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Education Focus

Just like buses...

Apprenticeship Levy, Area Reviews and the college insolvency regime: all major issues impacting on the sector, all becoming increasingly urgent, all awaiting key announcements from the Government – until now. With the Government effectively re-formed after the initial fall-out from the Brexit vote and a raft of new Ministers in place, the Secretary of State for Education and the Minister for Apprenticeships and Skills seemingly wanted to take a moment – or more accurately a few months – to take stock. Not an unreasonable position, but the timing was not fantastic for providers who are then expected to find a way to help deliver the Government's agenda. Over the course of a few days in October, the log jam started to be cleared, with several hundred pages of guidance and supporting papers being released for Senior Leadership Teams and Governors to start digesting. Guidance which in light of the AoC's recent judicial review challenge (since resolved) the Government is perhaps more conscious than ever it needs to follow.

We are actively working with our clients on assessing the implications of each of these and putting plans into action: for the time being, here are some of our brief initial thoughts. Turn the pages to read more on the perspective our sector specialists have on the apprenticeship levy and the insolvency regime.

Area Review implementation guidance

Guidance has been issued on the manner in which the Government would like to see accepted Area Review recommendations implemented. There are some useful questions and checklists contained within the Guidance and there is a recognition in the documentation that a proportionate approach to any given implementation project will be appropriate. Having said that, the proposed due diligence framework is quite extensive.

We are working on a number of implementation projects, some which started before the release of the Guidance and some after, but in many cases the full framework is in our view too heavy handed.

Due diligence underpins any project involving structural change, and it is helpful to see a fuller framework in the sense that Governors and Senior Leadership Teams can see what a quite fulsome exercise looks like. We would, however, recommend that caution is exercised to ensure that the nature of any due diligence exercise is such that it seeks to draw out the issues that really matter and that are relevant to the stage in the process that the particular project is at.

It should also not be assumed that multiple parties to a potential transaction are seeking information in order to fulfil the same objectives. For example, in a typical Type B college merger scenario, the Governors of the Corporation being dissolved need to be satisfied that the Corporation to whom the business and assets are being transferred is sound and will be a good home for the future fulfilment of the dissolving Corporation's objects. For the receiving (i.e. continuing) Corporation, the Governors need to be content that in accepting an inwards transfer of the business and assets of the dissolving Corporation the continuing Corporation will prosper in the medium-to-long term and as a minimum survive in the shorter term. Early engagement with Banks is important and in many cases providers should expect that affected Banks will wish to carry out their own top-up exercise.

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Also in this issue

Q&A Apprenticeship Levy Pitfalls and Benefits

The Apprenticeship Levy remains a hot topic for the FE sector with the imminent implementation of the Levy in April 2017. Caroline Hardcastle, who leads on dispute resolution matters for the Education Team, looks briefly at some of the benefits but also the potential pitfalls for providers engaged in the delivery of apprenticeships.

What do you believe are the most significant changes coming in May 2017 for employers regarding Apprenticeships?

Tax, but with a chance to get it back and create an improved workforce at the same time! The 2015 conservative manifesto promised to deliver 3 million apprenticeships over the next 5 years. That promise will start to bite in April 2017 with the introduction of the Apprenticeship Levy. UK employers with a pay bill of £3million plus will be required to pay a levy of 0.5%. This will be supplemented by a 10% top up from the Government with the fund to be used to pay for training/assessment of apprentices in England. Where UK employers do not have an annual pay bill in excess of £3million or the levy pot is exhausted, the Government will co-invest 90% of training and assessment costs.

Who is likely to benefit most from these changes?

Done right, it should be a win-win for all. The introduction of the levy will inevitably result in larger employers taking stock of their training needs and, in order to ensure they take advantage of the levy payment, investing in apprenticeships and training. This should allow employers the opportunity to invest for the future in their workforce and provide the right training for their employees. The challenge for employers will however be to ensure that the training providers they utilise provide good quality and relevant training for their employees – which offers a fantastic opportunity for providers who are on the ball.

What benefits will the Apprenticeship Levy bring for providers?

