



# Module 3

# The Main Statutory Framework

For suggestions on how to get the most out of these self-study materials, see the booklet on 'Using the materials'.

# Preface to Governance Training Materials

At the time of writing the Governance Training Modules, the **Education Act 2011** had been implemented. It abolished the Young People's Learning Agency, with funding for colleges now being administered by either the Education Funding Agency and / or the Skills Funding Agency. It significantly reduced the complexity of colleges' Instrument and Articles of Government, giving them greater flexibility to run their own affairs. The details are included in Schedule 12 of the Act which makes a number of amendments to prior legislation. Section 29b of Schedule 12 states that "the governing body of the institution may modify or replace its instrument of government and articles of government". These must however comply with certain requirements set out in Part 2 of Schedule 4, thereby retaining some of the key responsibilities previously enshrined in legislation. In some cases, the statutory provision for sixth form colleges differs from that of general further education (GFE) colleges with the **Department for Education (DfE)** overseeing the former and the **Department for Business, Innovation and Skills (BIS)** the latter; however all colleges will now be actively considering the changes that affect them and all governors will need to be aware of the implications for their own organisation. At the same time as the Education Act 2011 was passed into law, the Association of Colleges published **The English Colleges' Foundation Code of Governance**.

This voluntary code of practice was developed by the sector following extensive consultation and all GFE colleges have been encouraged formally to adopt it. It has the full support of the government and is seen as "an important milestone in making colleges more locally accountable and in freeing them to respond more effectively to local learners, employers and community partners".

The government's reform plan for the further education and skills system was set out in **New Challenges, New Chances** published on 1 December 2011 and further refined in **Rigour and Responsiveness in Skills** published in April 2013. A **summary of NCNC** is available from LSIS. In November 2011 the final report of the Independent Commission on Colleges in their Communities, **A Dynamic Nucleus**, was published. Alongside New Challenges, New Chances, these two documents establish the foundation for the future development of the further education and skills sector.

The 2013 version of the Governance Training materials incorporate these significant changes to the operation of further education but all governors are recommended to familiarise themselves with and take account of the key documents referred to in this preface. The materials enshrine the six principles set out in the Good Governance Standard for Public Services by the Independent Commission on **Good Governance in Public Services** (2005), to which all governing bodies are referred.

The **Association of Colleges** has also compiled a **Governance Resource Library** which provides a wide range of online resources for governors and which will usefully complement these materials.

The **Learning and Skills Improvement Service** which has produced these updated and much valued governance training modules will cease to exist after August 2013. It is hoped the essential updating of these resources will be regularly carried out by other existing organisations or newly-emerging ones.

## Acknowledgements

The first edition of these training materials was published by the Further Education Funding Council in 2000 and further updated and amended in 2002 following the establishment of the Learning and Skills Council in 2002. They were commissioned by LSC in 2002 under the Standards Fund and produced by a partnership of national organisations involved in further education.

This third edition of the training materials has been published by **The Learning and Skills Improvement Service (LSIS)**, as part of the **Leadership Skills for Governance** programme, and incorporates the changes brought about by the Education Act 2011 and government policy initiatives as at January 2013.

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Feedback on the modules should be sent to [fegovernance@lsis.org.uk](mailto:fegovernance@lsis.org.uk)

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# Introduction

This module looks at the main statutory framework within which the college's governing body conducts its business. Aside from the main governance legal framework itself, this module also focuses on two other main areas of the statutory framework of which governors should be aware: safeguarding young people and vulnerable adults, and information law.

This module should be read alongside Module 2: Values and ethical framework. Other parts of the statutory framework are covered in other modules, and where relevant this module refers to these other modules.

Some of the legal issues covered here are extremely complex. The aim is to give an overview and awareness of legal implications. It is not an exhaustive guide nor is it a substitute for appropriate legal advice.

Further information and links to specific documents (e.g. the various Acts of Parliament mentioned) are to be found in the Further reading section at the end of this document.

## Aims

**By the end of this module you should be able to:**

- describe the legal structure of your organisation and how it affects the governing body's activities;
- explain the need for caution when changing the legal status of the organisation, setting up subsidiary companies or entering into a joint venture;
- state the implications of a college's charitable status;
- list your organisation's powers and the consequences of acting outside them;
- know how to identify your responsibilities under the Instrument and Articles;
- identify the occasions when the college seal should be used;
- specify the lines of accountability regulating your organisation;
- outline the organisation's legal responsibilities to its learners;
- understand the legal framework and the governing body's responsibilities for safeguarding;
- outline the organisation's responsibilities in relation to information legislation;
- be aware of the significance of the Data Protection Act, the Freedom of Information Act and other relevant legislation relating to information and communication technology (ICT); and
- be aware of other key areas of college life that are covered by legislation and where to find information on them in these training materials.

## Contents

**Mark the sections you want to study and tick them off as you complete them.**

To do	Done		
<input type="checkbox"/>	<input type="checkbox"/>	Section 1	An overview of the statutory and legal framework
<input type="checkbox"/>	<input type="checkbox"/>	Section 2	Legal structure and legal personality
<input type="checkbox"/>	<input type="checkbox"/>	Section 3	Charitable status
<input type="checkbox"/>	<input type="checkbox"/>	Section 4	Education law

<input type="checkbox"/>	<input type="checkbox"/>	Section 5	Powers of further education colleges
<input type="checkbox"/>	<input type="checkbox"/>	Section 6	Instrument and Articles
<input type="checkbox"/>	<input type="checkbox"/>	Section 7	Accountability
<input type="checkbox"/>	<input type="checkbox"/>	Section 8	The college and its students
<input type="checkbox"/>	<input type="checkbox"/>	Section 9	Safeguarding
<input type="checkbox"/>	<input type="checkbox"/>	Section 10	Information and communication
<input type="checkbox"/>	<input type="checkbox"/>	Section 11	The college and other legislation

### Working on the self-study materials

These materials have been designed for flexible use. You can work through them with others or by yourself, dip in and out for reference, or complete in one sitting. A further reading list can be found at the end of the module, and those of you accessing the materials online will find web links embedded in the text.

### What you will need

To complete the activities in this module you will need to acquire the following documents. Please ask the clerk for them in the first instance:

- Your college's Instrument and Articles
- Relevant 2012 modification order for your college's Instrument and Articles
- College document setting out mission, vision and strategic aims
- College safeguarding policy and safer recruitment procedures
- College safeguarding risk assessment
- College enrolment form or learner agreement
- College publication scheme
- Acceptable use policy.

# Section 1

## An overview of the statutory and legal framework

The main legal framework for further education (FE) in England and Wales was established by the **Further and Higher Education Act 1992** (FHEA). Before this, most further education and sixth-form colleges were under the control of local education authorities (LEAs). The main exceptions were colleges that did not relate to a single LEA and which were grant-aided. As a result of the FHEA all these colleges were brought into a new further education sector and made independent from LEAs. At that time responsibility for funding them was given to the Further Education Funding Council (FEFC).

The FHEA has been amended by subsequent education legislation (see Section 4 below) and also the Employment Rights Act 1996, the Equality Act 2010 (see Module 2), and the Charities Act 2011 (See Section 3 below). The most recent legislation, the **Education Act 2011** has resulted in the greatest changes to the FHEA since 1992. In this module you will find out how the 2011 Act affects colleges in England. The 2011 Act is the first significant act following Welsh devolution and the position for Welsh colleges is different. The Welsh Assembly Government is still consulting about the resulting changes and they are unlikely to be fully implemented for another three years. Most Welsh colleges will still be subject to the standard 2008 Instrument and Articles.

Many of the provisions of these acts are brought into effect by Orders of the Secretary of State, which are known as statutory instruments. These are referred to as secondary legislation, and include the Instrument and Articles of further education colleges (FECs) and sixth form colleges (SFCs). Historically colleges have been regulated by one Secretary of State. The split in recent years between the Department for Education (DfE) on the one hand, and the Department for Business, Innovation and Skills (BIS) on the other, has led to some overlapping of policy of which governors need to be aware. The relevant government departments can also issue advice and guidance on the legislation in the form of circulars and administrative memoranda.

The governing body is a 'legal person' (see Section 2 below) with the same general legal responsibilities as other types of organisations, including the employment of staff, the offer of services, and the ownership of assets. As such it is subject to a raft of legislation that applies to organisations in England and Wales. Some of the main statutes are mentioned in this module.

In addition to these statutory duties, governing bodies are subject to other types of legal duties and obligations:

- Contractual obligations such as those arising from contracts with the college's staff, learners and suppliers, including adherence to European procurement regulations.
- Duties imposed by courts which are not based on either legislation or contract. These are common law duties, and the law relating to them is established through case law.
- Duties of loyalty and good faith, and of care, diligence and skills are owed by governors to the governing body due to their fiduciary position (a position of trust).

The governing body therefore has statutory, contractual and common law duties. All three types of duties may govern its relationships and activities.

## Section 2

# Legal structures and legal personality

Most further education colleges are statutory corporations set up by order of the Secretary of State under the FHEA (**Further and Higher Education Act**). A statutory corporation exists only for the particular purposes which Parliament intended (unlike some other legal structures where the only activities not permitted are those restricted by general law). These purposes (referred to as ‘powers’) are set out in sections 18 and 19 of the FHEA, as amended by later legislation. These statutory powers govern the relationship between further education colleges (FEC) or sixth form colleges (SFC) and the outside world.

See Section 4 for more details on the powers of further education colleges (FECs) or sixth form colleges (SFCs). In addition FECs / SFCs are governed by their Instrument and Articles of Government. These are prescribed in regulations made by the Secretary of State under powers established by the FHEA, though you should note that, following the 2011 Education Act, these can now be changed for colleges in England in most respects without having to get the Secretary of State’s permission – see Section 6 below for more detail. The Instrument and Articles set out the college’s composition and procedures and its internal powers, responsibilities and duties. These govern the internal management of FECs / SFCs but are subservient to the powers of the FEC / SFC. If, for any reason, there was a contradiction between the powers and the Instrument or Articles, then the powers would override the Instrument and Articles.

