www.gov.uk/guidance/esfa-education-and-skills-contracts-2019-to-2020

6. Schedule 9 of the Conditions of Funding Agreement sets out the key issues for Corporation members to take account of. Nevertheless, all governors should ensure that they have reviewed and are familiar with the conditions under which the college receives its funding.

Appendix 4 – Joint Audit Code of Practice/Audit Code of Practice

JACOP

The last version of JACOP was issued in June 2016 and was substantially unchanged from the previous version. It contained only minor editorial changes and clarifications. JACOP was relevant to accounting periods ending on or after 31 July 2016.

JACOP set out the mandatory audit requirements for colleges and the model documents needed to meet these requirements, including mandatory minimum terms of reference for the audit committee and requirements for financial statements audit, regularity assurance and internal audit.

Many of the requirements upon colleges reflect normal requirements and practice for central government funded bodies and reflect upon best practice across the voluntary and commercial sector.

JACOP was initially introduced for the following reasons:

- most significantly, the introduction of plan-led funding from 2004/2005 onwards (see LSC Circular 05/03) for the majority of Colleges. This led to changes to the assurance regime required by the LSC and now the ESFA. In particular, plan-led funding ended the requirement for Colleges to have an annual external audit of their funding claims. This was replaced by an increased reliance on "regularity audit" (see below), changing the role of the financial statements auditor

- the drive by the Government to reduce bureaucracy. In practice Colleges will not have perceived there to have been a significant reduction in bureaucracy. Indeed in 2008/9, the LSC expressed concerns about the reliability of data provided by some Colleges and, as a result, re-introduced funding audit for a sample of 75 larger Colleges, particularly focussing on adult responsive funding. Plan-led funding poses the risk of funding claw-back in what is a complex area of funding, at a time when such claw-backs can have a significant impact on college finances.

ACOP

In March 2017 ACOP was issued. The ACOP contained few changes from the JACOP. The main responsibilities of Corporations remain set out in the Instrument and Articles of Government and Conditions of Funding Agreement. The role of the Audit Committees in ensuring that such obligations is met continues to be emphasized.

ACOP has been applicable for periods commencing on or after 1 August 2016 and has been updated to reflect the Machinery of Government changes, including the transfer of the SFA into the DfE. Consequently it replaces the "Joint" Audit Code Of Practice. ACOP includes a new annex highlighting regularity concerns for colleges to consider. Examples include:

- weaknesses in the Corporation's approach to holding management to account

- ineffective implementation of policies and procedures

- ineffective management structure including lack of control processes

The ACOP does not include a regularity self-assessment questionnaire for Colleges to consider and complete and provide to their external auditor as part of the regularity assurance planning. An updated version of the questionnaire is expected to be issued separately.

The Funding Regime and Regularity Assurance Framework

Until 2004/5, Colleges were given a funding allocation by the LSC based on what was a best joint estimate of the activity the College would deliver. Colleges submitted a funding claim which was audited in depth by LSC appointed auditors each year with the prospect of a claw-back of the grant if the College under-performed.

Plan-led funding broke this automatic link between funding and performance. The LSC (now the ESFA) assumed that a College's allocation for the year is fixed, although this may be changed by negotiation if the College performs at a different level.

As in previous years, there is no requirement for an annual audit of the funding claim. Regularity assurance provides the ESFA key assurance in respect of the use of grant funding.

Prior to the introduction of the LSC Code, the audit of the funding claim provided a level of assurance for many Colleges on the internal controls over key number systems. In 2006/7 the LSC also introduced a risk based review of funding data to tackle the two risks of student non-existence and ineligibility. The LSC published the Learner Existence and Eligibility Audit Overview, Planning Guidance and Risk Evaluation in February 2007 and this regime was followed during the 2006/7 and 2007/8 financial years, before being discontinued. Therefore, Colleges now look to their internal auditors, financial statements auditors, assurance providers or consultants to provide this assurance.

Regularity assurance considers the regular and proper use of funding provided by the ESFA and other bodies. The regularity assurance framework is within ACOP. Colleges are still required to complete the self-assessment questionnaire. The self-assessment questionnaire must be completed and signed by the College accounting officer and Chair of Governors at a suitable committee meeting in advance of the reporting of the year-end audit work. College Corporations must publish a statement on regularity, propriety and compliance within their annual accounts. The format of this statement is set out in the Accounts Direction.