New markets have been created by the levy and, for those providers with strong links to business communities and who offer excellent provision, there are great opportunities to engage with employers and increase their apprenticeship provision. The initial proposal to restrict the use of subcontractors, thereby making it more difficult for providers to offer a diverse range of courses appears to have been relaxed significantly leaving providers with the ability to offer learning in a wide variety of areas. However, whilst the levy offers opportunities for providers, there are a number of risks to be aware of.

What risks do you envisage providers will face?

One of the key issues for providers is going to be the credit risk. Under the current proposals, employers are not required to have funds to cover the full cost of the apprenticeship prior to engaging the provider. This being the case, there will always be a risk that the employer cannot meet all the costs of the learning provision.

A further risk lies with the integrity of the digital account into which levy payments are made and from which the providers are paid. In the event that there are problems with the system, this may impact upon payments being made correctly and/or in a timely fashion. The Digital Apprenticeship Service will also allow employers to stop or suspend payments if they have an issue with the service given by the provider. Whilst this can protect the employer from providers who are not providing the level of service which should be expected, this does raise the question as to what providers should do if employers withhold money without legitimate grounds to do so. At the present time, there does not appear to be any prescribed dispute resolution procedure available.

A further concern for providers is in relation to pricing. There are 15 funding bands which cap the use of the funds and Government co-investments. However, there is no lower limit on the bands with the result that employers may seek to push down providers on price. The risk is that the provider, in order to ensure that it is awarded the contract for delivery of learning, is tempted to agree a price at which learning can only be provided at the expense of quality and therefore the reputation of the provider.

Just like buses…
Continued from cover…

Often due diligence is split into two parts – an exercise on each stand alone Corporation and an exercise on the combined colleges operating under the continuing Corporation. Where either exercise uncovers serious issues there is an opportunity to apply via the Transaction Unit for support from the Restructuring Facility. This is distinct from the Transition Grant available to all who agree to implement a recommendation arising from an Area Review, but both come with strings attached. It is fair to say that early indications are that the Transaction Unit is not processing huge volumes of successful applications at this stage and we are aware of a number of potential projects where there is a strong view that if at all possible a Restructuring Facility application needs to be avoided – which all points back to the importance of due diligence and the associated business plans which will be based on that exercise.

Apprenticeship Levy

One of the most eagerly awaited set of publications was the guidance around the Apprenticeship Levy following the Government's consultation on its (already then overdue) initial guidance issued earlier this year. The levy brings some exciting opportunities for providers, creates new markets and allows much needed flexibility to support employers in training their future workforce.

The overall impression is that the Government has listened to some of the concerns raised during the consultation process. Funding has been looked at again and some transitional arrangements are being put in place to provide more of a ramp than a cliff edge. The very clear attempt to severely curtail subcontracting has been reigned in for the time being, with providers now only having to directly provide some apprenticeships for an employer where the provider also wishes to subcontract provision in respect of that employer's apprentices (a move away from subcontracting being limited to substantially less than half of each apprenticeship). This clearly does not mean that the Government has had a complete u-turn: there is a still a political feeling that subcontracting is a bad thing because there have been enough examples of bad subcontracting. There does, however, seem to be some recognition that there are also plenty of examples of good subcontracting, where good quality provision has been made possible by pooling viable numbers of apprentices and delivering a more cohesive one stop shop offer to employers who have some specialist requirements alongside their mainstream needs.

The Digital Apprenticeship Service is more "DAS-lite" than what we are being told will come in the future. Trading of levy between employers; ATAs being able to receive a portion of their work providers' levies; and taking employer contributions through the DAS rather than directly from employers are all features that we are promised in the coming years, with all employers intended to be using the DAS by 2020. In the meantime one practical change which will be welcomed by levy payers is that levy funds will have a shelf life of 24 months rather than expiring after only 18 months.

There is a great deal of concern around end point assessment. There is currently a paucity of end point assessors. Given that the funding band caps include end point assessment costs, a real worry is that in a market of assessors where demand may outstrip supply the price will go up leaving less money available for the provision itself. The sector is working hard to find solutions to this, and to try to make sure that funds do not get unnecessarily dispersed. One solution we are increasingly seeing proposed is providers coming together to arrange to deliver assessment services for each other – either directly or through grouped arrangements. There will no doubt be capacity and timing issues to work through, but solutions such as this demonstrate the resilience of the sector.