In this and the following sections we will talk about ‘powers’ and ‘duties’. A power defines what the governing body is entitled to do if it chooses (it may only do those things that fall within its statutory powers). A duty is something the governing body or an individual must do.

### Designated institutions

A few colleges are collectively known as designated institutions. Generally, these are colleges which were not previously maintained by an LEA. These colleges have a variety of legal structures. Most are companies limited by guarantee, registered under the Companies Acts. The company is governed by its Memorandum (which sets out the main objects of the company) and the Articles of Association which set out its internal procedures, rights and responsibilities. Other types of designated institutions may be governed by trust deeds in which case the governors may be called trustees.

The other types of designated institution will generally have their own Instrument and Articles (or Memorandum and Articles of Association) which have been approved by the Secretary of State.

### Innovative legal structures

The major change following on from the 2011 Education Act is that colleges are free to dissolve themselves, converting from their current legal structure to any legal structure they believe will most help them to achieve their objectives. Colleges may convert to one of the existing structures already in use in FE and referred to above, or to any other models including for example:

- Higher Education Institutions which are legally independent corporate bodies, similar to an FEC / SFC, but subject to regulation from the Higher Education Funding Council.
- Mutuals such as industrial and provident societies. These are subject to relatively light regulation by the Financial Services Authority. Membership will be restricted to participants, for example staff.

- Charitable incorporated organisations registered under the Charities Acts. The governors will be members of the organisation. Charitable incorporated organisations were first introduced under the Charities Act 2006. Registration as a charitable incorporated organisation will be possible from the autumn of 2012 at the earliest, following the finalisation of regulations by Parliament. Initially this will not be an option for existing colleges as it will only be possible for new organisations to be created as charitable incorporated organisations.

The college's mission and objectives should be the starting point in a decision making process about changing legal status, and suitable arrangements must be put in place to safeguard current learners.

Annex A to the BIS policy document. **New Challenges New Chances: Further education and skills reform plan: building a world class skills system**, recommends that any college seeking to change its model of delivery should conduct a structure and prospects appraisal. Corporations are not required to do this but increase the possibility of legal challenge by one of their stakeholders if they do not. The factors for consideration set out in New Challenges, New Chances are:

- vision of the future
- selection of delivery solutions and partners
- value for money
- impact on staff
- impact on learners
- impact on employers
- impact within the community
- impact on competition
- quality of provision
- strategic leadership and management.

Specific factors to consider with regard to the most appropriate legal structure would be:

- legal personality (see below)
- business objects and charitable status
- business structure and partnerships
- relationship with stakeholders / 'owners'
- compliance and regulating bodies, e.g. Charity Commission, Financial Services authority
- tax
- costs.

Legal advice will be required to make the final decision, and colleges will need to consult upon and publish any changes.

See Module 7: Collaboration and partnerships, which also looks at federations and mergers.

## Legal personality

Those colleges with a corporate status, including statutory governing bodies, companies, and charitable incorporated organisations (see also Section 3 below), have a legal identity which is distinct from the identities of the governors or members. With this separate legal identity the college can assume rights, duties and liabilities in its own name in the same way as a person can. Incorporated entities are sometimes termed 'artificial legal persons'.



In theory, colleges might not have a corporate structure, if they were created by trust deed without corporate status, or indeed were unincorporated associations. In this case they would not have a separate legal identity and could not be held responsible for their actions. In these circumstances, as a general rule, it would be the individuals (the governors as trustees) who would have to take personal responsibility in law for the college's activities. An important consequence of this unlikely scenario would be that, on the insolvency of a college, creditors might be able to claim against the assets of the individual governors, whereas they cannot do this in the case of a college with a corporate structure. (In practice the only unincorporated structures likely to be found in colleges are the smaller student unions.)

### **Activity**

What is your college's legal structure?

Make a note of the legal status of your college. Note down what implications, if any, this has for governors. Check these with your clerk. If you are the clerk, take some time to research the implications or ask the college's legal advisers.

### **Viewpoint**

It is important that governors know the legal status of their college, and particularly that they understand the implications for personal liability of unincorporated organisations. Following the implementation of the Education Act 2011, governing bodies carrying out strategic appraisals will include a review of their strategic intentions against their current legal status to ensure that it is fit for purpose.

## Section 3 Charitable status

All publicly-funded colleges, whatever their legal status, are charities. This brings with it benefits and obligations, which vary according to the route by which the college was recognised as a charity.

- **Registered charities:** many designated institutions (see Section 2 above) are registered as a charity with the Charity Commission and are subject to the provisions of the Charities Acts. **The Charities Act 2011** has replaced previous Charities Acts. The **Charity Commission** exercises supervision over registered charities and has the power to act for the protection of the charity (for example by suspending trustees or governors).

Note that charitable incorporated organisations are registered charities. They have the legal personality advantages of companies limited by guarantee but charitable incorporated organisations are only subject to charity law, and not company law. As stated above, publicly-funded colleges have to be charities, so those colleges that are companies limited by guarantee are subject to company law but also have to register with the Charity Commission. However company law is generally intended to legislate for companies with profitable aims rather than charitable objectives.

Student unions in England and Wales are no longer considered exempt charities (see below) and are required to register with the Charity Commission if they have an annual income of over £100,000.

- **Exempt charities:** further education colleges (FECs) and sixth form colleges (SFCs) are exempt charities for the purposes of the Charities Acts. They do not fall under the direct supervision of the Charity Commission. The rationale is that they are adequately supervised by other bodies such as the relevant funding council, the Inland Revenue and the National Audit Office. In 2012 there was a temporary issue over who should be the principal regulator for general FECs. This is likely to be resolved with this role being allocated to the Department for Business, Innovation and Skills or the Skills Funding Agency by early 2013. The principal regulator for SFCs is the Department for Education. FECs and SFCs are therefore not registered with the Charity Commission, cannot describe themselves as a registered charity and do not have a registered number. There is a requirement however that governors of FECs and SFCs will follow the standards set out by the Charity Commission.

Following the changes to the governance of colleges resulting from the Education Act 2011, the Instrument and Articles (see Section 6 below) of FECs and SFCs are much more flexible than previously, but an FEC / SFC must not make any changes to its Instrument and Articles that would result in it ceasing to be a charity. Regulations, such as the financial memorandum with the funding agencies, are also being relaxed (see also Section 7 below). It could be said that FECs / SFCs were protected under the more prescriptive statutory instruments and regulations prior to April 2012. In effect these largely interpreted and applied charity law for the sector and, as long as these were complied with, FECs / SFCs did not often have to look further to fulfil their obligations under the Charities Acts. FECs / SFCs now have to refer to and comply with charity law itself, although it is still expected that they will have a principal regulator and not have to register with the Charity Commission.

Because colleges are charities, governors are required to:

- act in accordance with the charity's powers and its charitable objects (i.e. to act as an educational charity);
- promote the interests of the charity and ensure that its assets are applied only for its charitable purpose (i.e. the provision of education);
- safeguard the assets of the charity; and
- demonstrate that the aims of the college are for the 'public benefit'.

Special care must be taken when organising trading activities which may not be regarded as charitable or entering into a partnership with another organisation that does not have charitable status. In these circumstances the college may set up a subsidiary company, or enter into another arm's-length joint venture or partnership agreement with a partner. Care also needs to be taken where, for example, the college wants to make a payment or gift which is not related to the provision of education. The same considerations apply to student unions which will usually be incorporated associations with charitable status (see Section 6 below).

Charitable status has a number of tax implications.

- Colleges are exempt from capital gains, income and corporation taxes on income arising from carrying out the college's primary purpose – the provision of education. Advice must be taken on income generated from a college's trading activities.
- Colleges are exempt from charging VAT. On the other hand they cannot claim it back on their expenses. In most cases subsidiary companies are not exempt. Professional advice should be taken on the VAT implications of using subsidiaries. College building projects are another key area on which advice about VAT implications will be needed.
- Colleges are exempt from the payment of stamp duty where, for example, a property is transferred from one charitable body to another.

## Aims

Think about how a college might demonstrate that its aims are for the public benefit. What evidence could it provide that this is the case?

## Viewpoint

We know that colleges' principal powers are for the provision of further, higher and secondary education. It should be possible, with reference to the college's mission, vision and strategic objectives, to prove that the education is for the 'public benefit'. References in these to benefits for the local community and business, and to the general advancement of economic prosperity are relevant. The ease of accessibility to college provision, as demonstrated in the college's admissions policy, will also prove the 'public' element of 'public benefit' aims.

Further guidance on demonstrating public benefit is available from the Charity Commission. The **Higher Education Funding Council** has also issued useful guidance on demonstrating public benefit which can be applied to colleges.

## Section 4

# Education law

The statutory basis for further education colleges (FECs) and/sixth form colleges (SFCs) is the Further and Higher Education Act (FHEA) which has been amended by subsequent education acts as listed below:

- Education Act 1996
- Employment Rights Act 1996
- School Standards and Framework Act 1998
- Teaching and Higher Education Act 1998
- Learning and Skills Act 2000 – comprehensive reform of post-16 learning which included express powers for FECs / SFCs to form subsidiary companies
- Education Act 2002
- Education and Inspections Act 2006 – formal collaboration between colleges and schools permitted for the first time
- Further Education and Training Act 2007 – enabled colleges to apply for foundation degree awarding powers; included guidelines on consultation with learners, potential learners and employers, the facilitation of innovative delivery models and widening the scope of LSC delivery of shared services
- Education and Skills Act 2008 – raising the education or training leaving age to 18; governors given duty to promote education and training for young people
- Apprenticeships, Skills, Children and Learning Act 2009
- Education Act 2011 – ‘deregulation’ of the FE sector (see below).

Other relevant education legislation includes:

- Education (No2) Act 1986 – governors have a duty to take all reasonably practical steps to ensure that freedom of speech is secured for staff and learners and to issue a code of practice.
- Education Act 1994 – covers student unions. However the minimum Instrument and Articles (see Section 6 below) no longer include the requirement to have a student union.
- Education Act 2002 – positive duty on the governing body of a college to safeguard and promote the welfare of children receiving education and training (see also Section 10 below).

Links to some of the above are to be found in the Further reading section, below.