The level of assurance is now limited rather than reasonable assurance. The reporting accountant will provide limited assurance that expenditure disbursed and income received have been applied to purposes intended by Parliament and the financial transactions conform to the authorities which govern them.

Appendix 5 – GDPR and College Governance

On 25 May 2018 the General Data Protection Regulations came into force. This guidance note considers some of the key implications of the new regime for colleges' governing bodies, in their capacity both as controllers of personal data and as data subjects.

(1) What is the governing body's overarching responsibility in relation to compliance with new data protection legislation?

As part of a governing body's broad duty to oversee the activities of the college (under Article 3(1) of the Articles of Government), governors must ensure that their institution has in place arrangements to comply with all relevant legal requirements and that appropriate processes and procedures are in place to achieve such compliance. This means that governors must be aware of the key issues arising for the institution from the introduction of the GDPR and understand how to effectively monitor and review compliance with the new legislation. Governors should ensure, for example, that:

- they have visibility regarding the operational measures being taken by the college to comply with the new regime
- there are appropriate arrangements in place for the college's senior management team and data protection officer to report to the Board on data protection matters
- they are aware of any potential risk areas and what steps are being taken by the college to address them

(2) What are the responsibilities of individual governors when processing personal data?

In addition to their overarching role to oversee the institution's compliance with data protection legislation, there are a range of circumstances in which governors may be required to process the personal data of employees, students or other parties in the performance of their duties. For example, issues relating to staffing matters (particularly those relating to senior postholders) may be discussed at governing body or committee meetings. Governors may also be required to process personal data when considering appeals against employee dismissals or grievances, or in relation to their participation in other internal college staff or student procedures.

In processing personal data in this capacity, governors will be subject to the same duties as any other representative of the college, as a data controller. There are a number of practical steps that governors and clerks should take to ensure that the risk of breaching those duties is limited. These include:

- ensuring that governors are aware of their obligations under the GDPR and Data Protection Act 2018 and the circumstances in which they may undertake data processing. This may be included in governors' training and induction
- being mindful of potential data protection issues when creating documents. In particular, governors should be aware that any document that they create in the performance of their role which contains personal data including, for example, handwritten notes and internal email correspondence, will be subject to data protection legislation. This will include the right of the data subject to access their personal data contained in the document through a subject access request
- minimising, as far as possible, the inclusion of individuals' personal data in any agenda items or minutes. This may mean redacting any personal data from publishable minutes and meeting papers. (Note that Clause 17 of the Instrument of Government states that the agenda and minutes of every corporation meeting should be made available for public inspections but includes an express exclusion for any material relating to a person employed at or proposed to be employed at the institution, a named student or candidate for admission to the institution, or the clerk)

- any documents that do contain personal data should be kept secure and retained by governors only for as long as those documents are needed

- in all circumstances, governors should be mindful of the potential tension between, on the one hand, ensuring they meet their obligations under data protection legislation, and on the other, conducting themselves in a manner which is open, transparent and accountable

(3) In what circumstances may the college process the personal data of its governors?

As well as acting as representatives of the college (the data controller), individual governors will also be "data subjects", whose own personal data may be processed by the college in a range of circumstances. These include, for example:

- when the college is collating information as part of a governor recruitment exercise

- when appointing a governor (including, for example, undertaking criminal records checks, seeking declarations of interests, obtaining contact details and posting information on the college's website)

- following appointment (for example, when updating declarations and contact information, through references to individual governors in agendas, in meeting notes and other governance documents generated in the course of governing body business, on any renewal of a governor appointment or re-election to a governance position, in relation to any complaints about individual governors, or in relation to governors' involvement in any internal staff or student disputes procedures or external litigation)

"Processing" in this context will include any use of governors' data by the college, including obtaining, storing, sharing, recording, altering, using or deleting that data. As data subjects, governors have the same rights as any other individual whose data is processed by the college, including staff and students. Similarly, the college must discharge its duties to governors when processing their data in the same way as it would to any other data subject. This means that the college must have a lawful basis for processing governor data, there must be transparency around how and why that data is processed and the processing must be conducted in accordance with a number of overarching principles set down in the legislation.

(4) What are the potentially lawful bases for processing governors' data?

