The Learning and Skills Council’s Statutory Intervention Policy

October 2008

Of interest to FE colleges, FE governing bodies, and other LSC-funded providers within the FE system
Further information

For further information, please contact the appropriate Learning and Skills Council office. Contact details for each office can be found on the LSC website: www.lsc.gov.uk.

Learning and Skills Council
National Office

Cheylesmore House
Quinton Road
Coventry CV1 2WT
T 0845 019 4170
F 024 7682 3675
www.lsc.gov.uk

Of interest to FE colleges, FE governing bodies, and other LSC-funded providers within the FE system

This document sets out the LSC’s approach to using its powers of intervention, including where it is required, and how that intervention will operate in principle. The specific legislative powers of intervention may only be exercised in relation to further education institutions as defined by the Further and Higher Education Act 1992.

The document should be read in conjunction with Identifying and Managing Underperformance (available at www.lsc.gov.uk).
The Learning and Skills Council’s Statutory Intervention Policy

Presented to the Houses of Parliament pursuant to section 56B of the Further and Higher Education Act 1992 (as amended by the Further Education and Training Act 2007)
# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Paragraph number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1: Background and Introduction</td>
<td>1</td>
</tr>
<tr>
<td>2: Triggers for Intervention</td>
<td>16</td>
</tr>
<tr>
<td>4: Public Communications</td>
<td>50</td>
</tr>
</tbody>
</table>

## Annexes

- Annex A: Flowchart of the Procedures
- Annex B: Intervention Powers of the LSC
- Annex C: Checks and Balances
1: Background and Introduction

1 All uses of the term 'intervention' in this document refer to the formal action of statutory intervention as set out in sections 56A, 56B and 56C of the Further and Higher Education Act 1992 (the 1992 Act), as amended by the Further Education and Training Act 2007.

2 The document has been prepared in accordance with the requirements of section 56B of the 1992 Act to publish this policy and has been developed following a statutory consultation.

3 The purpose of this document is to provide a public and transparent policy statement of the process under which the Learning and Skills Council (LSC) will operate with respect to the exercise of its powers of intervention under section 56A of the 1992 Act. It is designed to clearly set out the process for governing bodies, clerks and senior college managers of any institution that may be subject to the use of the statutory powers of intervention.

4 In accordance with the 1992 Act, the policy will be kept under review. It is anticipated that the policy statement will remain in place for the next two years, or for as long as the LSC continues to exist (if less than two years).

5 This policy statement may be exercised only in relation to institutions in England within the further education sector as defined in section 91(3) of the 1992 Act. For the avoidance of doubt, it does not apply to any other LSC-funded providers which are managed through other funding arrangements.

6 In devising and operating its intervention policy, LSC actions will be underpinned by the following principles.

- Intervention will occur only when necessary (in accordance with section 56A of the 1992 Act) and the LSC will exercise any new powers only as a last resort.

- The level of intervention will be proportionate to the risk to learners and public funding.

- Actions will be agreed, as far as possible, between the governing body, the principal, the LSC and any other appropriate bodies.

Appropriate bodies would include government departments and representative bodies, such as the Single Voice (for self-regulation for further education), which has been created by provider representative bodies to represent the sector in strategic dialogue with government on regulatory matters.

7 The LSC anticipates that the use of the powers of intervention will be extremely rare, and as such it represents just one element of wider arrangements aimed at addressing unsatisfactory provision.

8 The LSC remains committed to a staged approach to intervention and to the intention that any statutory intervention will typically occur at the end of a lengthy process of support and dialogue. As such, there is a series of stages leading to intervention. These are:

1) the annual commissioning dialogue;

2) identification of underperformance;

3) support and challenge; and

4) (as a last resort) intervention.

9 Stages 1 to 3 provide for a substantial range of actions to be taken to support a college prior to any formal use of the statutory powers of intervention conferred under the 1992 Act. The document Identifying and Managing Underperformance (published in January 2007 and revised for each commissioning year – available at www.lsc.gov.uk) sets out that framework for action. It is these stages which provide flexibility for the LSC at local and regional level to respond to the circumstances of any individual college; they also allow for discretion to enable the LSC to consider its response on a case-by-case basis.