### **Education Act 2011**

The Act repealed a number of previous provisions in order to simplify and clarify the regulatory framework. This has had the double-edged effect of requiring colleges to focus more on general legislation, such as charity law (described in Section 3 above), property law and competition law. As previously stated, separate provisions under this Act are being applied to Wales.

## The Act

- transfers the power to modify and replace a corporation's Instrument and Articles of Government to the FEC / SFC itself, and repeals the Secretary of State's power to modify, replace or revoke an FEC's / SFC's Instrument and Articles;
- amends Schedule 4 to the FHEA so it only contains the essential requirements for governance that will enable FECs / SFCs to properly constitute and conduct themselves (see Section 6 below);
- transfers the power to dissolve the FEC / SFC to itself;
- gives the FEC / SFC the responsibility to transfer its property, rights and liabilities upon dissolution to specified educational providers and for educational purposes;
- requires the FEC / SFC to conduct a full consultation in accordance with regulations and take account of the views of those consulted in making its final decision to dissolve; and
- transfers in extremis powers to intervene in the affairs of colleges from the Chief Executive (of the relevant funding body) to the Secretary of State (of the relevant Department), and adds the power to direct an FEC / SFC to dissolve itself on a specified date (where the powers would only be exercisable in prescribed circumstances).

## Section 5

# The powers of further education governing bodies

A further education college (FEC) or sixth form college (SFC) may only lawfully exercise those powers it has been granted.

Sections 18 and 19 of the Further and Higher Education Act, as amended by the Learning and Skills Acts, the Education Act 2002, the FE and Training Act 2007 and the Education Act 2011, grant principal powers to:

- provide further, higher and secondary education for those aged 14 and over;
- participate in the provision of secondary education at a school; and
- supply goods or services in connection with the provision of education.

For the provision, or participation in the provision of secondary education, the corporation must have consulted the local authority.

Section 19 of the Act sets out the supplementary powers of FECs and SFCs. These are basically to do anything necessary or expedient for the exercise of the principal powers. This specifically includes:

- conducting an educational institution;
- providing facilities such as accommodation and recreational facilities for staff and learners;
- acquiring or disposing of property;
- entering into contracts such as employing staff;
- borrowing money and granting security;
- investing money;
- forming, participating in forming or investing or becoming a member of a company limited by shares, a company limited by guarantee, or charitable incorporated organisation (see below); and
- accepting gifts for any of these purposes.

The Education and Inspections Act 2006 permitted collaborative arrangements by FECs with maintained schools and further education bodies. The Education Act 2011 allows colleges to dissolve themselves in order to enter a different legal form.

### The principle of ultra vires: What happens if an FEC or SFC does something it does not have the power to do?

If a college decides to do something which it is not authorised to do, the decision would be ultra vires (outside its powers). Similarly, a college would be ultra vires if it decided to act outside its charitable objects.

Such a decision is open to challenge in the courts and may be declared invalid and void. An example of this would be carrying out a trading activity which is wholly unrelated to the provision of further education and training. Various consequences flow from a decision being ultra vires: the organisation could not rely on, or enforce contracts arising from the decision; and any contracting parties who suffer a loss as a result of the void agreement may have a claim against the organisation. Governors may be personally liable for such a loss.

Whenever your governing body proposes to do something which falls outside the key provision of education and training the questions should be asked: “Have we considered whether the college has the power to do this?” and “Does it fall within our charitable objects?”. The clerk should advise in the first instance, and external professional advice may well be needed as well.

## Aims

### What is your organisation empowered to do?

Look at the following examples of decisions which might be made by your organisation. For each one, note down the reasons why you think the action is within the powers of the organisation or whether it would be ultra vires.

1. Your college decides to let out its sports hall at a market rate to a local gym club for three evenings a week.
2. Your college decides to go into partnership with a commercial organisation in order to deliver a specialised area of provision that it does not have internal expertise and facilities to deliver on its own.

## Viewpoint

1. Letting the sports hall out will gain the college useful additional income. The income is for an activity that is outside the powers of the college. In addition the market rate implies that a profit will be made which will mean that it will be outside the college’s charitable objects. The college may be advised to use a subsidiary company in order to carry out this activity.
2. In this situation the college’s partner does not have charitable objects. The college could enter into a contract to buy in the services that it requires from the partner, or it may wish to enter into a joint venture in which case the lines could potentially become blurred between activities that are within the college’s powers and its charitable objects, and the commercial elements of the provision. If a joint venture is the preferred way forward the best solution could be to set up a joint venture company limited by shares.

## Section 6

# Instrument and Articles

The Instrument and Articles of Government are prescribed in regulations made by the Secretary of State under powers established by the Further and Higher Education Act. The Instrument and Articles set out the governing body's composition and procedures and its internal powers, responsibilities and duties. They govern the internal management of the governing body. The governing body may add to the governance framework with more detailed internal governance policies and procedures, including standing orders. These will be subsidiary to the Instrument and Articles, which will override them if there is a contradiction.

The different categories of designated institutions had slightly different Instrument and Articles to the general further education colleges (FECs) and to sixth form colleges (SFCs). The Instrument and Articles for each category of college have been amended by the Secretary of State on a number of occasions since 1992. Until April 2012, FECs and SFCs could only change their own Instrument and Articles with the permission of the Secretary of State, and colleges rarely went to the trouble of requesting bespoke changes for individual colleges. As a result the Instrument and Articles of most corporations in each category were very similar, if not identical.

Between 2008 and April 2012, most colleges operated under Instrument and Articles that had been issued by the Secretary of State in 2008. References to the Instrument and Articles in other parts of the training materials are currently to the clauses in the 2008 versions for general FECs.

Other modules in the training materials covering the Instrument and Articles are as follows:

### Instrument

- Composition and appointment of members – Module 12: Search committee
- Appointment of the Chair and clerk – Module 5: The process of effective governance
- Meetings, proceedings and related activities – Module 5: The process of effective governance.

### Articles

- Roles and responsibilities of the Chair, principal and clerk – Module 5: The process of effective governance
- Governing body responsibilities with regard to the employment of the principal and senior post-holders – Module 10: Finance and resources
- Governing body responsibilities with regard to the employment of the clerk – Module 5: The process of effective governance
- Governing body responsibilities with regard to strategy and educational character – Module 6: Strategy and educational character
- Governing body responsibilities with regard to finance and resources including staff – Module 10: Finance and resources
- Governing body responsibilities with regard to audit – Module 11: Audit committee
- Governing body responsibilities for quality and the curriculum – Module 9: Quality and standards, and Module 8: Curriculum.



## 2012 changes to the Instrument and Articles

Historically colleges have been regulated by one Secretary of State. Since 2009, colleges that have chosen to become incorporated sixth form colleges are regulated by the Department for Education (DfE) while other colleges continue to be regulated by the Department for Business, Innovation and Skills (BIS). Following the Education Act 2011 (see Section 4 above), the 2012 modifications to the Instrument and Articles have therefore been issued to their constituent FECs and SFCs in England by the relevant secretaries of state. The modification order for each FEC or SFC (now termed 'body' in the Instrument and Articles) inserts into the previous Instrument and Articles the changes that automatically take place as a result of the Education Act 2011.

One of these changes is that bodies now have the power to change their own Instrument and Articles, as long as they cover the minimum criteria laid down in the revised Schedule 4 of the Further and Higher Education Act (as specified in Schedule 12, Section 43 of the Education Act 2011) for an Instrument, and one of these criteria is that changes to Instrument and Articles must not result in the governing body ceasing to be a charity.

The Instrument (and / or Articles if in use) is a body's core constitutional document and the new Instrument (and / or Articles) must specify how the body may modify or replace the Instrument (and / or Articles). Because of their significance, bodies may wish to write into their Instrument (and / or Articles) that they may only be changed by a higher than usual percentage of the vote in favour of the resolution. In changing their Instrument (and / or Articles), bodies must strike a balance between on the one hand protecting the institution, its assets, its core aims and its stakeholders, and on the other hand enabling the body to be responsive, flexible and efficient. A change to the Instrument (and / or Articles) of a body is significant but is still less fundamental than dissolving the body and creating a different kind of legal entity. The latter must always come about as a response to strategic need (see Section 2 above). A change to Instrument (and / or Articles) may simply reflect a review of the practical workings of the body.

The minimum requirements for the Instrument in Schedule 4 are paraphrased below:

- Provision for numbers of the body, eligibility of persons for membership, and appointment procedures.
- Members must include staff and learners of the institution, and, in the case of sixth form colleges, parents of learners at the institution aged under 19.
- Provision about procedures of the body and the institution, in particular with regard to dissolution of the body and transfer of property, rights and liabilities.
- Provision for there to be a chief executive of the institution and a clerk to the body, and their respective duties.
- Responsibilities of the body must include:
  - a. for some sixth form college corporations the preservation and development of the educational character and mission of the institution, and the oversight of its activities;
  - b. for other bodies, the determination and periodic review of the educational character and mission of the institution and oversight of its activities; and
  - c. for all, the effective and efficient use of resources, the solvency of the institution and the body and the safeguarding of assets.

- Requirement for the body to publish arrangements for obtaining the views of staff and learners on the compulsory matters for which the body is responsible (see immediately above).
- Permission for the body to change its name with the approval of the Secretary of State.
- Specification of how the body may modify or replace the Instrument and Articles.
- Prohibition from the body making changes to the Instrument and Articles that would result in the body ceasing to be a charity.
- Provision for a copy of the Instrument to be given free of charge to every member of the body, for it also to be available free of charge or at cost of copy, on request by anyone.
- Provision for a copy of the Instrument to be available for inspection at the institution on request during office hours, to every member of staff and learner at the institution.
- Provision for the authentication of the application of the seal of the body.

## Corporation seal

Most contracts are signed to show that the parties have agreed to them. The execution of a document by a corporation seal is an alternative to this. It is not compulsory for colleges to have or to use a corporation seal. Certain documents relating to land transfers require execution by a seal, as a 'deed', to be legally effective. If a college is worried about other long-term contracts, it may also choose to use a seal for these. Again, these are often property transactions. Executing a deed may also be useful where there is an agreement but no 'consideration' or value changing hands, as in normal circumstances one of the pre-requisite for a contract is 'consideration'. If in doubt, legal advice should be taken on when to use a seal.

