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Autumn 2015

Education Focus

Area-based reviews

When it came to deciding upon a theme for this issue of Education Focus the shortlist was short indeed. There is no bigger topic in FE right now than area-based reviews for post-16 education and training institutions. It has the potential to have a profound impact upon a sector we hold dear, a sector which has a key role in the development of our communities and which plays a critical part in equipping our people with the skills needed to take our country forwards – whether that be in paving the way for progression into higher education and training, tooling up our young people to go directly into work with additional learning in the workplace or supporting the retraining of adults in later life.

It is well rehearsed that the Government has established a process to be undertaken on an area-by-area basis over the next year and a half and that the process has its issues – not least what are the areas (not necessarily intuitive), who is in scope (certainly not all post 16 providers despite the name attributed to the process) and who is going to fund any restructure (the Government would like providers to consider that future benefits and savings merit providers funding any transition now, whereas providers understandably may have quite a different perspective). The pilot reviews have been completed, the recommendations from those pilots are either being considered or implemented, the first wave is now underway and we are getting ready to look ahead to the second wave in 2016. There is much water yet to pass under the bridge, but a common theme nationwide is that the sector is looking to do what it does best – mobilise its teams, confront challenges with optimism and skill, walk towards the issues and find pragmatic and effective solutions rather than have someone trying to tell it what to do (that ship sailed in the early nineties and was reinforced by the Education Act 2011).

The impressive social enterprises carrying out their critical work are both charities and sophisticated businesses, run by professional hard working executive teams leading dedicated staff and backed by charity trustee governors. Whatever the outcome of each area-based review, their work training our nation should not be allowed to be disrupted, but disruption seems inevitable wherever such a large scale process is undertaken. The challenge is that, in an age when the Government is pursuing reform, there is a potential for resource to be sucked away from the very stakeholders the reviews are ultimately intended to benefit. The Government would argue shorter term pain for longer term gain, but it remains to be seen how effective the process will be or what the impact of the proposals subsequently arising out of the reviews will be.

These are challenging times, but I would not bet on any other sector being able to manage those challenges and maximise the resulting opportunities better than this one.

Tom Morrison

Also in this issue

The big interview

Joanne Dean: Area-based reviews – a force for good or ill?

In the first in a planned series of interviews with commentators from across the education sector, we speak with Joanne Dean, Managing Director of JD Management Solutions Limited. Joanne is an independent governance and human resource consultant and trainer with twenty eight years' FE and Skills sector experience. In this interview we ask Joanne for her take on the hot topic of Post-16 Education and Training Institution area-based reviews (ABRs).

A big topic, but how you would summarise your thoughts on area-based reviews?

Whilst they are the biggest change agent to hit the sector since incorporation, ABRs do afford a significant opportunity to rethink what, how and where we deliver our service for the benefit of users. However, by focussing only on GFE and Sixth Form Colleges, the usefulness of the outcomes are automatically limited.

What do you think the Government is hoping this process will yield?

The Government's Productivity Plan, Fixing the Foundations – Creating a More Prosperous Nation flagged improving productivity as a priority and the policy document Reviewing post-16 Education and Training Institutions advocates:

- *"clear, high quality professional and technical routes to employment, alongside robust academic routes, which allow individuals to progress to high level skills valued by the employers"; and*
- *"better responsiveness to local employer needs and economic priorities, for instance through local commissioning of adult provision, which will help give the sector the agility to meet changing skills requirements in the years ahead, building on the agreements with Greater Manchester, London and Sheffield."*

ABRs are seemingly the Government's mechanism to deliver "strong institutions, which have the high status and specialism required to deliver credible routes to employment, either directly or via further study" including a new network of Institutes of Technology and National Colleges "to deliver high standard provision at levels 3, 4 and 5." And here's perhaps the key – "while maintaining tight fiscal discipline" achieving "greater efficiency… that frees up resources to deliver high quality education and training which supports economic growth".

So the Government seeks:

- *"fewer, often larger, more resilient and efficient providers";*
- *offering "greater specialisation", "institutions that are genuine centres of expertise" supporting "progression up to a high level in professional and technical disciplines";*
- *"while also supporting institutions that achieve excellence in teaching essential basic skills – such as English and Maths";*
- *and "maintaining broad universal access to high quality education and training from age 16" for all, including those with special educational needs and/or disabilities.*

How likely do you think it is that the Government's goals will be achieved?

This depends in part on how many GFE and Sixth Form College corporations accept the ABR outcomes. After all, given their corporate and charitable status and the Education Act 2011 'freedoms and flexibilities' they don't have to. Real success relies on genuine buy-in from all post 16 institutions and the appetite for UTCs, school and academy sixth forms etc. to opt in remains to be seen. Without additional transformational resources, it is difficult to see how struggling institutions will be able to finance the ABR recommended changes.

There remain some key unknowns, including (1) how many institutions might identify their own alternative solutions to those recommend by the ABRs (perhaps through clever strategic alliances with better funded institutions e.g. HEIs, academies); and (2) how might the November Comprehensive Spending Review impact on ABR goals.

