The Learning and Skills Council’s Statutory Intervention Policy: Responses to the Consultation

October 2008

Of interest to everyone involved in delivering LSC-funded provision
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 findings of the analysis of the responses to the consultation of the LSC’s draft statutory intervention policy.
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Introduction

1. The Further Education and Training Act 2007 adds an additional clause to the Further and Higher Education Act 1992 to give the Learning and Skills Council (LSC) powers of intervention in respect of further education (FE) corporations.

2. The Act requires the LSC to prepare and publish a statement of its intervention policy with respect to the exercise of these powers and keep it under review. There is also a requirement placed on the LSC to consult and to take account of representations when preparing that policy.

3. At the request of Bill Rammell, the then Minister of State for Higher Education and Lifelong Learning, through the then Department for Education and Skills (DfES), the LSC produced a draft policy framework document that set out its intended approach to developing the intervention policy. The document’s purpose was to support understanding and provide background information for parliamentary discussions during readings of the Further Education and Training Bill.

4. In the interests of transparency, the document was shared with the following key stakeholder groups: the Association of Colleges (AoC), the 157 Group and the Sixth Form Colleges’ Forum (SFCF). Feedback was received, and incorporated into the document and subsequent draft policy.

5. A final draft policy was considered by the LSC National Council in January 2008 and published for consultation on 30 January. The consultation period concluded on 2 May 2008.

6. The communication and publication of the policy to the sector was promoted in a variety of ways. Prior to publication, the representative bodies were informed of the policy and were requested to inform their respective members. The consultation was highlighted in the Department for Innovation, Universities and Skills (DIUS) newsletter (published 12 February), which is sent to colleges and providers. The LSC also requested the representative bodies to remind their members when the consultation period was drawing to a close and this was backed up with a direct mail-out to all incorporated colleges.

7. A total of 36 responses were received by the LSC. These include:

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<th>Respondent type</th>
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<tr>
<td>General further education (GFE) college</td>
<td>9</td>
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<td>Clerk to a GFE college</td>
<td>1</td>
</tr>
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8 A full list of those respondents is included at the Annex. A small number of respondents wished to remain confidential. In the interests of meeting the requirements of the Data Protection Act 1998, the clerk to the college is not listed as that individual may be readily identified by naming the institution.

9 The LSC acknowledges that there has been a low volume of response. This was expected given that there had been significant debate on the new powers during the passage of the Bill and there is limited flexibility to amend the process, which flows from the statutory provisions. The policy is either standard LSC business practice or guided by the legislation. Furthermore, the LSC could not consult on the wording or phrases used in the 1992 Act.

10 Additional feedback, made in advance of publication, from the FE Communications Gateway Panel on the consultation document also suggested that the response might be limited; as the majority of providers are unlikely to be affected by the powers, there may be little incentive to consider its content.
This document provides an overview of the responses to the consultation. The consultation document provided an open-ended question seeking comments on the intervention policy, its approach and principles. This was deliberate due to the limited nature of the consultation content. The document did, however, highlight the following areas that respondents may wish to have considered:

- the appropriateness of the principles and approach to intervention;
- the importance of flexibility in managing intervention;
- whether there are circumstances that might lead to an institution not fulfilling its obligations, and in which it would not be appropriate for the LSC to intervene;
- the definition of non-co-operation or obstruction;
- the appropriateness and fairness of the timescales;
- the grounds for immediate intervention; and
- the impact of the use of the powers on the diversity of staff.

The analysis and commentary are structured against these headings, with some additional sections covering themes that were recurring in responses.

The consultation also sought views on the process of responding to this consultation (for example, the appropriateness of the number and type of questions, the ease with which it could be found, understood and completed). Of the 36 responses, nine made comments. The responses were mixed. There was one negative response which stated that the 'consultation process on the policy has been poor'. However, six responses were positive, indicating it was easy to understand and appropriate or that the use of the open-ended question was beneficial. Two responses made suggestions that they considered would have helped the consultation. One felt that some more specific questions would be helpful to steer analysis and feedback. The other response considered that it may have helped if the policy had been also sent directly to clerks of corporations.
Responses

Feedback received was varied in its focus on the actual intervention policy. Many respondents focused on other areas such as the triggers for intervention or means of identifying underperformance, and not the actual policy itself. Some respondents recognised that while these contributions were not part of the consultation, they contributed to decisions made by the LSC in relation to future intervention.