It is usual practice for the seal to be used with the signatures of two governors, and for the clerk to maintain a formal record of the use of the seal. Prior to April 2012, the Instrument and Articles of general further education colleges (GFECs), but not all other colleges, specified how the application of the seal should be authenticated. The new Schedule 4 of the FHEA simply says that the Instrument 'must provide for the authentication of the application of the seal of the body'. Thus if a body decides to have a seal then the rules it chooses to make for authenticating the application of the seal should be included in the body's Instrument. The new Schedule 4 applies to all FECs and SFCs, not just GFECs.

## Activity

Consider ways in which the following (a-c) in the 2008 Instrument and Articles may be changed for the better. The references are to the clause numbers in the Instrument and Articles of most general FECs because they represent the majority of Instrument and Articles in use in the sector as at April 2012.

- a. The definition of a meeting (Instrument: interpretation of terms)
- b. The appointment procedures for staff members of the body (Instrument: clause 2)
- c. The inclusion of the appointment of holders of senior posts as a non-delegable responsibility of the body (Article: clause 9d).

## Viewpoint

The Instrument and Articles of Government have evolved since 1992 and each modification by the Secretary of State has been made to update and improve the governance framework for colleges. Bodies should take great care before deciding to change or eliminate existing clauses, and not to make changes for short-term convenience as these may have unforeseen consequences. Bodies also have to be mindful that they need to continue to comply with general law, such as charity, contract and employment law.

Having said all of that, there is scope for amendments to the Instrument and Articles, either because there are some clauses that could be improved generally, or because of the particular context for a body. When making changes, the body needs to consider how flexible the replacement clauses should be. If they are very flexible they may be misused in future. On the other hand more detailed rules can be inserted in the standing orders. If the Instrument and Articles are not flexible enough then they will need to be re-visited again unnecessarily.

The three areas you are asked to consider are examples of provisions in the 2008 Instrument and Articles that some might consider being ripe for improvement.

- a. The definition of a 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”. Company law has for some time allowed the use of telephone-conferencing. This may be more practical than video conferencing although of course those members who are linked up by telephone will not be able to see the other members and gauge their responses to debate. Some bodies may wish to change the definition of a meeting to permit the use of telephone-conferencing. Bodies might also like to consider the practice, permitted for private companies under company law, of taking most decisions by means of a written resolution. As an alternative to decision-making in a meeting, a written resolution must be circulated to all members either electronically or by hard copy, and agreed to electronically or by hard-copy signature.
- b. The appointment procedures for staff members of the governing body are quite detailed and do not allow for the nomination of staff by campus. According to the 2008 Articles, constituencies for sourcing and nominating staff members may only be split into academic and non-academic staff. Where campuses have very different characteristics and / or a merger has taken place, it may well be appropriate for the constituencies to be split by campus and the Instrument could be relaxed to allow this.
- c. The appointment of the principal and holders of senior posts is non-delegable. Most people would probably consider that the appointment of the principal should be made by the whole governing body because it is so important. There are sometimes practical difficulties in convening a full meeting of the governing body for a sole agenda item to confirm the recommendation of the governors’ appointments’ panel. Bodies might wish to consider removing the appointment of senior post-holders, other than the principal, from the list of non-delegable responsibilities in the Instrument.

## Section 7 Accountability

Section 5 above examined the powers of further education colleges (FECs) and sixth form colleges (SFCs), and the responsibilities of FECs / SFCs were touched on in Section 6. What happens if the governing body does not discharge its responsibilities effectively? In terms of giving a financial account, all FECs / SFCs are subject to upward lines of accountability to the government through the funding councils and ultimately to Parliament through the Public Accounts Committee and the Secretary of State. The principal, as accounting officer for the college, is directly responsible and accountable to Parliament, through the Public Accounts Committee, for the organisation's stewardship of public funds. The governing body is also subject to a parallel line of accountability to and through the courts. This form of accountability to Parliament and the courts is distinct from the duty of responsiveness to stakeholder groups. Accountability can be enforced by legal and financial sanctions; responsiveness generally cannot.

### Financial audit

FECs and SFCs are required by their funding councils, and usually by their Articles, to arrange for their accounts to be audited externally. As well as auditing the accounts, the external auditors will carry out a 'regularity' audit to ensure that the money allocated by the funding council has been spent properly and for the purposes for which it was intended. External auditors are therefore often known as 'financial statements and regularity auditors'. FECs, but not SFCs, are also required to have internal auditors. FECs and SFCs may also be audited by a wide variety of other external bodies including the funding council, the National Audit Office, the Public Accounts Committee and providers of specific funding such as the European Commission. These audits form a system to ensure that colleges are publicly accountable for the use of public funds (see also Module 11: The audit committee).

### The funding council

Colleges are required to enter into a financial memorandum with a funding council. Where they draw down funds from more than one funding council then the financial memorandum will be with the one from which they receive the most funds. The funding council imposes its own terms and conditions on the payment of grant monies. Breaching such a term will give the funding council the right to impose a sanction, such as withholding payment.

### The Secretary of State

The government, through the relevant Secretary of State, can intervene in extremis in order to protect learners and public money, and has the power to direct an FEC or SFC to dissolve itself on a particular date. The Secretary of State's role in this regard is akin to the Charity Commission's role for charities. The Secretary of State also needs to be consulted over a change of name for the FEC or SFC. Recent changes have removed previous powers of the Secretary of State.

## The courts

As public bodies, FECs and SFCs are subject to administrative law and can be challenged through the courts by a process known as judicial review.

Any decision by the governing body can be challenged by a person who has an interest in that decision on the basis that it is:

- illegal (e.g. outside its powers)
- irrational
- flawed by procedural impropriety. FECs and SFCs must comply with the requirements of procedural fairness and natural justice – the right to a hearing and unbiased decision making.

Judicial reviews must generally be brought as soon as possible. The usual remedy is to quash the decision and for the FEC or SFC to reconsider, although the court could require them to follow a specific course of action. The courts' jurisdiction over the activities of colleges is based on case law, not statute law.

Governing bodies can also be held to account through the criminal justice system if they have committed a criminal offence (for example, where the college has breached health and safety legislation, or, in extreme circumstances, the Corporate Manslaughter and Corporate Homicide Act 2007) where governors could be personally liable. They may be held to account to third parties through the courts where they have failed to comply with their legal obligations imposed by statute, or where they have breached their contractual obligations, or have failed to comply with duties imposed by the courts.

Generally if an FEC or SFC is being sued (for example for personal injury caused by the negligence of the governing body), it will be the corporate entity that is sued. As long as the institution has corporate status, and providing governors act in good faith and exercise such skill, care and diligence that could be expected from a reasonable person, it is very unlikely that individual governors will be held liable.

## Personal liability of governors

If governors have breached the duties imposed upon them by the Articles of Government, by statute, or the courts, it is theoretically possible that they could be held personally liable. This is very unlikely to happen and the college can take out appropriate insurance. In addition, under the Learning and Skills Act 2000, Section 145, if a governor is found liable in civil proceedings for an action or omission as a governor, an application may be made to the court to make an order extinguishing, reducing or varying the liability, if the court deems the action or omission to be honest and reasonable. Likewise governors may apply to the Charity Commission for relief as a charity trustee under Section 38 of the Charities Act 2006.

The 2008 Articles allow FECs to insure their members against liabilities incurred as members, and to pay the corresponding premiums. Insurance cannot be taken out against criminal liabilities.

## Activity

What practical action can governors take, apart from making sure they have insurance, to minimise the risk of personal liability?

## Viewpoint

Governors must act openly and honestly at all times, but this is not enough.

Governors need to ensure that they get the necessary training to understand their duties, responsibilities and liabilities. Using these training materials is one way to do this, but all governing bodies should take part in skills and training audits in order to assess the training required and then undertake a training programme. Not only do they need to understand their own responsibilities, but also how these fit together with the responsibilities of the principal and senior management team.

Once they fully understand their duties and responsibilities, governors should ensure that they are getting sufficient and timely information in an understandable format to enable them to take decisions; and they should take independent professional advice where they feel this is necessary. They need to declare financial and other interests, and to make sure that the governing body operates in accordance with its procedures. They also need to ensure that appropriate risk management policies, assessments and plans are in place and followed through.

## Section 8

# The college and its students

### The student contract and complaints

The student contract is fundamental to the relationship between the college and learners. It does not have to be in writing and can be drawn from a wide variety of sources including the prospectus, handbook, student charter, offer and acceptance letters, disciplinary, complaints and appeals procedures; and departmental literature. It may also include statements made by staff in interviews and elsewhere. The contract is formed when the learner unequivocally accepts an offer of a place by post, email, telephone, enrolment or registration.

Learners are generally regarded by the courts as consumers, so that all terms must be fair and written in plain, intelligible English. Consumer law includes the Unfair Terms in Consumer Contract Regulations 1999.

Colleges should have published complaints and grievance procedures in place and governors may be involved in the last step of the appeals procedure. These procedures should contain a clear process by which a learner or other organisation can make a complaint, have it investigated, reviewed and resolved. The procedure should also outline the process, timescales and named individuals. There should be an appeals process to deal with any challenges to the decision reached. Colleges should ensure that learners or other organisations are given relevant information about such procedures. When complaints cannot be resolved by the organisation, learners should be provided with relevant funding council contact details. If the course is in an HE institution then, when complaints cannot be resolved by the college, students will be able to appeal to the Office of the Independent Adjudicator for students in Higher Education. External bodies will not usually investigate complaints until the college's procedure, including the appeal, has been exhausted. The external bodies reviewing complaints are not courts of law, and will focus on whether the college followed its own procedures, and whether the outcome was fair.

If learners are still dissatisfied following the complaints procedure they may take complaints to the civil courts.

Governors will be concerned about quality, equality and safety for their own sakes. In addition, resolving a complaint can take a disproportionate amount of time and can affect the reputation of the college. Governors need to ensure that the organisation has an open culture which will acknowledge and address problems and learn from them before they have a chance to escalate. There should be a complaints procedure in place, and having put it in place, it is important that staff then follow it. Many governing bodies receive an annual complaints report. This will identify whether the number of complaints is increasing or decreasing, how quickly and effectively complaints are addressed, and whether there are any trends that might indicate underlying problems.

