

## Further Education and Training Act 2007 November 2007

The Further Education and Training Act 2007 (“the 2007 Act”) received Royal Assent on 23 October 2007.

The Act aims to improve the responsiveness and quality of the provision of further education and in doing so raise participation in FE and enable skills gaps to be addressed.

Methods of achieving these aims in the 2007 Act include:

- restructuring the Learning and Skills Council, (“LSC”) so that it operates at a regional rather than a local level;
- extending the LSC’s duty to ensure provision for suitable education and training encourage diversity and improve learner choice;
- provisions requiring the LSC and further education institutions to have regard to guidance requiring consultation with learners, potential learners and employers when planning their policies;
- provisions enabling further education colleges to seek power to award their own foundation degrees;
- enabling the LSC, further education corporations and higher education corporations to establish or invest in companies and charitable incorporated organisations for educational purposes;
- provision for the LSC (in England) and Welsh ministers (in Wales) in circumstances specified in the 2007 Act, to intervene in the management of unsatisfactory further education institutions in England and Wales; and
- provision enabling the Secretary of State to require that all principals achieve a leadership qualification.

This briefing deals with the key provisions of the 2007 Act which directly impact on further education institutions.

### **Foundation degree awarding powers (“FDAPs”)**

The 2007 Act amends the Further and Higher Education Act 1992 (“the 1992 Act”) to enable the Privy Council to grant applicant further education institutions (further education corporations or those institutions designated under the 1992 Act) FDAPs.

Allowing further education institutions to be able to award their own foundation degrees means that it will no longer be necessary for those institutions with FDAPs to have their foundation degree courses or degrees validated by a university or an institution with taught degree awarding powers. The grant of FDAPs is seen as enabling FEIs to act more responsively to employers' needs in the future. However, criteria in draft guidance for further education institutions applying for FDAPs limit this aim and mean that in practice few further education institutions are likely to apply.

The guidance states that applicant institutions:

- Should normally be able to demonstrate that they have four or more years' consecutive experience of delivering higher education immediately preceding the year of application.
- Will need to demonstrate that they have agreed and are promoting clear progression routes for learners wishing to proceed to a course of higher level study on completion of a foundation degree, although agreed progression routes are not expected to provide a guarantee of a place on any specific higher level course.
- Must submit evidence to the Privy Council that they have consulted their students about whether they should seek FDAPs, of how such consultation was carried out and its outcome.
- Will be subject to detailed scrutiny by the Quality Assurance Agency for Higher Education ("QAA").
- Should be aware that the QAA will invite any validating partner institutions of the applicant to offer comments on the nature of the operation or relationship and the suitability of the applicant institution's intention to seek FDAPs.
- Should be aware that an application for FDAPs will have significant internal resource implications arising from the costs incurred by both the Privy Council and its assessors and the QAA.
- Should be aware that initial orders granted by the Privy Council are likely to be for a period of six years and will not permit them to authorise other institutions to deliver foundation degrees.
- Will be able to apply for FDAPs to be renewed for an indefinite period following the initial six year period. On renewal, the FDAP may be upgraded to allow the institution unlimited ability to authorise others to deliver its foundation degrees.

Further education institutions need not replace existing validation arrangements with FDAPs and will need to consider which means of delivery is the most appropriate in the context of both the type of foundation degree offered and the opportunities in the region in which they operate.

### **New models of delivery**

Currently, both further education corporations ("FECs") and higher education corporations ("HECs") are prohibited from forming or acquiring an interest in a company for the purpose of conducting an educational institution.

The 2007 Act removes this restriction and enables both FECs and HECs to set up or invest in companies, or charitable incorporated organisations, (“CIOs”), for the purpose of conducting an educational institution. FECs will require the prior consent of the LSC if established in England, or Welsh ministers if established in Wales, before being able to do so. Prior consent is not required for HECs which decide to form or invest in companies or CIOs to carry out an educational institution.

These new powers will provide greater opportunities for FECs and HECs to work collaboratively within the education sector and with businesses to establish new models of delivery.

Further education institutions should be aware that although one of the benefits of using a CIO is that only the regulatory requirements of the Charity Commission will have to be complied with rather than those of both Companies House and the Commission, only registered charities can be CIOs. FECs and HECs in deciding to use a CIO rather than any other corporate form for delivering educational services need to consider whether the benefits of separate incorporation outweigh the burdens of having to complying with the regulatory requirements of the Charity Commission.

### **Powers of intervention of the LSC in further education institutions**

The 2007 Act transfers the Secretary of State’s intervention powers currently set out in the 1992 Act, with modifications, to the LSC.

In circumstances specified by the 2007 Act, including mismanagement of an institution or significant underperformance, or failure or likely failure to give an acceptable standard of education or training, the LSC may do one or more of the following:

- remove members of the institution’s governing body;
- appoint new members of that body if there are vacancies;
- direct the governing body on how to exercise its power and perform its duties.