Are they the right goals in your view?

It cannot in my view be wrong to periodically undertake a fundamental review of what we are doing, why, consider its current relevancy and whether it might be achieved more effectively and efficiently. Some Government 'goals' appear to be pre-determined 'solutions' e.g. that there will be "fewer and larger institutions." – based on the unproven premise that this will deliver more efficient and effective ones.

The goal of Institutes of Technology and National Colleges providing level 3 upwards fails to address how learners will attain levels 1 and 2 in preparation to access higher level programmes of study.

What do you think area-based reviews will not achieve?

1. True localism: *Fewer and larger institutions will literally put distance between educational institutions (suppliers) and many learners, business and the wider community (customers).*

2. Accessibility: *Worse, it may put learners off enrolling if travelling distances are too great and expensive. In addition, larger institutions can feel intimidating to our more vulnerable learners.*

3. A comprehensive review of post 16 education: *Focussing on GFE and Sixth Form Colleges alone, is a missed opportunity for a genuine, comprehensive strategic review and hence at best delivers a partial and hence potentially misleading set of recommendations.*

4. Maximised cost effectiveness: *Since not all providers (UTCs, school and academy sixth forms etc.) will be reviewed.*

5. Consensus: *There is no appeal system and whilst in theory providers do not have to follow the ABR recommendations, there might be a financial imperative to do so if the funding agencies withdraw their support.*

What would be your top piece of guidance for Governors right now?

Stay true to your college's mission; be open minded about what might best serve your learners, employers and community – and remember that there is no legal obligation to comply with an ABR outcome. If your Board does not feel that the proposals which come out of an ABR are right for your college and its stakeholders, then remember that you have legal obligations as charity trustees to consider, which in those circumstances may well not be discharged by following the ABR proposals.

Disclosure – why so important?

In a period of increased activity around the structure of the sector, it has perhaps never been so important to have a thorough understanding of a typical merger process. We have been publishing a series of articles in Education Focus over recent years walking through each step in a typical merger or acquisition process – past issues are available online at rollits.com or can be supplied on request. In this latest in the series, Richard Field and John Flanagan look at the importance of the disclosure process in which sellers/ merger partners spell out what issues might have to be dealt with in the future.

In a corporate context, on an acquisition or disposal warranties will be provided by the sellers to a buyer, such warranties being incorporated into the Sale and Purchase Agreement. Warranties are statements of fact/promises given by the sellers to a buyer in relation to the state of affairs of the entity being sold. The warranties will be keenly negotiated as a buyer will seek to have as great an amount of warranty protection as it can obtain; any warranted fact which turns out to be untrue or misleading following completion could potentially give the buyer a claim for breach of contract against the sellers. From the sellers' point of view it is important that they understand fully and are comfortable with the warranties being given.

The same is true in any education sector merger or acquisition. For ease of reading we are choosing to refer to sellers and buyers, but in practice the governors of, say, a further education corporation (who of course are also charity trustees) can be either or both depending on the transaction in question. Sellers have protection against a claim for breach of warranty if any facts which potentially give rise to such a claim were disclosed to the buyer prior to completion. A buyer cannot claim breach of warranty if it was aware of such breach, or potential breach, prior to entering into the documentation and chose to go ahead with the transaction anyway. It is in part this process which helps protect governors from potential liability connected with a merger, for example.

The manner in which sellers formally make the buyer aware of any facts which could amount to a breach of warranty is through a disclosure letter, sent by the sellers to the buyer immediately prior to completion. The disclosure letter is therefore a key protection for the sellers and a significant amount of time should be spent drafting and finalising this letter to ensure that appropriate disclosures are made to avoid the sellers finding themselves on the receiving end of a breach of warranty claim. Equally a buyer should ensure that the disclosure letter is fully and properly reviewed to avoid any unpleasant surprises post completion.

The process for putting together a disclosure letter is for the sellers to go through each warranty in turn (typically with their financial, legal and other appropriate professional advisers) and consider carefully whether anything needs to be brought to the attention of the buyer in relation to each warranty. At this point it is important to remember that any disclosures made have to provide the buyer with sufficient information to enable a buyer to understand the issue or matter being "disclosed". Case law confirms that if a disclosure is too vague then the sellers run the risk that a court will find such disclosure was insufficient to preclude a claim for breach of warranty.

The disclosure letter will be accompanied by the "disclosure bundle" which contains all of the documents referred to in the disclosure letter. Therefore if, for example, an employee claim is disclosed then it is likely all correspondence relating to such claim would be contained within the disclosure bundle to ensure that the buyer cannot subsequently claim to not have had such details in relation to the claim. Depending the size of a transaction, bundles can run to many binders and it is becoming increasingly common for disclosure bundles to be contained on a closed CD (i.e. not subsequently editable) for ease of reference at the time of the transaction, and in the future.