### Student discipline

Under the 2008 Articles, the governing body is responsible, after consultation with students' representatives, for making "rules concerning the conduct of students, including procedures for their suspension and expulsion". The principal is responsible for student discipline. Governors can now allocate responsibilities to anyone they choose.

It is necessary to balance the smooth functioning of the college and its duty to protect its staff, learners and reputation against the rights of the individual learners being disciplined. The disciplinary code should satisfy the principles of natural justice and fairness, in particular the principles that every learner has a right to a hearing before an impartial adjudicator, and to be accompanied. There should also be a right of appeal to a person who has not previously been involved in the disciplinary process.

The basis of a college's power is its contract with the learner. It is therefore important to ensure that the disciplinary code is effectively incorporated into the student contract.

## The student union

The law does not require colleges to establish a student union, but most, if not all, colleges will have a student union or association. Where there is a student union in place, the Education Act 1994 imposes extensive duties on the governing body for the student union. The governing body should "take such steps as are reasonably practical to secure that any Students' Union.....operates in a fair and democratic manner and is accountable for the finances". This includes ensuring that the student union has a written constitution covering elections, appointment of officers, allocation of funds and financial reporting, complaints procedures and affiliations to external organisations. The governing body needs to approve and review the constitution at regular intervals. If the governing body fails to discharge its statutory responsibilities in relation to the student union it is possible that the governing body itself could be sued for debts owed by the student union.

Under the 2008 Articles, the governing body is responsible for approving the constitution of the student union and receiving its audited accounts annually. Going forward this is not one of the areas that must be included in the Instrument under the revised Schedule 4, but governors should still be mindful of the provisions of the 1994 Act. The auditing of the accounts usually takes place as part of the overall process for auditing the college's accounts.

A student union is regarded as having a separate legal identity to the college. Its legal status will be that of an unincorporated association (similar to a club) and it is perceived as a charity. Therefore the officers of the student union, who may in some cases be sabbatical officers, will be trustees of any property held for the purposes of the union. Under charity law, the student union is required to register with the Charity Commission if its income is over £100,000.



## Section 9 Safeguarding

It is acknowledged that there is no single piece of legislation that covers safeguarding of children and vulnerable adults in the UK, but rather a plethora of laws and guidance that are continually being amended, updated and revoked. (See the Further reading section below for key pieces of legislation). A child or young person is an individual up to their eighteenth birthday. A vulnerable adult is a person aged 18 or over “who is or may be in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation” (Law Commission Report 1997).

All organisations that work with children and vulnerable adults have a responsibility to safeguard and promote their welfare. They must ensure they have in place safeguarding and safer recruitment policies and practices, including enhanced Criminal Records Bureau (CRB) checks for specific roles.

### Significant developments: vetting and barring

The vetting and barring scheme (VBS) was created to help safeguard children and vulnerable adults by introducing new measures including monitoring and registration requirements following the Richard<sup>1</sup> inquiry. Many thought the VBS, while well-intentioned, was a disproportionate response to the risk posed by a small minority of people who wished to commit harm to vulnerable people. Following a thorough review in February 2011, a number of its recommendations have been built into the Protection of Freedoms Bill. The key changes include:

- abolishing registration and monitoring requirements;
- redefining the scope of ‘regulated activities’; and
- abolishing ‘controlled activities’.

However the barring<sup>2</sup> functions will remain.

The services of the Criminal Records Bureau (CRB) and the Independent Safeguarding Authority (ISA) will be merged and a single, new non-departmental public body created. The new organisation will be called the **Disclosure and Barring Service** (DBS). The DBS became operational on 1st December 2012.

The Government has made commitments to improve disclosure and barring services by scaling them back to ‘common-sense levels’. This will ensure that there is a continued service to help safeguard children and vulnerable adults from those who work or volunteer with them who pose a risk of harm, but that it operates in a way which reduces the burden on employers and better respects the civil liberties of the individual.

<sup>1</sup> An inquiry set up following the murders of Holly Wells and Jessica Chapman.

<sup>2</sup> Barring refers to a register of individuals who are barred from working with either children or vulnerable adults or both. This is now managed by the Independent Safeguarding Authority (ISA). If someone is barred then this is identified via an Enhanced CRB check.

The Protection of Freedoms Bill has now completed its passage through Parliament and has received royal assent. It is now the **Protection of Freedoms Act 2012**. However, royal assent does not mean that the changes to disclosure and barring commence immediately, therefore the safeguarding regulations introduced in October 2009 continue to apply, including those listed below. The only exception is provisions applying to volunteers which will change slightly.

- a person who is barred by the Independent Safeguarding Authority from working with children or vulnerable adults will be breaking the law if they work or volunteer, or try to work or volunteer with those groups;
- an organisation that knowingly employs a barred individual to work with children or vulnerable adults will also be breaking the law; and
- if your organisation works with children or vulnerable adults and you dismiss a member of staff or a volunteer because they have harmed a child or vulnerable adult, or you would have done so if they had not left, you must refer this information to the Independent Safeguarding Authority.

The Criminal Records Bureau continues to be responsible for the disclosure of criminal records and the Independent Safeguarding Authority for barring. Colleges will be required to ensure that they have the relevant safeguarding processes and practices that comply with these legal requirements.

## A checklist for success in overseeing safeguarding

In order to achieve success in overseeing safeguarding, your organisation will need to have the following in place.

- High-quality leadership and management that make safeguarding a priority across all aspects of the organisation's work.
- Stringent and appropriate checking procedures in place for staff and other adults.
- Rigorous safeguarding policies and procedures in place, written in plain English, compliant with statutory requirements and updated regularly.
- Safeguarding arrangements that are accessible to everyone, so that everyone knows who they can talk to if they are worried.
- Excellent communication systems with up-to-date information that can be accessed and shared by those who need it.
- A high priority given to regular training in safeguarding, generally going beyond basic requirements, extending expertise widely and building internal capacity.
- Robust arrangements for site security, understood and applied by staff, learners and visitors.
- A curriculum that is used to promote safeguarding, not least through empowering learners to stay safe, to protect themselves from harm and how to take responsibility for their own and others' safety.
- Responsible behaviour by the learners, enabling everyone to feel secure and well-protected.
- Well thought-out and workable day-to-day arrangements to protect and promote learners' health and safety.
- Risk assessments used to good effect in promoting safety.
- Statutory compliance and ensuring governors understand their responsibilities.

## Activity

The governance safeguarding checklist

Please work through this checklist awarding scores using the following key:

- 1: This is in place and working effectively.
- 2: In place but not reported to the governing body.
- 3: Not sure so need to take action to check.

When you have completed this activity, identify and record three key actions you should take in order to further improve your understanding and confidence in how the college is meeting its statutory requirements for safeguarding.

Best practice element	1	2	3
There is a safeguarding policy that is regularly updated.			
There is a process of involving all stakeholders in the review and further development of the policy.			
The policy is underpinned and related to other policies, e.g. Safer recruitment, Anti-bullying, Reporting a disclosure, Inclusion, Equality and diversity.			
The college has a risk assessment process that supports key safeguarding decisions and planning.			
The college is moving towards an approach to e-safety / e-responsibility that includes and involves learners and staff and encourages and supports them to take responsibility for their own actions.			
The college operates safer recruitment procedures and makes sure that all appropriate checks are carried out on staff and volunteers who work with learners.			
The college has a clear strategy for the use of enhanced CRB checks.			
The college has a robust process for making referrals to the Independent Safeguarding Authority (ISA).			
The college has appropriate checking and recording systems in place for agency and other contracted staff.			
The college has appropriate procedures for dealing with allegations of abuse against members of staff and volunteers.			

Best practice element	1	2	3
The college has a safeguarding team to include a senior lead for safeguarding and at least two designated people (DPs).			
All other staff have received appropriate training to equip them to carry out their safeguarding responsibilities effectively, that this is kept up-to-date by refresher training at three-yearly intervals.			
Governors understand how safeguarding is promoted across the college and all staff and contractors are aware of their safeguarding responsibilities.			
Governors understand how safeguarding is promoted to all learners.			
Any deficiencies or weaknesses in safeguarding arrangements are brought to your attention and appropriate action taken.			
The college has a nominated member of the governing body who takes responsibility for liaising with the senior management team in relation to safeguarding matters.			
The college reviews safeguarding policies and procedures annually and records how the above duties have been discharged.			

**Those elements highlighted in grey support the college in meeting its legal responsibilities. All others are examples of best practice.**

## Viewpoint

Considering these elements will help you to reflect on how effectively the college is responding to its statutory safeguarding responsibilities. Governors might wish to ensure that their responsibilities for safeguarding are properly fulfilled by receiving annual reports on:

- the college's review of safeguarding policies, and review of recruitment procedures from a safeguarding perspective;
- the implementation of safeguarding procedures and their impact; and
- the review of the college's safeguarding risk assessment.

## References

Key organisations to look at:

<b>Organisation / Reference</b>	<b>Overview</b>
<b><u>Home Office Vetting-Barring Scheme</u></b>	The Home Office and the ISA are to merge. The Home Office is responsible for many legal aspects of safeguarding including CRB checks.
<b><u>Independent Safeguarding Authority (ISA)</u></b>	The ISA is responsible for making decisions about who should be barred from working with children and / or vulnerable adults.
<b><u>Ofsted: Safeguarding children and young people</u></b>	Ofsted's limiting Grade for Safeguarding was in place until September 2012. Ofsted's new framework will require evidence of safeguarding practice and the impact this has on learners and the whole learner experience.
<b><u>Learning and Skills Improvement Service</u></b>	LSIS has recently developed an online module relating to e-safety and e-responsibility across the sector. They also have training and resources specifically for governors on e-safety. From 31 July 2013 LSIS programmes will cease to be funded and some may be transferred to other agencies in the sector.
<b><u>JISC Legal</u></b>	e-safety / e-responsibility are areas gaining more importance in FE and HE today. Institutions have both legal and statutory duties to safeguard the welfare of all learners when making use of ICT. There are various legal issues to consider within the e-safety context, including: cyber-bullying, harassment, defamation, hosting liability and data protection. See also Section 10 below.