We are on with developing employer, apprentice, end point assessment and subcontractor contracts for providers to use to protect themselves and make the most of the opportunities the levy brings. This edition's Q&A also covers some concerns which Education Team dispute resolution specialist Caroline Hardcastle has about how providers may be exposed to new risks and how these could be mitigated.

The proposed insolvency regime

Education Team member and corporate insolvency specialist Richard Field has brought his wider experience of insolvency to our analysis of the Government's consultation, its response and the associated Technical and Further Education Bill. His early thoughts are set out later in this edition of Education Focus. The key issue appears to us to be whether the insolvency regime will (and whether it should) have an impact on the attitudes of Banks, LGPS, Governors and other stakeholders towards further education corporations.

There is a wide variance in popular reporting on this topic, with some seeing the Government's response as an indication that it will be willing to "bail out" colleges in the future (ignoring of course the impact changing Government policy has had on colleges in recent years in particular). It seems to us that it is more accurate to say that the Government knows that there is a serious risk that, if mishandled, the bringing into force of the proposed regime could have a very significant and detrimental effect on college finances. A concern is that the Banks are taking a more cautious approach to the sector and so the Government is in danger of causing the very destabilisation it is seeking to avoid.

So there is a lot going on, even on the scale the education sector has become accustomed to. On the up-side, and having just returned from this year's AoC conference where there seemed to be a renewed optimism in the air, the can-do attitude prevalent amongst providers and their pin sharp focus on improving the lives of millions of learners gives us all hope for the future. No sector is better equipped to manage the threats and maximise any opportunities that all of these policy changes might bring.

Tom Morrison

With all these risks facing providers, is there any way they can protect themselves?

The key to the provider reducing risk is to ensure that there is an effective agreement in place between the provider and the employer. This can cover what happens when there are delays in receiving payments, either due to non payment by an employer or the failure of the Digital Apprenticeship Service and specify a dispute resolution procedure to resolve issues where the employer stops or suspends payments. In any event, it is always advisable for a provider to enter into a contract with the employer to ensure that both sides know what their rights and obligations are. It also allows providers to limit their liability and to reduce the risk of an employer putting the provider in breach of any SFA rules. Employer agreements currently in place are in our experience inadequate to protect against the new risks presented by the changes coming in 2017.

You have mentioned the importance of an employer agreement being entered into but are there any other ways in which a provider can reduce risks?

What most good providers are doing now and what they should continue to do is ensure that there is full and proper due diligence of the employer. This should be a thorough exercise, undertaken for all employers, with the answers reviewed and followed up where there are discrepancies. This should not be a simple tick box exercise. By ensuring a proper due diligence process is undertaken, the risk of issues arising over payment will hopefully be minimised.

It is also essential for providers to be firm and clear in their negotiations on price and to make sure the price being offered is sufficient to cover every element of work to be undertaken to avoid having to compromise on quality. Where possible, all negotiations should be documented in the event that there is an issue at a later date.

Is your estate in order?

In the current climate there has never been a more pertinent time to ensure that your Estate is in order. In further and higher education, providers are seeking funding from commercial lenders more than ever before and the nationwide programme of Area Reviews has provided an opportunity to revisit each college's estates strategy. We have set out below a list of proactive steps which should be undertaken and issues considered to ensure that your organisation's Estate is in good order to enable any future dealings with it to be dealt with quickly and efficiently.

Consider property ownership – if your organisation has a number of sites, it would be useful to prepare a schedule of properties setting out the property address, whether the property is freehold or leasehold, the title numbers for the property, whether the property is charged (and if so to whom) and whether there are any leases (and if so to whom). A list of any rights, covenants, options, overage provisions and other documentation could also be entered onto the Schedule.

Locate the title deeds – you should ensure that the location of any title deeds for each property, including the lease for any leasehold property, is known. If the location of the title deeds is unknown, make enquiries with your (current and any previous) solicitors and any lender to locate the deeds.

Register any unregistered land – the Land Registry currently has a considerable backlog and first registration applications are taking in excess of one year. It is therefore advisable to voluntarily register any unregistered land, and deal with any title issues, now so that problems do not arise when any future charges are granted or transfers are entered into. This will also enable any future transactions to be dealt with quicker and more cost effectively.