10 The application of the policy itself cannot be varied, as it is a set of procedures to be followed if the LSC wishes to use the powers of intervention as outlined in section 56A of the 1992 Act.

11 The LSC also has powers of intervention, under section 11 of the Learning and Skills Act 2000 (the 2000 Act), to appoint up to two additional members to the governing body of a given institution in the further education (FE) sector which mainly serves the population of England.
12 This power to appoint members to the governing body will typically be used, often with the agreement of the college, where there is apparent failure by the governing body to discharge its functions. The additional governors may be part of a package of strategic support for the college to ensure that there is improvement; for example, sufficient progress against a Notice to Improve (this is a vehicle for driving up performance, outlining the conditions that a college must adhere to in order to secure continued funding in its current configuration and with its existing provision).

13 This power may also be exercised, for example, when Ofsted has declared a college’s ‘Leadership and management’ inadequate, but the college has not been declared overall inadequate. These additional members may include individuals proposed by the Single Voice, at the request of the LSC. The aim of using this power in the 2000 Act is to ensure that a college has sufficient support and strategic leadership to improve, thereby minimising the risk of the LSC having to resort to the use of the statutory powers of intervention in the 1992 Act.

14 The Framework for Excellence has been developed as a single, unified framework to assess the performance of providers, including the ways in which they meet the needs of all users. Assessments against the Framework will, in time, underpin the identification of underperformance and intervention. The Framework will be used to inform the issue of Notices to Improve and other serious actions relating to identifying and managing underperformance.

15 These changes will not require further consultation, as they relate to the evolution of Identifying and Managing Underperformance and will be utilising robust evidence that is either already an element of the Framework or will be incorporated into it. Further information on the Framework is available at ffe.lsc.gov.uk.
2: Triggers for Intervention

16 The statutory powers of intervention may be exercised if the LSC is satisfied that one of four matters (as set out in section 56A(2) of the 1992 Act) apply to the corporation. The LSC considers that there are two situations, or triggers, that would enable the LSC to be satisfied that the powers may be exercised. The first trigger follows the first three stages, as set out in paragraph 8, and is an occasion where a college has not met the conditions of the Notice to Improve and the LSC and the governing body cannot agree a way forward. This could result from the governing body not providing the necessary leadership to take action. Alternatively, it could be because of non-co-operation or obstruction by the college executive (i.e. its senior post-holders) and/or governing body.

17 Non-co-operation or obstruction will be defined as, but not be limited to, the inability or unwillingness of an executive and/or governing body to respond to a reasonable request to adopt a particular course of action, and where this has resulted in a breakdown in relations between the LSC and the corporation.

18 In these circumstances, where a way forward cannot be agreed, and if it is considered that all the possible alternative approaches to instigating change have been exhausted, the LSC may seek to exercise its statutory powers of intervention.

19 It is anticipated that these circumstances will be extremely rare, either because the college has successfully met the conditions of its Notice to Improve or because the LSC and the college have agreed an appropriate course of action. It would be anticipated that, in this period, the sector itself, through the Single Voice or another appropriate representative body, would be providing support and/or mediation, particularly if there is non-co-operation or obstruction by the college executive and/or governing body.

20 The second trigger falls under the broad heading of exceptional circumstances. This is where there is an immediate, serious and exceptional risk to learners and to public funding, and urgent action is required, and the LSC may wish to intervene more immediately than a staged approach allows. It would cover any circumstance not described within the first trigger. These circumstances may include:

- evidence of serious misuse of public funds, fraud or deception;
- failures in management which result in immediate serious risk to learner health, safety and welfare; or
- evidence of a serious breakdown in employee relations within the institution, caused by an action taken by a principal (or by a senior member of staff) or governing body outside the corporation's instruments and articles or its agreed policies and procedures, and which threatens the college's ability to deliver education and training.