Prior to the introduction of the GDPR, many colleges will have relied upon consent, or implied consent, as the lawful basis for processing governors' personal data. The GDPR sets a considerably higher standard for reliance on consent as a lawful ground. Consent must now be clear, unambiguous and relate to a specific type of data processing. It must be given freely and the data subject must be able to withdraw that consent at any time. What this means is that a generic consent provided by a governor as part of the documentation that they complete on their appointment is very unlikely to constitute valid consent for any future processing of their personal data. Even if the format and mechanism for obtaining governor consent is compliant with the new standard, the ability for governors to withdraw consent at any time means that, in many circumstances, this is unlikely to be the most appropriate lawful basis for processing. Other lawful grounds for processing should therefore be considered. Those that may be potentially relevant to the processing of governor data include:

- Processing necessary for the performance of a contract – It is likely that when appointing a governor, a college will undertake a number of contractual obligations to the individual. Compliance with these obligations may require the processing of governors' personal data. If so, this may constitute a lawful ground for processing. This may include, for example, processing relating to the payment of any expenses to which governors are entitled in the course of their duties. This lawful ground also covers steps taken at the request of the data subject prior to entering into a contract. It would also therefore potentially apply to the provision and sharing of certain data in relation to the appointment or reappointment of a governor.

- Processing necessary for compliance with a legal obligation – This may cover processing in connection with any pre-appointment checks of governors that may be required by law, for example, criminal records checks (where applicable) and obtaining governors' declarations of interests (to comply with charity law obligations).

- Processing necessary for the purposes of the legitimate interests pursued by the college or a third party – This may cover a range of processing activities, provided the processing is necessary to achieve a specified legitimate interest and this need has been balanced against the interests, rights and freedoms of the individual and is consistent with their reasonable expectations regarding the processing of their data. However, it will not apply to any processing that is carried out by a college in the performance of its functions as a "public authority" (that is, processing that is connected to the college's statutory function of providing further education). Processing that may potentially fall within the legitimate interests ground could include, for example, considering references or other information as part of any governor recruitment process, maintaining governors' contact information, the conduct of governor performance appraisals, managing any complaints by or against governors, any processing of governor data in connection with marketing or press releases and any general communications with governors in connection with their role.

There are a different set of lawful processing grounds that apply to "special category" personal data (which includes information about a governor's race, ethnic origin, politics, religion, trade union membership, genetics, biometrics, health, sex life or sexual orientation). Those processing grounds include processing necessary for the establishment, exercise or defence of legal claims and processing necessary for reasons of substantial public interest. This latter ground may potentially be relevant to, for example, the processing of governors' equality information (relating to their race, ethnic origin or health) for the purposes of equality monitoring and/or to comply with the Public Sector Equality Duty. However, the grounds that are available for processing governors' special category data are likely to be more limited and there may therefore need to be greater reliance on explicit consent as the potentially lawful ground for this processing (subject to the conditions discussed above).

(5) Does the college have to provide governors with information about the processing of their personal data?

Yes. As for employees and students of the college, governors have the right to be informed of how their personal data is to be processed. For practical purposes, this will mean that information relating to the processing of governing data must be included within a privacy/fair processing notice and a copy of that notice must be made available to governors.

Whether the processing of governors' data is addressed in a separate governors' privacy notice or included within a notice issued to staff is likely to depend on the extent to which there is overlap between the purposes and types of processing of governor data and employee/worker data. However, in most cases, we would expect that governor data is dealt with in a separate privacy notice, for purposes of clarity.

As for any other privacy notice issued by the college, governors must be provided with the mandatory information required under the new legislation, including details of the purposes for which the governors' data will be processed and the legal basis for that processing, the categories of personal data that are processed, the periods of storage of data and details of the rights of governors as data subjects. The notices should be kept under review and updated to reflect changes in the collection or use of governors' data. Language used must be concise, plain and easily understandable and the notices must be communicated in a way that ensures they are easily accessible by governors.

(6) What other principles should be observed when processing governors' personal data?