# Section 10

## Information and communication

### Introduction

Information and communication in their many forms are at the core of college business in the 21<sup>st</sup> century. Much of the curriculum can now be delivered online and many resources for learners are available electronically on a virtual learning environment (VLE) or via the college website. Email and texting are now standard means of communication on a daily basis, and governing bodies are moving into a world of 'e-governance'.

Section 5 of Module 5 of these governance training materials concerns openness, communications, publications, the college website and intranet, and reminds us how technology has enabled governance to be much more transparent, and how colleges are now required to publish various information concerning the work of the governing body on the college's website.

Being open and transparent in decision making processes are at the core of good governance practice. Module 2 explains the Nolan Principles of standards in public life, which governors sign up to as part of their Code of Conduct. This is a code that promotes openness, integrity and accountability and which is also reflected in the **English College's Foundation Code of Governance**.

Within this environment, governing bodies will need to have an awareness of the requirements of information legislation within the provisions of the Data Protection Act 1998, the Freedom of Information Act 2000 and the other regulations overseen by the Information Commissioner's Office, as well as the legislation that surrounds a college's cyber-liability and increased use of information and communication technology (ICT). Governing bodies will need to be satisfied that policies and procedures are in place and the clerk will need a good understanding of this legislation as it affects college policies and governance information.

### The Information Commissioner's Office

The **Information Commissioner's Office** (ICO) is the UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals. Most UK colleges and universities are considered to be public bodies under this legislation.

The ICO responsible for five pieces of legislation relating to information rights. As well as data protection and freedom of information, the ICO is responsible for the law relating to electronic communications, environmental regulations and the INSPIRE Regulations, all of which apply to colleges.

**Privacy and Electronic Communications Regulations 2003** – often referred to as the 'cookie regulations', these regulations apply to how cookies and similar technologies for storing information are used on a user's equipment such as their computer or mobile.

**Environmental Information Regulations 2004 (EIRs)** – provide individuals with the right to obtain information about the environment. A college must proactively disseminate the information, through an approved publication scheme and respond to requests from the public. These regulations implement a European Directive and provide a stronger right of access to environmental information

than a request under the Freedom of Information Act 2000. A notable feature is that information about emissions cannot be withheld on the grounds of commercial confidentiality.

Colleges must provide and publish environmental information relating to the “state of the elements of the environment”, e.g. air, water, soil, land; emissions and discharges; noise; energy and waste, together with relevant policies, plans, agreements and related reports that may affect these elements.

**INSPIRE (Infrastructure for Spatial Information in the European Community) Regulations 2009** are designed for sharing spatial data, such as plans and maps, across public bodies. They are not designed to be used for the public to request information, but to facilitate sharing of relevant data to aid infrastructure development.

**Data Protection Act 1998 (DPA)** aims to balance the right of individuals to privacy and the need for institutions to process personal information for their legitimate business purposes. The purpose of the Act is to protect the rights and privacy of individuals and to ensure that the information (data) that is held about them is processed only with their knowledge and consent. The DPA only applies to personal data (i.e. information which relates to a living individual who can be identified from that information). Consent for processing is only required for “sensitive personal data”, that is information about an individual’s racial or ethnic origin; political opinion; religion; beliefs; sexual life; alleged criminal activity; and court proceedings.

The DPA covers all records and information held by the college, whether digital or print, current or archived.

The Act gives individuals certain rights regarding the personal information held about them and places certain obligations, in the form of eight principles, on those who process the personal information. Under Section (1) of the Act, ‘processing’ refers to anything that is done with the data. The people who determine the purpose and manner in which the information is processed are referred to as data controllers (e.g. a college) and those whose data are subject to process are known as data subjects (e.g. learners, staff, alumni).

Part of the requirements of the DPA relate to the ‘processing’ of personal data, how data is obtained, held and stored. It also covers processes operating within the organisation related to disclosure, retrieval, storage and use of data and its destruction. In fact it applies to any activity relating to personal data.

There are eight data protection principles which govern the manner in which data is collected, stored and processed:

1. Personal data shall be processed fairly and lawfully.
2. Personal data shall be obtained only for specified and lawful purposes.
3. Personal data should be adequate, relevant and not excessive in relation to the purpose or purposes for which it is processed.
4. Personal data should be accurate, and when necessary kept up-to-date.
5. Personal data should not be kept for longer than is necessary for the purpose for which it was collected.
6. Personal data should only be processed in accordance with the rights of individuals under the DPA – the main one being the individual’s right of access to data held about him / her.
7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss, destruction, or damage to personal data.

8. Personal data shall not be transferred to a country outside the EU unless that country adequately protects personal data.

There is a wide range of personal data kept by colleges, mainly about staff and learners. In addition to factual information it includes expressions of opinion. It includes photographic images captured on CCTV and collected via security cards. The DPA has been amended by the **Freedom of Information Act 2000** to enhance the rights of individuals to see more of their personal information. It now covers “any other personal data” held by a public authority, information referred to as “unstructured” personal data. This right is limited in relation to manually-held employment records. An individual making an application to see personal information is making a “subject access request” and a college has 40 days in which to respond.

Colleges must maintain a data protection notification with the Information Commissioner’s Office. This is renewed annually and a fee is payable. Colleges must appoint a nominated Data Protection Officer who is responsible for ensuring that it processes personal data in accordance with the eight principles and with their notification.

Breaches of the provisions of the DPA can lead to criminal and civil liability for a college. It is therefore important that a college’s internal documents are regularly reviewed to ensure they comply with data protection principles.

The person responsible (DPA Officer) is usually also responsible for compliance with the provisions of the Freedom of Information Act 2000 (see below) and there is considerable overlap between the two.

Note that, unlike school education records, where the law sets out parental access rights, there is no similar right in respect of the education record of students at a general further education or sixth form college and so disclosure to a parent will need to be done in accordance with the DPA. This means the consent of the student will usually be needed.

## Activity

Look at your college’s enrolment forms or a student learning agreement and identify how the learner can be informed of the purposes for which the information is being obtained and processed, and where appropriate, how the consent of the learner is obtained for processing sensitive data.

### **Data protection and mobile devices**

Mobile devices can be defined as memory sticks, mobile phones including smart phones, tablet technologies, PDAs, netbooks and laptops. Mobile devices, allowing flexibility in access and working arrangements for staff, are actively encouraged and are used more and more in teaching and learning activities.

The obligations placed on colleges under the DPA with respect to the use and security of personal data apply equally to information stored on mobile devices on- or off-site as well as to college networks and systems, a fact which may be overlooked.



## Activity

A college teacher takes learners on an outing to a shopping centre as part of their independent living skills programme. The learners have various medical conditions and disabilities and the teacher has transferred a note of these to his smartphone for ease of access during an emergency, to ensure any problem is dealt with promptly and appropriately. How is this covered by the Data Protection Act?

## Viewpoint

Details of individuals' medical conditions and disabilities are sensitive personal data. The data is relevant and not excessive for the purpose and so transfer to the smartphone is justified. Appropriate measures should be taken to protect the data from loss or unauthorised processing. This may involve enhanced security on the phone, and guidance on the measures should be given in appropriate college procedures.

### **Freedom of Information Act 2000**

The **Freedom of Information Act 2000** (FOIA) gives a right of access to information held by 'public authorities'. Most UK colleges and universities are public bodies as defined by the Act. Unlike the DPA, the FOIA covers all information, not just personal information and covers all records and information held by the public authority, whether digital or print, current or archived.

Requests for environmental information should be dealt with under the **Environmental Information Regulations (EIRs)**, not under the FOIA.

As a general rule colleges should assume that information will need to be disclosed. Information may only be withheld where there are good reasons, i.e. one of the Act's exemptions applies. Some exemptions are absolute but for others a public interest test has to be applied.

Public authorities must produce and maintain a Publication Scheme which details the type of information routinely provided to the public and how they may be accessed. Publication schemes must be approved by the Information Commissioner and regularly reviewed. The Information Commissioner provides a model Publication Scheme for colleges which most colleges choose to use and this is available on the Information Commissioner's Office (ICO) website. The Publication Scheme includes things like documents defining the structure and organisation of the college, its services and procedures, and minutes of meetings.

The ICO has announced that changes are to be made to the information public authorities must release proactively as part of their publication scheme. The change, which will be introduced on 1 April 2013, includes a requirement to release information in reusable formats and provides for changes required under the **Protection of Freedoms Act 2012** (see note below). A revised Model Publication Scheme will be introduced with some sector specific guidance to accompany the main scheme; full details will be available on the ICO website.

## Activity

Compare your college's Publication Scheme with the model scheme approved by the ICO, and identify when it was last reviewed. [Guidance is available here.](#)

Any member of the public, anywhere in the world (including the college's own members of staff) has the right to ask for information which is not already available through the publication scheme. The person requesting information need not indicate that the request is a freedom of information request.

All non-routine requests for information, except those identified as concerning the requestors' own personal data, should be treated as freedom of information requests. The college is not entitled to know why the information is being requested but there are a number of legal requirements when making a request:

For a request to be dealt with according to the FOIA, it must:

- be made in writing, for example in a letter, email or text;
- contain the applicant's real name; and
- be sent from an address to which the college can reply. This can be a postal or email address.

A request for access to information must usually be answered within 20 working days.

The college has two requirements in response to a request made under the provisions of the Act: firstly to disclose if the information exists and secondly to disclose if an exemption applies. If the information is already readily available elsewhere, for example on the college website or detailed within the Publication Scheme, then the college does not have to provide it again.

Breach of the provisions of the FOIA and failure to provide information requested can lead to a case being brought before an Information Tribunal, or ultimately before the High Court. If information is refused as it is covered by an exemption, the college must explain why, including explaining the public interest in maintaining it, and inform the individual of the rights to an internal appeal and thereafter a complaint to the Information Commissioner's Office.

**The Protection of Freedoms Act, 2012** achieved royal assent on 1 May 2012. It will be relevant to colleges as it extends the scope of the Freedom of Information Act to provide greater transparency and creates a new 'right to data' ensuring that all data published by public bodies is published in an open and standardised format so that it can be used easily and with minimal cost by third parties. Full details will be available on the ICO website.