21 In these circumstances, there will be an urgent and direct dialogue with the governing body and senior managers of the college to determine the extent and nature of any necessary action. This will be confirmed in a formal notification to the college of the immediate action to be taken.

22 In such circumstances, the LSC would not take action to use its statutory powers of intervention if the governing body is able to demonstrate that it is capable of taking action to address the concern. Where the governing body is not able to demonstrate this capability, the LSC may exercise its statutory powers of intervention following the processes outlined in paragraphs 24 to 48.

23 In all cases, it is anticipated that, prior to any action, the decision to act would be taken following discussions with the Single Voice, or another appropriate representative body.
3: Exercise of the Statutory Powers of Intervention: the Process

24 At the stage where one of the triggers (as set out in paragraphs 16 to 22) has been identified and the LSC is satisfied that the powers may be applied (under section 56A(2) of the 1992 Act), the appropriate regional director, having consulted with the area director, will take the decision to progress the possible use of the powers of intervention.

25 If it is determined that this is the appropriate action, the regional director will discuss the intention to use the powers with the Chief Executive and Council solicitor through the presentation of evidence either of the need for immediate intervention or that the LSC and the governing body cannot agree a way forward. The action and interpretation of the evidence will have been discussed with the Chair of the Regional Council.

26 Upon confirmation that there is a sound legal basis for action and sufficient evidence, the Chief Executive will then write to the Secretary of State for Innovation, Universities and Skills to say that the LSC is considering the potential use of the powers of intervention under section 56A of the 1992 Act. The Chair of the LSC National Council will also be informed.

27 If the education and training of 16- to 19-year-olds is affected, the Chief Executive, at the same time, will write to inform the Secretary of State for Children, Schools and Families. Neither Secretary of State will be active in this process, but the intention is that, by keeping them informed of any proposed statutory intervention, there will be no possibility for the LSC to use its powers arbitrarily. It is important to acknowledge that, prior to informing the Secretary of State, departmental officials will have been regularly briefed about the situation.

28 The regional director will then formally write to the governing body notifying the institution of the LSC’s intention to invoke its powers under section 56A of the 1992 Act. The letter will include:

- details of the action it is minded to take;
- the rationale for being minded to exercise its statutory powers under section 56A, including the reasons why any previous plans or responses by the college are not considered to be sufficient;
- the relevant evidence; and
- key dates and timescales.

29 If the LSC is minded to direct the governing body to secure that the procedures applicable to the consideration of the case for dismissal of a member of staff whom it has the power under the articles of government to dismiss are given effect, it will also name the member of staff concerned. The governing body, in turn, would be expected to raise the issue with the member of staff concerned and respond to the LSC with its view within the time-period.

30 A key element of the underperformance or failings of the institution may result from an action (or failure to act) by the governing body. Where this is the case, if the LSC is minded to remove one or more members of the governing body, these individuals will be named in that letter.

31 The receipt of the letter will trigger the start of the 30 working days period within which the institution can make representations. The start and end dates of the period of representations will be included in the letter. The representations will be between the governing body and the appropriate area director and regional director.

32 Within five working days of receipt of the notification, the governing body must acknowledge receipt of the letter, in writing, to the LSC. This letter should include confirmation of whether or not it plans to make representations to the LSC. This decision should be taken by the governing body and should not be delegated by the governing body to an employee of the institution. It would not be anticipated that the governing body will be expected to meet to discuss the response. The close discussions that will have taken place between the college and the LSC from the moment of identification of underperformance or serious concerns will mean that the LSC’s letter setting out its intended actions will not be unexpected.
33 If, after considering the governing body's response, the LSC decides to proceed with its proposed intervention, it will set out its reasons in writing and allow the governing body a further opportunity to respond (as part of the 30 working days). The decision to proceed with intervention will be taken by the regional director, with advice from the Council solicitor.