The appropriateness of the principles and approach to intervention

Nearly all respondents endorsed the proposed processes that the LSC would undertake, either as they stand or with some minor refinement or further clarity. A single respondent was negative, stating that they were ‘disappointed with the way in which the policy has been drafted and the confrontational approach that it appears to adopt’. This respondent also indicated reservations about the transfer of powers of intervention to the LSC.

Remaining respondents were broadly supportive, welcoming the policy. Statements included:

‘In general, we believe these new powers are framed appropriately and have sufficient controls to prevent misuse or disproportionate responses by the LSC whilst retaining a robust and speedy approach to quality improvement.’

‘The principles and approach to intervention appear sound.’

‘The overall principles of the intervention policy are sound.’

‘We have no issues with the principle of direct intervention in order to deal with underperformance.’

‘We agree with the overall approach.’

Several respondents welcomed the LSC’s statement that its preferred option will be not to exercise the powers unless absolutely necessary and that intervention by the LSC should be a power of last resort. Even the sole respondent who had strong reservations stated that they welcomed the ‘opportunity to comment on the proposed intervention policy in the expectation that it will never need to be used’.

The importance of flexibility in managing intervention

The views of the seven respondents which focused on the importance of flexibility varied. Five respondents agreed that there needed to be some degree of flexibility as ‘each college and context in which it operates is unique’. Caution was also expressed: three felt that there was a need to ensure that there was consistency in the use of the powers and that they should be applied in a uniform manner across the LSC’s regional structure (one response overlaps the two areas, which is why numbers do not total seven). The LSC’s proposal for flexibility centres on the first three stages outlined in the consultation document, with a more precise and definitive non-flexible approach for stage four – the actual invoking of the powers.

Other respondents also felt that the policy would be clearer and stronger if the LSC’s structures and accountabilities for the decisions and procedures in this policy were further outlined.

Circumstances that might lead to an institution not fulfilling its obligations, and in which it would not be appropriate for the LSC to intervene

This prompt received limited response with only three respondents expressing a view. One respondent indicated that institutions might not be able to fulfil obligations because of a local catastrophe, such as outbreak of serious illness, or as a result of employment law. One respondent clearly stated that ‘it is difficult to conceive of a situation where this might happen’.
The definition of non-co-operation or obstruction

21 Four responses focused on the definition of non-co-operation or obstruction. Two responses (both from providers) offered a definition. These were:

‘Non-co-operation or obstruction might be defined as the inability or unwillingness of an executive or governing body to respond to a reasonable request for information.’

‘It would seem reasonable that if the LSC has taken all the steps described to ensure the improvement of the provision, working with the college executive and/or governing body, and the advice has not been followed, with no improvement, this should be deemed to be non-co-operation or obstruction.’

22 The response from the non-governmental body noted that failure to act might stem not from incompetence, but from a lack of understanding of responsibilities. It also highlighted that the definition of non-co-operation or obstruction of a college may need to be predicated on LSC analysis, which in turn may be challenged itself by the corporation.

23 One representative body acknowledged that, in cases where there is no co-operation by the college executive and/or governing body and all possible approaches have been exhausted, the LSC would have the right to exercise its statutory powers. However, it also highlighted that non-co-operation or obstruction might not result from the executive or the governing body acting together, but rather from them acting separately. The example cited was that a principal could be constrained from co-operating by decisions made by the governing body.

The appropriateness and fairness of the timescales

24 Nine responses explicitly referenced timescales. The proposed 30 days for the period of representations was seen by some as adequate and by one respondent as insufficient. Four clearly felt that the timescales were appropriate. One simply sought to clarify that it was 30 working days, as opposed to just 30 days. Another felt that the timescales, as described, provide an opportunity for a balanced support programme, but two felt that the timescales for assessment in relation to performance were important, and that the full range of evidence for improvement should be considered.

25 One respondent felt that the timescales needed revising, particularly as the 30 days proposed in the consultation was triggered by the date of the letter and not the receipt of the letter, but apart from this issue they were ‘satisfied that the proposed process allows for sufficient timescales and safeguards before any action is taken’.

26 As a result, the intervention policy has been revised so that the period of representations begins upon receipt of the notification of the intention to use the powers, as opposed to the date of issuing the notification. In addition, the policy is now clearer in indicating that the period for representations is 30 working days.