The disclosure process is often a very similar process to the due diligence process considered in the Spring 2015 edition of Education Focus, however it should be approached as a new process given its crucial importance to the sellers going forward. The disclosure letter is the final opportunity for sellers to bring any specific issues to the attention of a buyer before completion takes place. It might be that a particular disclosure causes the buyer to have second thoughts, adjust the price or seek legal or other protections such as additional indemnities or a retention of part of the purchase price for a period of time to cover off the value of a post completion claim which might or is likely to arise. In a sector merger it can make the difference between proceeding and not, or can be helpful in securing additional support from other sources such as funders to enable a merger to stack up financially.

Richard Field and John Flanagan

Rollits' Education Team rated by Legal 500

We are delighted that the work of the Education Team at Rollits has again been recognised by legal ratings directory Legal 500. This latest accolade only serves to reinforce the immense pride we have in working with such committed clients in the sector, with talented and hard working teams who we are proud to be able to support in a combined effort to best serve students, employers and our communities. In this most recent edition of the directory, the editors have highlighted in particular our specialism in advising further and higher education institutions on strategic and commercial matters along with our work in helping providers navigate contentious issues. The editors conduct their own independent research into law firms' skills, capability and track record and publish their findings in what is one of the UK's leading ratings directories. Their conclusions are a testament to the work of our clients, for whom we are extremely grateful.

The Legal 500

Sub-contracting and the 2015/2016 Funding Rules: a practical approach

In our Summer 2015 edition of Education Focus we looked at the changes to the Skills Funding Agency's Funding Rules for 2015/2016 and, in particular, the greater emphasis being placed upon the control of sub-contractors. The risk to education providers if they get this wrong could be severe not only financially if there is a significant claw-back from the funding body but also in terms of reputation.

Education providers are well aware that the control of sub-contractors is not an issue to consider once and then forget about but rather that it is an ongoing process. The checks and controls which a provider should have in place need to be considered prior to entering into a contract at the due diligence stage. The same considerations should apply whilst negotiating the terms of the contract and continue throughout the performance of the contract.

Due diligence
Ensuring that the education provider chooses the right sub-contractor to work with is essential. Due diligence must be carried out thoroughly and not simply be a "tick box" exercise. This should include, as a matter of course, a review of financial and legal information but equally references should be taken up and, if possible, speak directly with other education providers who have worked with the sub-contractor to see what experience they have had of working with this particular provider. The SFA's List of Declared Subcontractors (formerly known as the Sub-Contracting Register) can be useful in terms of identifying potential referees, but the List is not of itself an endorsement. Equally the due diligence process is not a "one off step" and should be repeated when contracts are renewed.

Drafting the contract
Good drafting of the contract is critical to ensure that the education provider is given sufficient rights to intervene and actively manage the sub-contractor in the event that the services are not being provided to the standard expected. If the contract does not include any such rights or sufficient rights, it makes subsequent contract management much more difficult to undertake with the result that the delivery of learning can be undermined and the reputation of the education provider called into question.

Contract management
Once the contract is underway, the sub-contractors must b e managed effectively. We have seen some good practice in this area: it is clearly not going to be sufficient to simply allow them to "get on with the job" but rather proactive steps must be taken particularly where there are any signs of deviation from the contract. The contract should include a number of provisions which require the sub-contractor to provide regular documentation and information in relation to progress. Education providers should ensure that the sub-contractor is providing this information on a regular basis. This is particularly important when payment is conditional upon the supply of such information. Has the sub-contractor provided all documentation which it is required to provide before payment is made? Is the documentation which has been provided completed correctly? If it is not, then payment should not be made.

The contract should also allow for the education provider to visit sub-contractors not only at regular, pre-arranged meetings, but on an ad hoc basis. If there are any indicators of the contract not being performed strictly in accordance with its terms, for example where certain documentation has not been provided, then visits should be encouraged. The earlier any signs that the sub-contractor is not complying with the contract can be addressed, the more chance there is to resolve matters and show to the funding body that the education provider is managing its sub-contractors robustly. Equally, any resistance to a visit may indicate that all is not well.

The final issue to consider in order to ensure robust contract management is that the breach provisions in the contract are utilised. If the sub-contractor is in breach of the contract, for example for failing to submit documentation by a certain date without a good explanation as to the reason for the delay, a Notice of Breach requiring the breach to be remedied should be served. Early intervention hopefully ensures that the provision of services remains on track and again, in the event that there is a problem later down the line, it will help to demonstrate to the funding body that the education provider has taken all appropriate steps to manage its sub-contractor. The contract should also provide for the termination in the event of continued breaches or fundamental breaches and again, in the event that matters are so serious they fall within such definitions, serious consideration should be given as to whether or not Termination Notices should be served.

The SFA has not, in its Funding Rules, given explicit rules or examples as to what it considers robust contract management will look like. However, by ensuring contract management is at the forefront of all contract managers' minds from start to finish it will hopefully limit any potential problems with the delivery of learning and reduce the risk of financial and reputational damage.

Caroline Hardcastle

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 or email tom.morrison@rollits.com

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, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law is stated as at 12 November 2015.

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