34 The governing body may determine that it does not intend to make representations. This should be confirmed in its acknowledgement of receipt of the LSC letter (referred to in paragraph 28). Where this occurs, the 30-working-day period of representations will end. Within 20 working days upon receipt of written confirmation from the governing body that it does not intend to make representations, the LSC’s National Council will consider whether or not the statutory powers of intervention should be exercised. The processes set out from paragraph 37 onwards will be followed.

35 If the governing body informs the LSC that it intends to make representations, it will then have the remainder of the 30-working-day period to make representations, supported by any relevant evidence, to the LSC. The governing body should make representations as soon as possible to allow time for further clarification and dialogue. The governing body and the LSC may agree key dates in the period of representation on which evidence will be presented and considered. At any point in the period of representations, if the area director and regional director are sufficiently satisfied that an appropriate outcome can be achieved, the governing body will be informed of this assessment in writing. The period of representations will then end.

36 At the end of the 30-day period, the LSC’s National Council will consider whether the statutory powers of intervention should be exercised.

37 Within 10 working days of the conclusion of the period, the LSC’s National Council will consider whether or not to exercise the powers of intervention. The National Council will consider a recommendation from the Chief Executive and the Council solicitor, any representations made by the institution and any other relevant evidence when reaching its decision.

38 If the National Council determines that the use of the statutory powers of intervention is appropriate, it will give notice to the Secretary of State for Innovation, Universities and Skills. If the education or training of 16- to 19-year-olds is to be affected, the Secretary of State for Children, Schools and Families will be copied into that notice.

39 If the use of the statutory powers of intervention is to be applied to a college primarily delivering to 16- to 18-year-olds, the notification will be to the Secretary of State for Children, Schools and Families. The Secretary of State for Innovation, Universities and Skills will receive a copy where the education or training of post-19-year-olds is to be affected.

40 In either circumstance, the notice will state:
- the matter or matters listed in section 56A(2) as to which the National Council is satisfied;
- the reasons why the National Council is satisfied;
- the actions that the National Council proposes to take; and
- the reasons why the National Council proposes to take those actions.

41 The Secretary of State who receives the notice will respond within 10 working days to the Chair of the National Council, indicating if there are any concerns with regard to the intended use of the powers. If the other Secretary of State has any concerns, these will be shared with the Secretary of State upon whom the notice has been served, to inform the National Council.

42 If no concerns are raised, the National Council will give notice to the institution’s governing body stating:
- the matter, or matters, listed in section 56A(2) as to which it is satisfied;
- the reasons why it is satisfied; and
- the reasons why it has decided to take the action or actions.

43 If the Secretary of State raises concerns about the LSC’s use of the powers, the matter will be referred back to the National Council for further consideration.

44 The National Council may decide that it would be inappropriate to exercise the powers. This decision may result from the National Council’s desire to receive more information, or because it is of the opinion that the information presented does not support or justify the use of the powers. If this occurs, the appropriate regional director will duly inform the governing body within three working days of that decision. The notification of the decision taken by the National Council will include the information outlined in paragraph 37.

45 If the LSC has made a direction to a governing body to make collaboration arrangements, within the meaning of section 166 of the Education and Inspections Act 2006, the governing body will begin to make the appropriate arrangements.

46 If the LSC has made a direction that the governing body secure that the procedures applicable to the consideration of the case for dismissal of a member of staff whom it has the power under the articles of government to dismiss are given effect, the governing body will then follow its own dismissal procedures. The LSC will
not control, participate (unless requested as a witness) or interfere in that process. The governing body will be responsible for the investigation, the process and the final decision.

47 If the LSC has made a direction for the removal of one or more of the members of the governing body, the member(s) concerned will be given notice to leave office forthwith. The governing body must comply with that direction.

48 If the National Council determines that to exercise the powers would be inappropriate, the LSC will then either request that the Council further consider the case or move to consider alternative strategic options as outlined in Identifying and Managing Underperformance.