The grounds for immediate intervention

27 There was limited response on the grounds for immediate intervention. One college commented that the ‘philosophy underlying immediate intervention is sound’. A representative body also noted that if the circumstances as described in the consultation document do arise then the LSC should have the power to take immediate action.

The impact of the use of the powers on the diversity of staff

28 Five respondents specifically referenced the impact of the use of the powers on the diversity of staff. The non-governmental body indicated that it felt it was unable to comment on this potential issue without additional evidence. A representative body had no comment at present, but was looking forward to reading the equality impact assessment accompanying the final policy document.

29 The remaining responses were from GFE colleges. One college noted that if the policy complied with equalities legislation then there should be no detrimental effect on any staff. A second college focused its response on the need for sensitive handling by governing bodies and senior staff to allay any fears from wider college staff that may stem from invoking this policy. The third college noted that the ‘diversity of staff is less important than student experience’.
Wider Themes

30 Most respondents offered commentary on wider issues beyond the focus on the actual intervention policy. The areas included both minimum levels of performance and financial health as triggers for a Notice to Improve. The issues raised will be addressed in more detail in discussions with the appropriate representative bodies.

31 There were, however, wider issues which were related to the longer-term role of intervention. These are set out below.

Raising Expectations: enabling the system to deliver

32 A common theme among responses was that the planned changes set out in the Government’s White Paper *Raising Expectations: enabling the system to deliver* (2008) meant that the policy would be temporary, and that it was important to provide clear statements about how the powers outlined in the intervention policy will operate after the abolition of the LSC in 2010, including consideration of what intervention powers should be given to the agencies that will be responsible for this provision in the future. It was further recognised that the life of the policy is effectively time-constrained and, therefore, the process set out here is essentially interim.

33 The revised policy states that the policy will remain in place until the LSC is dissolved. Any future intervention policies led by the Young People’s Learning Agency and the Skills Funding Agency will be contingent upon the Government’s decision regarding the statutory requirements of those agencies.

Self-regulation

34 Self-regulation is clearly a key driver that will impact upon intervention. Eight responses welcomed the LSC’s recognition of the importance of representative bodies supporting members to avoid escalation to LSC intervention, but would wish to see more about the importance of self-regulation and the role of the sector in acting itself to prevent formal intervention by the LSC, or in providing mediation before the LSC exercised the powers.

35 As part of the consultation, the Single Voice was kind enough to share its initial thinking on how intervention could be fitted into a multi-agency funding system. This information and the Single Voice’s response to the *Raising Expectations* consultation have informed the final policy.

36 In supporting the move towards self-regulation, the LSC will undertake further work with the Single Voice and other appropriate representative bodies to determine their role in the ‘management’ of its members to prevent escalation to LSC intervention, as well as at various stages of the process of intervention. This will also inform activities in the sector, once the LSC has been dissolved. The LSC believes that the Learning and Skills Improvement Service will also have a key role and will seek to involve this body in this work.

Equity among providers

37 As such, one representative body indicated that, if the Government felt that the policy should exist, then it should apply to all educational establishments receiving public funds, not just incorporated colleges. The respondent noted that while intervention is a requirement of the Further Education and Training Act 2007, there was no reason for the LSC not to extend the scope of the policy to schools, higher education institutions, WBL providers and others receiving LSC funding.

38 In contrast, no other representative body felt that the intervention policy should apply to all LSC-funded providers. Two representative bodies, however, argued that while the policy could not apply to all types of provider and therefore the approach resulted from statutory differences, they were keen that, as far as possible, all providers should be subject to the same regulatory framework. The LSC was urged to promote this approach wherever possible in discussions with government. In more detail, one representative body felt that policies for the identification of underperformance should apply equally to all providers, most notably, the application of minimum levels of performance to schools. This view was echoed by one GFE college which, in the context of forthcoming changes in relation to the machinery of government, stated that it hoped ‘that similar procedures are introduced for schools in the 14–19 partnerships colleges operate within’.
39 Feedback from some WBL-focused representative bodies noted that they supported the proposals in principle, but that it was clear that the process in its entirety would directly apply to only its college members. The focus of these organisations was a need for parity among WBL providers and colleges in accessing the support available to colleges under stage three of the process where their performance is judged not to meet minimum levels of performance. This was echoed in all WBL providers’ responses.