There are a range of principles that must be applied whenever the college processes governor personal data. Again, these principles are consistent with those that must be applied when processing the data of employees or students:

- purpose limitation – Governor data should only be processed in a manner that is compatible with the purposes for which it was collected, which should be set out in the relevant privacy notice. If information is going to be processed in a way that is not compatible with this purpose, the privacy information provided to governors must be updated

- data minimisation – The governor data held by the college must be relevant and limited to what is necessary in relation to the purposes for which the data is processed. This means, for example, that when carrying out a recruitment exercise for new governors,

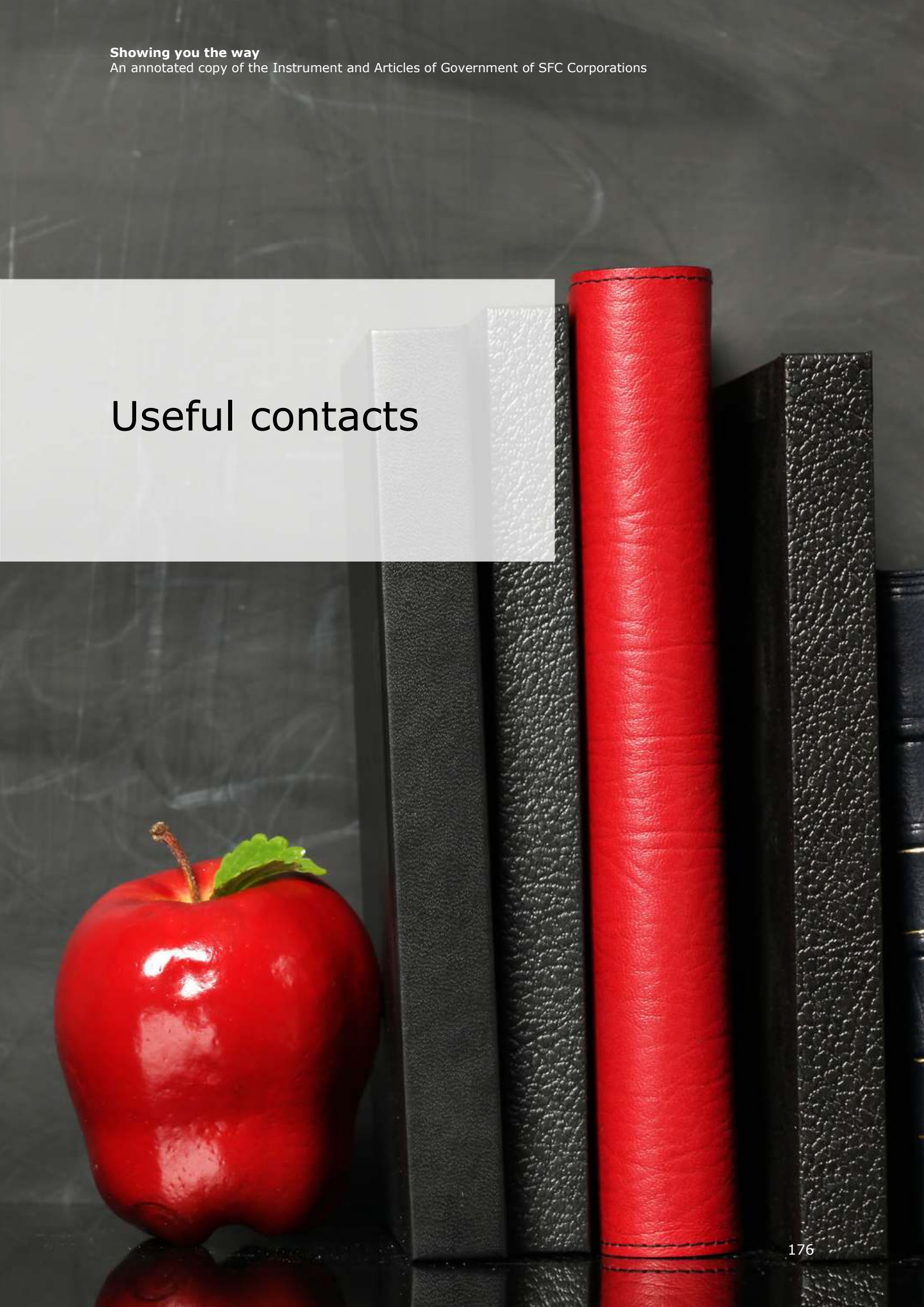
the college should only request sufficient information from governors as is necessary to allow them to select for that particular role

- accuracy – Any governor personal data held must be accurate and up to date. This means that data should be reviewed and where data is found to be incorrect, misleading or out of date, steps must be taken to correct or erase it as soon as possible

- data security – The governor data must be held securely and access to that data should be limited. Where possible data should be anonymised

- storage limitation – This is the principle that governor data must not be kept for any longer than it is needed. The college should have a policy which sets standard retention periods for governor information and this should be kept under regular review. As with the retention of employee or student data, the college must consider carefully for what purposes data is being held and it must be able to justify the length of time it retains data by reference to that purpose. When considering appropriate retention periods, relevant factors may include, for example: demonstrating compliance with any legal duties to which the college is subject (for example, the undertaking of criminal records checks and declarations of interests); the ability to respond to any potential claims (that is, potential claims from individual governors and/or any potential claims against governors arising from their role – for example, in connection with their role in the conduct of any formal internal employment procedure).