49 To protect the interests of learners, the LSC will ensure that funds are safeguarded during the period of representations and the subsequent period, and during any necessary transition arrangements that may follow.
4: Public Communications

50 As part of its Annual Report, the LSC will publish a statement of how it has used its statutory powers of intervention as conferred under both the 1992 Act and the 2000 Act. All relevant institutions will be named. To provide context, the statement will also detail the number of Notices to Improve issued in that year and any that remain active. The LSC will not name recipients of such Notices in the Annual Report.

51 The LSC will not disclose cases where the processes outlined in paragraphs 24 to 45 are current, or where they did not result in the use of the statutory powers of intervention, subject to its legal obligation to provide information under the Freedom of Information Act 2000.
Annex A
Flowchart of the Procedures

1. LSC writes to the governing body outlining its concerns
2. Governing body responds
   - Has the governing body successfully addressed the concerns?
     - NO
       - LSC outlines why the concerns have not been addressed
     - YES
       - University continues as normal
3. This process may occur more than once
4. LSC recommends to the Council the use of the powers of intervention
   - Does the Council endorse the recommendations?
     - NO
       - Council reconsiders
     - YES
       - Has the Secretary of State raised any concerns?
         - YES
           - LSC removes one or all of the members of the institution’s governing body
         - NO
           - LSC begins strategic options
2. LSC directs governing body to collaborate
   - Formal collaboration process begins
3. LSC requests governing body to consider dismissal proceedings for a post-holder
   - Governing body instigates dismissal process according to its procedures
   - Governing body follows procedures and determines not to dismiss post-holder
   - Post-holder not dismissed
4. LSC removes one or all of the members of the institution’s governing body
   - Post-holder dismissed
5. If applicable, LSC considers strategic options

30 Working Days
Annex B

Intervention Powers of the LSC

Learning and Skills Act 2000

11 Further education: governors

(1) The council may appoint a person to be a member of the governing body of an institution which –

(a) falls within the further education sector (within the meaning given by section 91(3) of the Further and Higher Education Act 1992), and

(b) mainly serves the population of England.

(2) But no more than two members of the governing body of a given institution may at any given time have been appointed under this section.


56A Intervention: England

(1) This section applies if the Learning and Skills Council for England is satisfied as to one or more of the matters listed in subsection (2) in the case of an institution in England within the further education sector; and it is immaterial whether or not a complaint is made by any person.

(2) The matters are –

(a) that the institution's affairs have been or are being mismanaged by the institution's governing body;

(b) that the institution's governing body have failed to discharge any duty imposed on them by or for the purposes of any Act;

(c) that the institution's governing body have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under any Act;

(d) that the institution is performing significantly less well than it might in all the circumstances reasonably be expected to perform, or is failing or likely to fail to give an acceptable standard of education or training.

(3) If this section applies the council may do one of the things listed in subsection (6).

(4) Before doing one or more of those things, the council must give the Secretary of State a notice stating –

(a) the matter or matters listed in subsection (2) as to which the council is satisfied;

(b) the reasons why the council is so satisfied;

(c) the thing or things that the council proposes to do;

(d) the reasons why the council proposes to do that thing or those things.

(5) If the council does one or more of those things, it must at the same time give the institution's governing body a notice stating –

(a) the matter or matters listed in subsection (2) as to which the council is satisfied;

(b) the reasons why the council is so satisfied;

(c) the reasons why the council has decided to do that thing or those things.

(6) The council may –

(a) remove all or any of the members of the institution's governing body;

(b) appoint new members of that body if there are vacancies (however arising);

(c) give to that body such directions as it thinks expedient as to the exercise of their powers and performance of their duties.

(7) The directions that may be given to a governing body under this section include a direction requiring a governing body to make collaboration arrangements (within the meaning of section 166 of the Education and Inspections Act 2006) with such bodies and on such terms as may be specified in the direction.

(8) Directions may be given to a governing body under this section despite any enactment making the exercise of a power or performance of a duty contingent on the body's opinion.
The council may not direct a governing body under subsection (6)(c) to dismiss a member of staff.