40 It was further requested that the policy should list in an annex those institutions to which it applies. The policy will only be published once. As colleges continue to merge, there may be institutions that wish to be redesignated as part of the systemic changes to support Raising Expectations, and as such that list would be quickly outdated. Therefore, it will not be included in the final policy.

Governing bodies

41 Two responses noted the LSC focus on the role of governing bodies in recognising their own responsibilities where mismanagement has occurred or may occur. Both queried how the LSC would promote this growth in recognition. One response went further and expressed concern that the LSC seems keen to distance itself from the governing body’s investigation, process and final decision on dismissing senior postholders, as a result of intervention proceedings. While the LSC notes that governors are voluntarily providing time and expertise to colleges and deserve appropriate support, it firmly believes that any work to strengthen governing bodies, and raise awareness of their role, is firmly within the remit of self-regulation.

Appeals

42 Two representative bodies sought clarity on how to challenge any LSC decisions. Decisions in relation to challenging the LSC’s assessment of whether or not the conditions of a Notice to Improve have been met lie within the LSC complaints process and also the checks and balances at Annex C in the final policy. One of these representative bodies felt that there was no appeal procedure included in the policy and that this was a serious oversight.

43 The representative body also felt the checks and balances, with complaints being considered by the LSC and the Parliamentary Ombudsman, to be insufficient and that there should be an independent appeals mechanism included in the policy. In advance of the use of the powers, the period for representations acts as that in-built mechanism. The Parliamentary Ombudsman has the ability to instigate a judicial review and acts as an independent process for challenging the LSC’s decision to use the powers. In contrast, another representative body indicated that its members found the list of checks and balances to prevent arbitrary use of any intervention powers by the LSC useful.

The Framework for Excellence

44 Two responses focused on the Framework for Excellence. One, from a GFE college, indicated that the Framework is not yet robust enough to inform intervention, and that it has to be highly credible to utilise Framework outcomes for intervention. The other response, from a representative body, notes that if the Framework is to be a key measure of performance, it is essential that it is fit for purpose across all parts of the FE sector, but that version one of the Framework does not cover the entire sector. The LSC notes both responses, but would wish to highlight that the decision to take action is currently predicated on robust processes and evidence that are either already elements of the Framework or will be incorporated into it. Therefore, LSC action for formal intervention will continue to be based on currently available evidence, which will simply form part of the Framework. In addition, intervention in the formal sense will apply only to the GFE sector, which is already covered by the Framework.

Employees covered by the policy

45 A representative body considered that there was a need to clarify which employees are covered by the powers to direct a governing body to commence procedures for the consideration of a case for dismissal. The Act is clear that it applies only to those members of staff whom the governing body has the power, under the institution’s articles of government, to dismiss.

46 The same respondent also noted that, where the LSC directs a governing body to give effect to procedures for consideration of a case for dismissal against an employee, if the outcome does not meet the expectations of the LSC and the member of staff is not dismissed, or other sanctions applied, then a serious dispute may arise. They note that such disputes have occurred previously in other public sector organisations. While it is anticipated that this is highly unlikely, the provision in Section 56A of the Further Education and Training Act 2007 was drafted with the intention to leave the final decision on dismissal of the corporation’s employees with the governing body. In addition, the independent arbitration process does not fit with the employment legislation and would not have any legal force.
Annex: List of Respondents

Association of College Management
Association of Colleges
Association of Colleges – West Midlands
Association of Learning Providers
Association of School and College Leaders
Bedfordshire and Luton Education Business Partnership
Care Training – East Midlands
Carlisle College
Consortium for Learning
Greater Merseyside Learning Providers Federation
Haddon Training
JHP Group Ltd
Kimberly-Clark Limited
Langdon College
Leeds College of Building
Leeds Training Trust
Lewisham College
NATSPEC (Association of National Specialist Colleges)
NEETA (North East Employment Training Agency) Ltd
NIACE (National Institute of Adult Continuing Education)
Northern College for Residential Adult Education
Norton Radstock College
Nottingham Hairdressing Training Agency
Park Lane College Leeds
Prostart Training
Providers in Partnership
Single Voice
Sixth Form Colleges’ Forum
South Tyneside College
Wakefield College
WS Training
YMCA Training