Useful contacts



Association of Colleges (AoC)	
2-5 Stedham Place London WC1A 1HU	T: 020 7034 9900 **enquiries@aoc.co.uk** **www.aoc.co.uk**

The Charity Commission	
Charity Commission Direct PO Box 1227 Liverpool L69 3UG	T: 0300 066 9197 (support for completing on-line forms only) **www.gov.uk/government/organisations/charity-commission**

Companies House	
Crown Way Maindy Cardiff CF14 3UZ	T: 0303 1234 500 **enquiries@companies-house.gov.uk** **www.gov.uk/government/organisations/companies-house**

Department for Business, Energy and Industrial Strategy (BEIS)	
Ministerial Correspondence Unit 1 Victoria Street London SW1H 0ET	T: 020 7215 5000 **enquiries@beis.gov.uk** **www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy**

Department for Education (DfE)	
East Lane Runcorn Cheshire WA7 2GJ	T: 0370 000 2288 **info@education.gsi.gov.uk** **www.gov.uk/government/organisations/department-for-education**

Education and Training Foundation	
157-197 Buckingham Palace Road London SW1W 9SP	T: 020 3740 8280 **enquiries@et-foundation.co.uk** **www.et-foundation.co.uk**

Education and Skills Funding Agency (ESFA)	
Piccadilly Gate Store Street Manchester M1 2WD	Email: via form on website **www.gov.uk/government/organisations/education-and-skills-funding-agency**

Equality and Human Rights Commission – England	
Equality and Human Rights Commission Equality Advisory Support Service FREEPOST FPN4431	T: 0808 800 0082 **englandhelpline@equalityhumanrights.com** **www.equalityhumanrights.com**

Further Education Trust for Leadership	
6 Trull Farm Buildings Tetbury Gloucestershire GL8 8SQ	T: 0203 637 0977 **enquiries@fetl.org.uk** **www.fetl.org.uk**

Guild HE	
Woburn House 20 Tavistock Square London WC1H 9HB	T: 020 3393 6132 **info@guildhe.ac.uk** **www.guildhe.ac.uk**

Office for Students (OfS)	
Nicholson House Lime Kiln Close Bristol BS34 8SR	T: 0117 931 7317 **info@officeforstudents.org.uk** **https://www.officeforstudents.org.uk/**

The Home Office (for useful guidance on a number of issues such as freedom of information, human rights)	
Direct Communications Unit 2 Marsham Street London SW1P 4DF	T: 020 7035 4848 **public.enquiries@homeoffice.gsi.gov.uk** **www.gov.uk/government/organisations/home-office**

Information Commissioner's Office (for Codes of Practice, Guidance and information on the Data Protection Act 1998 and Freedom of Information Act 2000)	
Information Commissioner's Office Wycliffe House Water Lane Wilmslow Cheshire SK9 5AF	T: 0303 123 1113 Email: online enquiry form **www.ico.org.uk**

National Audit Office (NAO)	
157-197 Buckingham Palace Road London SW1W 9SP	T: 020 7798 7000 **enquiries@nao.org.uk** **www.nao.org.uk**

Office for Standards in Education (OFSTED)	
Piccadilly Gate Manchester M1 2WD	T: 0300 123 1231 **enquiries@ofsted.gov.uk** **www.gov.uk/government/organisations/ofsted**

Office of Qualifications and Examinations Regulation (Ofqual)	
Spring Place Coventry Business Park Herald Avenue Coventry CV5 6UB	T: 0300 303 3344 **public.enquiries@ofqual.gov.uk** **www.gov.uk/government/organisations/ofqual**

Sixth Form Colleges Association	
Local Government House Smith Square London SW1P 3HZ	T: 020 7187 7349 **info@sixthformColleges.org** **www.sixthformColleges.org**

Eversheds Sutherland national telephone number is: 0207 497 9797
For advice on any governance issues, please contact:
governance@eversheds-sutherland.com
T: 0161 831 8293

eversheds-sutherland.com

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