This last power does not mean that the LSC may direct a governing body to dismiss a member of the institution’s staff. However it does mean that where the LSC considers appropriate (and the governing body has power to dismiss), it may direct a governing body to ensure that procedures applicable to the consideration of the case for dismissal of a member of staff are put in place. This means that the further education institution as employer must follow the usual statutory procedures and relevant provisions under its Articles of Government in order to ensure procedural fairness. During the passage of the 2007 Act through Parliament it was envisaged that this power would only be exercised by the LSC as a last resort where the governing body was unable or unwilling to deal with a situation which had become untenable. The LSC will expect colleges to have strong evidence to dismiss on which it would be able to rely in the event of a claim for unfair dismissal being brought by the dismissed member of staff.

The LSC's power to direct a governing body on how to perform its duties also includes the power to require collaboration with other bodies, such as other further education institutions, to discharge functions jointly.

The 2007 Act requires that the LSC's new powers are underpinned by a statement prepared by the LSC as to how it proposes to use its powers of intervention which must be kept under review. The LSC is required by the 2007 Act to consult the sector in the development of the intervention policy and to take the sector's representations about the policy into account.

The intervention powers of the Secretary of State under the 1992 Act allowed intervention when an Ofsted or Adult Learning Inspectorate report stated that an institution was in "serious weakness" or failing to provide an acceptable standard of education. The new powers given to the LSC also apply when an institution is performing significantly less well than might in the circumstances reasonably be expected. During the passage of the 2007 Act through Parliament it became clear that factors identified in the LSC document "*Identifying and Managing Underperformance*" issued on 22<sup>nd</sup> January 2007 would form the basis for the LSC to intervene on this ground.

The Secretary of State may give the LSC guidance on how it is to exercise its functions with regard to the intervention policy, particularly in relation to the form and content of the policy. The LSC is required to have regard to any such guidance. The intervention policy must also be approved by the Secretary of State before it is laid before Parliament.

Concessions agreed during the dying stages of the passage of the 2007 Act through Parliament led to the adoption of an amended procedure to be followed by the LSC when exercising its powers of intervention. The LSC must notify the Secretary of State of why it is exercising its powers of intervention, what it proposes to do and why it proposes to do it. It must similarly notify the failing institution. In addition the Secretary of State retains powers to direct the LSC in the exercise of its powers of intervention where he or she is satisfied that it would be appropriate to do so. The LSC must comply with any such directions.

The transfer of powers of intervention to the LSC while preserving powers of direction for the Secretary of State means that although intervention may be rapid there are plenty of safeguards in place for both colleges and staff.

### **Incorporation and dissolution of further education corporations**

Currently, whilst the Secretary of State formally decides whether to agree a merger proposal and so establish new or dissolve existing further education corporations, this decision is based on information and a recommendation provided by the LSC. In practice it is rare for the Secretary of State not to act on the recommendations of the LSC.

The 2007 Act transfers powers to establish and dissolve further education corporations, and to make associated orders, from the Secretary of State to the LSC in England and to Welsh ministers in Wales.

The Secretary of State can use existing powers to require the LSC to establish and dissolve further education corporations where he or she is satisfied that the LSC has acted or is proposing to act unreasonably.

If upon dissolution of a further education corporation it is necessary to transfer the property rights or liabilities to the LSC to achieve the best outcome, the LSC will need to seek the agreement of the Secretary of State before making such provision.

### **Consultation with employers and learners**

The 2007 Act imposes a duty on the governing bodies of further education institutions in England to have regard to guidance from the Secretary of State and governing bodies of institutions in Wales to have regard to guidance from Welsh ministers, about consulting with those who are or who are likely to become students and with employers in connection with decisions which will affect them.

Draft guidance on the section states that it is for governing bodies to decide how best to consult with learners, potential learners and employers in their area. It directs governing bodies to consider the potential role of consultation to inform the range of decisions taken by them in delivering their services. The guidance particularly directs institutions to consider consultation in regard to any decisions that impact on the learning experiences of individuals or which may address barriers to remaining in, or entering, learning.

### **Qualifications of principals of further education institutions**

The Further Education (Principals' Qualifications) (England) Regulations 2007 require that all Principals first appointed in England on or after 1 September 2007 must hold, or be working towards, a specified leadership qualification. Regulations covering Principals who move to a new Principal's post are intended to be brought into force from April 2009.

It is not intended to make the qualification mandatory for serving Principals who remain in post. It is anticipated that serving Principals will undertake the qualification on a voluntary basis, but if a significant number of them have not taken up the programme by April 2009 further regulations may be introduced for this group too.

### **Timetable**

Most of the 2007 Act will be brought into force by specific commencement orders which will be made at least two months after Royal Assent.

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