But subsection (9) does not prevent the council, where it considers that it may be appropriate to dismiss a member of staff whom the governing body have power under their institution’s articles of government to dismiss, from giving the governing body such directions under this section as are necessary to secure that the procedures applicable to the consideration of the case for dismissal of that member of staff are given effect to in relation to that member of staff.

A governing body must comply with any directions given to them under this section.

An appointment of a member of a governing body under this section shall have effect as if made in accordance with the instrument and articles of government of the institution concerned.

(7) The council must publish –

(a) the statement of its policy approved by the Secretary of State;

(b) where the Secretary of State approves a revised statement of its policy, the revised statement.

(8) The council must have regard to the statement most recently published under subsection (7) in exercising, or deciding whether to exercise, any of its powers under section 56A in relation to an institution.

56B Intervention policy: England

(1) The Learning and Skills Council for England must –

(a) prepare a statement for its policy with respect to the exercise of its powers under section 56A,

(b) keep it under review, and

(c) if it considers it appropriate in consequence of a review, prepare a revised statement of its policy.

(2) When preparing a statement or revised statement of its policy, the council must –

(a) undertake such consultation as it thinks appropriate;

(b) consider any representations made to it about policy to be set out in the statement.

(3) The Secretary of State may give the council guidance in relation to the exercise of its functions under subsections (1) and (2), and in particular in relation to the form and content of the policy.

(4) It is the duty of the council to have regard to any guidance given to it under subsection (3).

(5) The council must send a copy of the statement or revised statement prepared by it to the Secretary of State.

(6) If the Secretary of State approves it he shall lay a copy of it before each House of Parliament.

(a) the Secretary of State is satisfied as to one or more of the matters listed in section 56A(2) in the case of an institution in England within the further education sector, and

(b) the Secretary of State is satisfied that the circumstances are such that it would be appropriate for the Learning and Skills Council for England to do one or more of the things listed in section 56A(6) in relation to the institution.

(2) In such a case the Secretary of State may give the council such directions as he thinks fit as to the exercise of the council’s powers under section 56A.

(3) Where the Secretary of State gives the council a direction under this section, he must at the same time give the council a notice stating the matter or matters listed in section 56A(2) as to which he is satisfied.

(4) The council must comply with any directions given to it under this section.

(5) Where the council does a thing listed in section 56A(6) in relation to an institution in compliance with a direction under this section –

(a) the council must give the institution’s governing body a copy of the relevant notice under subsection (3), and

(b) the requirement to give a notice under section 56A(5) does not apply.
Annex C
Checks and Balances

There is a range of safeguards already in place to prevent the arbitrary use of any intervention powers by the LSC. These include:

- the Secretary of State's powers under section 56C to direct the LSC to do one or more of the actions set out in section 56A(6), where he is satisfied that the circumstances are such that it would be appropriate for the LSC to do so, and the LSC must comply with those directions;

- the Secretary of State's powers under section 56B to give the LSC guidance on the intervention policy statement and consultation process, to which the LSC must have regard;

- that the LSC must act within its powers to give directions;

- that the LSC will consult the sector in the development of the intervention policy to ensure that stakeholders' concerns are considered and that appropriate processes are put in place;

- that the use of powers will be reasonable and proportionate and will take account of the relevant circumstances in each case (for example, in almost all cases the college will have a period of 12 months in which to improve, and where it has not improved there will be a period of discussion with local and regional LSC staff with regard to actions to be taken);

- the right of the corporation (governing body) to make representations during the 30-day period, having received detailed information from the LSC as to why it proposed to intervene;

- that the corporation is the employer of staff in an FE institution, and the LSC, in the exercise of its power to give a direction to the corporation to consider the dismissal process, should have regard to the corporation's obligations under employment and equal opportunities legislation; and

- that corporations can complain through the LSC's published complaints procedure about the LSC's administration and decisions. If complainants are not satisfied with the outcome, they can have recourse to the Parliamentary Ombudsman or seek a judicial review of the decision.