Check extent of registered titles – it should be ensured that the whole extent of each property owned by the organisation is registered and that the actual boundaries of each property match the boundaries of the title plans for the property and adjoin the public highway. A search of the index map can be carried out to ensure that the whole extent of each property is registered. Any discrepancies can then be dealt with.

Deal with any title issues – any known title issues or disputes should be dealt with expeditiously so that any issues do not delay any future transactions.

Formalise any informal arrangements – any informal rights, covenants or occupational arrangements should be formalised in writing to ensure such arrangements are valid and registered against the title to the property (if appropriate). This will reduce the likelihood of any future disputes regarding the nature and extent of any informal arrangements.

If you are able to carry out all, or even some, of the above exercises then when it comes to potentially urgent transactions you will be in much better shape to be able to maximise any opportunities which may present themselves in the future.

Libby Clarkson

Implementing the New Fair Deal for the LGPS – consultation on proposed changes

In previous editions of Education Focus we reported on the New Fair Deal guidance applies to staff transferring from public sector pension schemes to private sector contractors as a result of the outsourcing of services, and the fact that it was not made mandatory for the FE or HE sector.

That guidance also does not apply to transfers from local government (and other best value authorities), as these are currently subject to the Best Value Authorities Staff Transfers (Pensions) Direction 2007 (which itself broadly reflected the previous Fair Deal provisions).

After much delay, the Department for Communities and Local Government ("DCLG") has recently published draft provisions to the Local Government Pension Scheme ("LGPS") Regulations 2013. These set out how the New Fair Deal is to be implemented for central government bodies such as local authorities compulsorily transferring staff to a private sector employer on an outsourcing. As expected, such transferee employers will, except in limited cases, be required to enter into an Admission Agreement to participate in (and contribute to) the LGPS, removing the option for the employer to enter into "a broadly comparable pension scheme."

However, in contrast to the New Fair Deal provisions, on a re-tender or subsequent transfer to another contractor where staff have already transferred out to a broadly comparable scheme under existing provisions, there is to be no requirement to obtain admission to the LGPS for the purpose of the new contract.

Other provisions have been introduced to improve administration, including enabling a surplus to be paid out to a contractor by the LGPS fund where at the end of a contract the cessation valuation shows a surplus (in similar manner to the existing provisions where an exit payment is to be made by an employer where the cessation valuation shows a deficit). Further, the draft regulations also allow Admission Agreements to have retrospective effect, which should help where transfers to contractors are negotiated on short notice.

One note of caution – these new provisions would catch almost all scheme employers, including small admitted bodies (a large number of which are charities), thereby increasing the costs for these bodies (as bonds and guarantees would need to be put into place by them under the Admission Agreement).

The consultation on these draft provisions closed in August, and DCLG is currently considering the responses before finalising the draft regulations. Education providers who have staff in the LGPS should take note, particularly on any contracting-out of employees to private contractors in the future.

Craig Engleman

A proposal for a College Insolvency Regime

Earlier this year BIS published a Consultation on developing an insolvency regime for the sector. Last week in Parliament, Robert Halfon, the Minister for Apprenticeships and Skills said, "*We have a moral duty to students that money is spent on learning and a responsibility to deliver value for money to tax payers.*". He went on to say that the Bill "*will also encourage prudent borrowing and lending, making sure that money that would otherwise be spent servicing the debt will be invested in high quality education and training.*"

Colleges are self evidently large and increasingly complex businesses. Although there is a commitment to funding the sector, the way it is funded is changing and with that change comes uncertainty – all in the context of a sector where a very significant proportion of colleges were in deficit last year. The Government's programme of Area Reviews was launched across England with the aim of ensuring 'high quality, sustainable provision capable of meeting the future needs of leavers and employees'. It is hoped that one of the results of the Reviews will be to reduce the possibility of financial failure in the future.

So that begs the question, if the Area Review programme is successful in this objective why is a new insolvency regime needed? What happens at the moment and why is change needed?