With emerging technologies it is essential to consider security, reliability and other risks as well as cost efficiencies to ensure that the risk of data loss is minimised as far as possible.

## Activity

How should the college respond to the following Freedom of Information requests?

1. A member of staff asks in writing to see her personal file and in particular a copy of the reference recently provided by the college to a prospective employer. The job offer has been withdrawn and the member of staff believes the reference may be relevant.
2. ABC Contractors have recently unsuccessfully tendered for a major building project and write asking why they did not get the bid, who the successful tenderer was and the price of the successful bid.
3. A former member of staff asks for information about a research project which the college has undertaken with a local business. The ex-member of staff would have been aware of the project before she left. The relevant department, the governors and the local company in question are adamant that the information must not be disclosed.

## Viewpoint

1. This is a request for personal information and should be treated as a request under the provisions of the Data Protection Act 1998. It is outside the scope of the Freedom of Information Act. The member of staff is entitled to request a copy of all personal information about her held by the college. The college can charge a fee for providing this. The file should be checked to make sure it does not contain personal information about third parties which cannot be disclosed without their consent, or information that is not personal to her. The college is not obliged to disclose the reference if it was provided in confidence, although the college should bear in mind that the Information Commissioner's view is that employers should be as open as possible.
2. The college should be willing to inform ABC Contractors why they were not successful in line with the principle of openness, although there is no legal duty to do so under the Act. The company has the right to be given this information if it has been recorded somewhere, unless one of the grounds for exemption applies. The identity of the successful tenderer should be disclosed and may in any case be in the public domain. The college will have to disclose the price of the successful bid under FOIA unless it believes that one of the exemptions applies (i.e. if the information is commercially sensitive). The college can charge for the costs of copying and postage in relation to dealing with the request.
3. Again the information will have to be disclosed under FOIA unless one of the exemptions apply (e.g. if the information is commercially sensitive or intended for future publication).

## Cyber liability and e-safety

The other main areas of the law which impact on the use of information and communication technology (ICT) in colleges are outlined below.

e-safety is an important area for colleges today. Institutions have both legal and statutory duties to safeguard the welfare of all learners when making use of ICT. Institutions have a legal duty in terms of health and safety legislation to protect staff, learners and others from any reasonably foreseeable harm, as well as a common law duty of care towards staff, learners and others.

The Education Act 2011 will focus the college inspection in what the government is stating are four core areas, one of which is behaviour and safety. It is already established that safety includes e-safety and this highlights the need for colleges to have procedures in place which are regularly reviewed to ensure that e-safety is included as part of safeguarding learners.

There are various of other legal issues to consider within the e-safety context including: cyber bullying, harassment, defamation, hosting liability and data protection. Each college should ensure that its staff and learners use ICT facilities in accordance with the terms of an 'Acceptable Use Policy'. It is recommended that this is issued to learners at enrolment and to staff as part of their induction, and regularly updated. Staff and learners should sign to say that they have received a copy and understand it.

e-safety law is wide-ranging and there are implications for many different areas of the law. [JISC Legal has some helpful e-safety resources.](#)

## Cybercrime

Colleges can be affected by cybercrime such as hacking, fraud and theft, obscene content (including child pornography) and harassment. Many of these are crimes prosecuted within the existing criminal justice structures, just as they are when the offence is committed where no computer is involved. In addition some are classified as crimes under the Computer Misuse Act 1990.

Computer crime may be classified into the following categories:

- Content-related crime, for example child pornography and criminal copyright infringement (i.e. deliberate infringement on a commercial scale).
- Traditional crimes committed by means of a computer, for example, harassment, fraud and theft.
- Attacks on computers and computer systems, for example, hacking.

These crimes can also be referred to as cybercrime, e-crime or hi-tech crime.

**The Computer Misuse Act 1990** makes hacking and the introduction of viruses criminal offences. It also covers fraud and theft using computers. ICT security systems, policies and procedures need to be in place enabling action to be taken under the criminal law or through the use of disciplinary procedures.

## Other legislation relating to cybercrime

**Pornography: the Obscene Publications Act 1959 and 1969** – makes it illegal to publish material that tends to deprave and corrupt those viewing it. The scope of the Act covers the electronic world. The threshold for publications to be obscene is fairly high. Material generally available in newsagents is unlikely to be illegal under the Acts. However, such material is probably inappropriate for use on the college system and may result in harassment of staff or learners.

**The Sexual Offences Act 2003** makes it a crime to befriend a child (up to the age of 18) on the internet or by other means and to meet or intend to meet the child with the intention of abusing them. It prohibits adults from engaging in inappropriate behaviour with children online. This legislation has particular significance for staff in colleges who are deemed to hold positions of trust.

**Online harassment:** with email now a routine form of written communication, harassment by email or online is a serious concern for many colleges. The Protection from Harassment Act 1997 is intended to prevent 'stalking' and other similar unsocial conduct including by email or by other computer-related means such as discussion forums.

In England and Wales, under Section 1 of the **Malicious Communications Act 1988**, it is an offence to send an indecent, offensive or threatening letter, electronic communication or other article to another person and under Section 43 of the Telecommunications Act 1984 it is a similar offence to send a telephone message which is indecent, offensive or threatening.

The problem of illegal, harmful, distasteful or offensive content on college computer systems or the internet is of course not restricted to pornography.

Internet content exists which contravenes the rules enacted to prevent the making of:

- anti-religious statements (the law of blasphemy)
- racist or inflammatory statements (incitement to racial hatred or 'hate speech' rules – **Equality Act 2006**)
- politically subversive or seditious statements.

Incitement to racial hatred is governed by Section 21 of the Public Order Act 1986 which states that it is an offence for a person to publish or distribute material which is threatening, abusive or insulting.

## Copyright

Colleges should ensure they have appropriate permissions to use digital material. This may include images, videos, sound files, materials from journals or magazines, or software and others. Where this information is made available on a website it does not mean it is automatically available for use. Sometimes, use will be permitted for educational purposes, but if the actual usage is for commercial purposes then the permission will not extend to this. Where appropriate, licences such as from the Copyright Licensing Authority should be obtained. However, not all copyright holders sign up to these collective license arrangements. Materials authored by learners will not be owned by the college and the college will not have rights to use them. Specific written consent should be obtained.

In most cases, copyright infringement is dealt with as a civil matter where a court requires that the copying stops, and damages are paid. Exceptionally, where there has been deliberate infringement for commercial purposes there can be criminal infringement.

## Online defamation

A range of offences can be committed by the inappropriate use of internet and email. Words are defamatory if they tend to reduce the reputation of an individual in the minds of 'right-thinking members of society' and a college can be vicariously liable for the consequences of the misuse of ICT systems by members of staff acting in the course of their employment.

Colleges providing discussion forums, blogs and other similar facilities should remind participants that the law of defamation applies in the online world. Also, they should ensure that they have well understood, clearly-publicised take-down procedures in the event of complaints, in order to minimise the risk of liability as publisher.

In order to fulfil their e-safety obligations, colleges may perform some level of monitoring of staff and learner use of social networks. Colleges and universities have the right and power to monitor the use of their network and their facilities to prevent abuse. Staff and learners, as far as is reasonably possible, should be made aware that monitoring may take place. This might be done in a variety of ways, for example in the form of clauses within a student contract or contract of employment or through the college's Acceptable Use Policy.

## Sharing music

Music or other file -sharing can be unlawful under the Copyright Designs and Patents Act (CDPA) and learners or staff who trade, swap or share music files illegally over the internet open themselves up to the possibility of civil legal action, or where this is carried out commercially, criminal action.

## Activity

### Your college's Acceptable Use Policy

Obtain a copy of your college's Acceptable Use Policy and make notes on what areas it does and does not cover. For example does it contain the following?

- A clear take-down procedure.
- A statement that the policy applies to all persons employed by the college who use email and the internet using computers based at the college's premises or through using computers on other sites via the college's network.
- A statement that the policy applies to everyone and non-compliance may result in disciplinary action.
- Names of staff members who can be approached if anyone is in any doubt about the regulations and procedures set out in the policy.
- A statement that the college will monitor the usage as it considers necessary to ensure compliance with the policy and to protect staff, learners and other users.
- If appropriate, a statement that email and the internet may only be used in the reasonable conduct of college business along with clear statements as to what types of use will not be tolerated. However, if personal usage is permitted, the extent of such permission.
- A statement relating to the rules concerning entering into contractual commitments by email.

## Liability

The EU Electronic Commercial Directive 2003/31/EC (in the UK, the Electronic Commerce (EC Directive) Regulations 2002) provides specific defences for liability (whether criminal or civil) for material that is merely hosted by the college. This covers any liability, whether for defamation, copyright, obscene material or otherwise. There are provisos before the defence will apply, but essentially where the material has not been published or edited by the college, provided the college removes the material promptly after becoming aware of it, then the college would not be liable. This is increasingly important around social media, forums, bulletin boards, virtual learning environments and anywhere with user-generated content. Best practice is generally to have clear guidance around what can be posted by users, an email address for notifications about inappropriate material and a clear take-down policy and procedure to remove the material quickly.

## Viewpoint

This is not only an issue for staff. It is important that the college has similar policies in place for learners. If your college does not have an e-communication policy, or does not cover all of the above points, use your notes as the basis of an email to the principal on the matter.

## Section 11

# The college and other legislation

This chapter has covered key parts of the legal framework and cross-referenced modules with related subject matter along the way.

The following legislation is not covered in this module but is covered in other modules:

'Whistle-blowing' or public interest disclosure	Module 2 – Values and ethical framework, and Module 5 – Process of effective governance
Equalities	Module 2 – Values and ethical framework
Human rights	Module 2 – Values and ethical framework
Employment law	Module 10 – Finance and resources
Health and safety	Module 10 – Finance and resources
Corporate Manslaughter Act	Module 10 – Finance and resources

Other legislation will affect colleges from time to time. This will include, but is not limited to the following:

- Bribery Act 2010
- Terrorism Act 2006
- Property law
- Company law
- EU procurement regulations.