Exceptional Financial Support has in the past been used to help colleges in financial difficulty, and with that comes other forms of "support" involving a process which may result in significant changes within a college. Sometimes colleges (as with many other types of businesses) have had structural issues such that a merger is a potential solution, but finding a merger partner can be difficult because a failing college is perhaps inherently so unattractive such that no prudent college would risk a merger unless there was something in it for them. There have been examples where the deal has been sweetened by the Government to enable a successful transaction, but there have been some prominent examples where nobody wanted to do the deal on offer. The plain fact is that a bad deal is a bad deal whether or not it is done under the current regime or, in the future, with an insolvency practitioner.

If a formal insolvency process is to be introduced in the sector, legislative change is needed as there is uncertainty about whether the current insolvency legislation has current application. Any changes would require both primary and secondary legislation.

The reasons given for the new proposals by BIS are:

- an orderly process which protects creditors;
- protection of learners;
- retention of independence and freedoms for colleges whilst removing the expectation of additional public funding; and
- support for local and national education and training needs.

The sixty four thousand dollar question (if only it were so little) is whether the proposed new regime will do this any more efficiently than the current regime.

So what is the new proposed regime?

The proposals are similar to those that apply to companies under the Insolvency Act 1986. The regime includes Company Voluntary Arrangement, Administration, Compulsory Liquidation and Creditors' Voluntary Liquidation. But, most importantly and, in addition, a Special Administration Regime ("SAR"). This would be triggered if a college becomes insolvent and the Secretary of State deems it appropriate to apply for a SAR to protect learning provision. A SAR has some overtones of a Trust Special Administrator in the Health Sector who is appointed if the Secretary of State considers it to be 'appropriate in the interests of healthcare'.

So will the new regime change anything in the FE sector. It could, but there may also be unintended consequences on bank funding, the costs of 'rescue' and the willingness of individuals to become or remain governors – to name just a few. The insolvency specialists within our Education Team are currently assessing the impact of the draft Bill currently going through the Houses of Parliament and, if enacted, what the effect could be on the behaviour of a range of stakeholders. In the next edition of Education Focus we will analyse the process and the possible impacts in greater detail.

Richard Field

Ofsted logo clampdown

Ofsted hit the headlines recently when it threatened to bring legal action against a number of education providers for their unauthorised use of the Ofsted logo.

Although it may initially seem strange to group it with marketing heavyweights such as Coca Cola, Apple and McDonalds, there can be no denying that Ofsted is another famous brand known throughout the UK. And, just like those aforementioned heavyweights, Ofsted has taken steps to protect its brand by registering its name as a trade mark and asserting its ownership of the copyright in the various incarnations of its logo.

Under Ofsted's logo terms of use, there are only very limited circumstances where third parties may reproduce the logo. Education providers who are awarded an overall judgement of 'Outstanding' are permitted to use Ofsted's 'Outstanding Provider' logo on stationery and signage but otherwise the terms of use are quite prohibitive (and specifically state that there is no logo available for 'Good' providers to use).

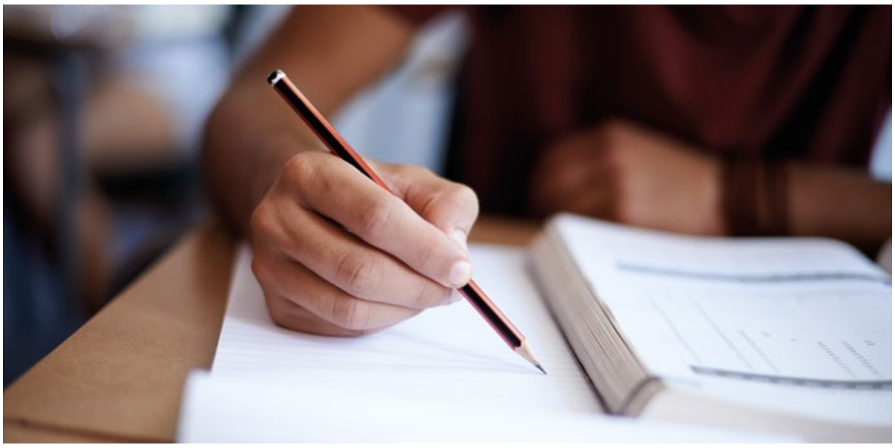
However, it has been known for education providers to adapt Ofsted's existing logo into a 'Good Provider' logo for promotional purposes. This came to a head recently when Ofsted wrote to several providers informing them that such actions were an infringement of Ofsted's intellectual property rights and threatening legal action unless the offending logos were removed (which would result in expense for the provider).

Ofsted's approach has been criticised and it is believed that it is reviewing its logo policies internally before taking any further action. That said, although the vast majority of education providers concerned will likely have adapted the Ofsted logo without any malicious intent, the case serves as a poignant reminder for providers to ensure they have obtained appropriate the consent before reproducing any third party trade marks or copyright works, however well meaning their intentions.

James Peel

Risk to academies
of breaching transparency rules

In the previous edition of Education Focus we reported that the EFA had issued a pre-termination warning to Durand Academy Trust (DAT). The warning was issued because of concerns about the structure of DAT and potential conflicts of interest in respect of its relationship with other organisations. The EFA was also demanding that DAT sever its links with its Chair of Governors and former Executive Head, Sir Greg Martin, who was criticised by MPs after it transpired he was paid more than £400,000 in salary from DAT and management fees from a related-party organisation.



Following this, BBC England's data unit selected 100 academies across England at random and found 19 of them had not published the required current Register of Interests for governors and members on their school or trust websites. The BBC's report said "education campaigners" alleged a "culture of secrecy" around some academies. It is reported that the DfE is investigating the academies which apparently did not comply. A DfE spokesperson was quoted as saying that "…this system of financial oversight and accountability is more transparent and more robust than for council-run schools. We take any breaches seriously and where trusts are found to be flouting the rules, we will not hesitate to take action."

Again, this emphasises the need for all academies to ensure that they maintain and publish Registers of Interests. The Registers must be kept up to date and governors and members should be periodically asked to review their entries. Adequate procedures must also be put in place to identify and effectively manage conflicts of interest and to ensure that the Academies Financial Handbook is complied with.

As above, the DfE takes the failure of academies to identify and effectively manage conflicts very seriously because it goes to the heart of public trust and confidence in academies. The BBC also quoted Russell Hobby, general secretary of the National Association of Head Teachers as saying "*…Education, is now a high stakes and highly scrutinised business. It is important that schools lead by example, and demonstrate a gold-standard approach to financial matters.*"

It is a legal requirement for conflicts of interest to be effectively managed and failure to do so can have serious consequences not only for trustees personally in respect of breach of company and charity law, but also in academy trusts and multi-academy trusts' relationships with the EFA.

The DfE has also announced that it is proceeding with the termination of DAT's funding agreement after the academy chain refused to cede to the DfE's demand to sever links with Sir Greg Martin. The DfE has issued a notice of intention to terminate its agreement, claiming that DAT has failed to comply with 6 of 8 requirements set out in the termination warning notice. DAT has said that it intends to challenge any termination in court. The termination gives DAT one year's notice, after which the DfE can either find a new sponsor or close the school. Irrespective of the final outcome, a great deal is at stake in terms of reputation and students' education.

We advise all academies to provide adequate training to their trustees and members, to keep records of this and, in particular, to make new trustees aware of their legal duties to be transparent, declare interests, manage conflicts and ensure compliance with the requirements of the Academies Financial Handbook.

Gerry Morrison

The Legal 500 United Kingdom

We were delighted when Legal 500 published its latest law firm rankings last month. The work which Rollits' Education Team has carried out in partnership with our education sector clients over the past year has been recognised and rated by the independent editors, with their resulting report that '*Rollits is noted for its "impressive sector knowledge". The Team is led by the "insightful" Tom Morrison, who handles strategic and commercial issues, and includes the "excellent" Caroline Hardcastle, who is highly experienced in dispute resolution matters.*' Our work is a genuine team effort – a team comprising all of the impassioned lawyers whose pictures you can see in every edition of Education Focus and the scores of dedicated and talented individuals working at the providers to whom we have the privilege of being advisors. We are immensely proud of the work of our clients and grateful for their continued support.

Information

If you have any queries on any issues raised in this newsletter, or any education matters in general please contact Tom Morrison on 01482 337310.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice.

We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Citadel House, 58 High Street, Hull HU1 1QE.

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