## Module review

This module has looked at the legal framework within which governors operate. The law provides basic ground rules for the protection of society. As a governor you are one of the individuals who together form the college's legal person, the governing body. It is important for you to have an understanding of the legal framework to help you to discharge your specific legal duties and obligations as a governor, and also for you to be able to satisfy yourself that the college is operating correctly within the law and does not become legally liable. These study materials should give you an overview of the legal framework for governance and the legal principles involved in safeguarding and information law. Governors are not expected to be experts, but the clerk and other appropriate college professionals are all available to answer questions. Some areas are very complex and legal advice will be needed.

If you have worked your way through the whole module you should be confident that you can:

- describe the legal structure of your college and how it affects the governing body's activities;
- explain the need for caution when changing the legal status of the college, setting up subsidiary companies or entering into a joint venture;
- state the implications of a college's charitable status;
- list your college's powers and the consequences of acting outside them;
- know how to identify your responsibilities under the Instrument and Articles;
- identify the occasions when the college seal should be used;
- specify the lines of accountability regulating your college;
- outline the college's legal responsibilities to its learners;
- understand legal framework and the governing body's responsibilities for safeguarding;
- outline the college's responsibilities in relation to information legislation;
- be aware of the significance of the Data Protection Act, the Freedom of Information Act and other relevant legislation relating to ICT; and
- be aware of other key areas of college life that are covered by legislation and where to find information on them in these training materials.

### Summary of key learning points

Further education colleges have a variety of legal structures. Most are statutory further education corporations (FECs) incorporated under the 1992 Further and Higher Education Act but there are various other possible legal structures. As of 1 April 2012, colleges are free to decide their own legal structures but should act with caution when considering change because of the wide-ranging implications. Any change of legal status should be based on a strategic appraisal, including a structure and prospects appraisal.

Colleges are charities and governors must act within the charity's powers and objects, make sure its assets are applied only for its charitable purposes: the provision of education, and preserve and maximise its assets.

The college's powers govern the relationship between the college and the outside world. If the college does something outside its powers, the act in question is invalid and void.

A further education college's Instrument and Articles of Government set out the governing body's constitution, procedures and in its internal powers and responsibilities. They govern the college's

internal relationships. Since 1 April 2012, governing bodies can themselves modify or replace their own Instrument and Articles, so long as they include the minimum requirements for the Instrument as set out in the revised Schedule 4 of the FHEA, and that the governing body continues to be a charity.

Governing bodies are subject to upward lines of accountability to the government through the funding councils, and ultimately to Parliament through the Public Accounts Committee and the Secretary of State. In extreme circumstances the Secretary of State can still intervene in the affairs of the college. Governing bodies are also accountable to the courts through the process of judicial review.

The student contract is fundamental to the relationship between the college and its learners. In law students / learners are regarded as consumers. The college therefore needs to have appropriate complaints and grievance procedures in place. A disciplinary code should also form a part of the contract. Under the Education Act 1994, the governing body needs to ensure that any student union operates in a fair and democratic manner and is accountable for its finances. Student unions with an income of over £100,000 must register with the Charity Commission.

The governing body has specific legal responsibilities for ensuring that policies and practices for safeguarding children and young adults are in place. The law on this continues to evolve and governors should be briefed on how it develops. Governing bodies should ensure that policies and procedures go further than the law and follow good practice.

The technical development of information and communication channels continues apace and the law has developed alongside it. Two key interrelated areas affecting colleges are data protection and freedom of information. The law for both of these is regulated by the Information Commissioner's Office. Cybercrime, e-safety, copyright and defamation are also relevant areas of the law where criminal and civil liability can be incurred by the college.

The college is subject to a raft of general legislation and other types of legal duties and obligations that cover all organisations in the England and Wales. Governance and the important areas of safeguarding and information and communication are covered in this module. Some of the other key ones, for example equalities, whistle-blowing and human rights are covered in the other modules.

## Where next?

You have now completed work on Module 3: The statutory framework. If there are areas in which you need more guidance or information, they may be covered in other modules. Turn to 'Check your current knowledge and skills' in 'Using the Materials'. This self-assessment questionnaire will help you to decide which modules or sections may help to fill these gaps. Tick the useful sections for further study.

If you cannot find the information you need within these materials, turn to the 'Action planner' in 'Using the Materials'. Note down what further information, support or guidance you would like. The 'Action planner' gives advice on who may be able to help, and how.

## Putting it into action

We hope that working through this module has raised useful questions, increased your awareness of issues and given you ideas for practical action that you would like to follow up. The 'Action planner' in 'Using the Materials' contains a section where you can note down any questions or action points that you want to follow up within your own college.

## Further reading

**AoC (Association of Colleges)** and **LSIS Excellence Gateway** websites for emerging guidance and case studies on legal structures for colleges.

### **Education Act 2011, especially Schedule 4**

The **Charity Commission website** for law and guidance applying to all charities, including exempt charities.

**New Challenges New Chances. Further Education and skills system reform plan: building a world class skills system** BIS December 2011. Chapter 6: Strategic Governance for a dynamic FE Sector is particularly interesting on new organisational and business models and new partnerships. On page 38, the statement about 'removing regulations' refers to the new powers the Education Act 2011 will allow. Annex A outlines a structural appraisal tool.

**JISC legal information** provides guidance to prevent legal issues being a barrier to the development and adoption of new ICT within the further and higher education sectors, delivered through a website with news, FAQs and a range of resources and tools as well as more detailed guidance publications covering all relevant areas of law and practice.

**Information Commissioner's Office** for information on Data Protection and Freedom of Information.

The Financial Memorandum with the college's funding body.

Audit Code of Practice for your college.

**Eversheds** law firm offer a legal guide to, or 'illustrative version of' the Instrument and Articles which can be purchased as part of, or separately to their broader governance subscription services. To find out more contact **governance@eversheds.com**. Your college's own law firm may also offer a fixed price governance advisory service.

Some of the **key legislative documents**, providing the legal framework for organisational and individual safeguarding practice, in date order:

### **Protection of Freedoms Act 2012**

The Government has made commitments to improve disclosure and barring services by scaling them back to 'common sense levels', while ensuring a continued service to help safeguard children and vulnerable adults by those who work or volunteer with them, but that they operate in a way which reduces the burden on employers and better respects the civil liberties of the individual. The Act will be introducing a range of key changes. However, the changes are not yet introduced and will be phased in once the legislative timetable has been agreed.

### **The Children, Schools and Families Act 2010**

The Children, Schools and Families Act 2010 has the main purpose of reforming the law about reporting family proceedings. However, commencement of its provisions is under review by the coalition government and the provisions are not currently in force. The 2010 Act will also empower Local Safeguarding Children Boards to require safeguarding information to be provided to them. When these provisions of the Act are in force, they will remove some of the difficulties faced by boards in securing the co-operation of external agencies in their review work.

### **The Equality Act 2010 (The Act)**

This Act replaces existing anti-discrimination laws with a new single Act.

Public sector organisations and organisations delivering services on their behalf are covered by the terms of the Equality Act. The Act protects learners and staff from discrimination on the basis of protected characteristics. These are:

- age
- disability
- gender reassignment
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation.

The Act prohibits direct and indirect discrimination on the basis of the above protected characteristics.

### **Safeguarding and equality**

In the context of providing a safe environment in which to learn and work, equality legislation and related provider level equality and diversity policies are a powerful additional and parallel resource to set alongside safeguarding legislation and policy.

### **Working Together to Safeguard Children 2006 (updated in 2010)**

This states that ‘all agencies and individuals should aim to proactively safeguard and promote the welfare of children so that the need for action to protect children from harm is reduced’.

### **Safeguarding Children and Safer Recruitment in Education 2007**

This guidance document is a consolidated version of earlier guidance material. It looks at the recruitment and selection processes, recruitment and vetting checks, and duties for safeguarding and promoting the welfare of children in education.

### **Safeguarding Vulnerable Groups Act 2006**

This Act provides the legislative framework for the introduction of the Independent Safeguarding Authority and a new Vetting and Barring Scheme for those working with children and vulnerable adults. The primary aim of the scheme is to bar individuals from working in situations where evidence suggests that they present a risk of harm, to children or vulnerable adults.

### **Immigration, Asylum and Nationality Act 2006**

This Act makes employers responsible for the prevention of illegal working by checking that employees who are subject to immigration control have leave to be in the UK which:

- does not restrict them from taking up jobs; or
- falls into a category where employment is allowed.

Employers must take 'reasonable steps' to check the immigration status of all employees. Under Section 21 of the Act, an employer may commit a criminal offence if he / she knowingly employs an illegal immigrant.

### **Every Child Matters: Change for Children, 2004**

This sets out the national framework for change programmes to build services around the needs of children and young people in order to maximise opportunity and minimise risk. It highlights five outcomes that are key to the wellbeing of children and young people, all of which are underpinned by the Children Act 2004:

- 1) Stay safe.
- 2) Be healthy.
- 3) Enjoy and achieve.
- 4) Make a positive contribution.
- 5) Achieve economic wellbeing.

### **Children Act 2004**

Section 10 places a duty on each local authority to make arrangements with relevant agencies to co-operate to improve the wellbeing of children (i.e. people under the age of 18). Section 11 gives a range of organisations including local authorities, the police and health services, the duty to ensure that their functions are discharged with regard to the need to safeguard and promote the welfare of children.

### **Education Act 2002**

Section 175 places a duty on local authorities, maintained schools, and further education institutions including sixth form colleges, to carry out their function with a view to safeguarding and promoting the welfare of children and young people. Section 157 places the same duty on independent schools, including academies and technical colleges.

### **Human Rights Act 1998**

The Human Rights Act 1998 mostly came into force in October 2000. The aim of the act is to give further effect in UK law to the rights contained in the European Convention on Human Rights. The Act contains five articles of particular relevance to safeguarding:

- Article 3 – no one shall be subjected to torture or to inhuman or degrading treatment or punishment.
- Article 5 – the right to liberty and security of person.
- Article 6 – the right to a fair trial.
- Article 8 – the right to respect for private and family life.
- Article 14 – freedom from discrimination in the enjoyment of Convention rights.

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