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Technical and Further Education Bill [Bill No 82 of 2016-17]

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Summary

This paper has been written for the House of Commons Second Reading debate of the [Technical and Further Education Bill 2016-17](#) which is scheduled for 14 November 2016. The Bill was presented in the House of Commons on 27 October 2016.

The Bill's proposals aim to improve the quality of technical education (TE), address skill shortages and support the Government's social mobility agenda.

The Bill implements measures set out in the Government's [Post – 16 Skills Plan](#) which was published in July 2016; these proposals were developed in response to recommendations in the [Report of the Independent Panel on Technical Education](#) chaired by Lord Sainsbury. The Bill will extend the role of the Institute for Apprenticeships to cover technical education and classroom-based TE in addition to apprenticeships. It also includes measures which support the Institute's establishment and remit regarding apprenticeships.

The further education (FE) measures in the Bill support the Government's ongoing Area-based Review of FE provision – this Review aims to create a more financially resilient and stable FE sector. The results of the Reviews may lead to mergers, or closures of some colleges. In the event that a college becomes insolvent in the future, the Bill will create a new insolvency regime. A consultation on an insolvency regime was launched in July 2016¹ and the Government's response to the proposals was published alongside the Bill.²

Additional measures in the Bill regarding FE information aim to ensure that the Secretary of State for Education continues to be provided with data on the FE sector after the transfer of skills provision and the Adult Education Budget to combined authorities as part of the Government's devolution programme.

The Bill is in four parts:

- **Part 1** renames the Institute for Apprenticeships the "**Institute for Apprenticeships and Technical Education**" and makes consequential changes. Schedule 1 extends the remit of the Institute for Apprenticeships and Technical Education.
- **Part 2** creates an **insolvency framework** for FE corporations and sixth form colleges and creates a new special administration regime for FE corporations, sixth form corporations, and companies which run designated institutions in England and Wales.
- **Part 3** extends the **statutory duty to provide information** on FE in the *Further and Higher Education Act 1992* to cover providers of FE who receive funding from the combined authorities.
- **Part 4** contains general provisions.

Four schedules to the Bill contain detail on some of the measures.

This briefing paper provides background on the main provisions of the Bill, contains comment and raises issues. The Paper follows the outline of the Bill but is not intended to be an exhaustive clause-by-clause analysis; the [Explanatory Notes](#) to the Bill, published alongside it, provide explanation of individual clauses. The Bill and accompanying

¹ Department for Business, Innovation and Skills, [Further Education and Sixth Form Colleges Consultation on Developing an Insolvency Regime for the Sector](#) July 2016

² Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector Government consultation response](#) October 2016

documents are available on the Parliament website at [Technical and Further Education Bill 2016-17](#).

The following documents contain information which is relevant to the Bill:

- [Report of the Independent Panel on Technical Education](#), April 2016.
- Department for Business, Innovation and Skills and Department for Education, [Post-16 Skills Plan](#), July 2016.
- Department for Business, Innovation and Skills, [Further Education and Sixth Form Colleges Consultation on Developing an Insolvency Regime for the Sector](#), July 2016.
- Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector Government consultation response](#), October 2016.
- Department for Education, [Technical and Further Education Bill: Impact Assessment](#), October 2016.
- Department for Business, Innovation and Skills and Department for Education, [Technical education reform: assessment of equalities impact](#), July 2016.
- Department for Education, [The Technical and Further Education Bill: factsheet](#), October 2016.

Clause 1 and schedule 1 of the Bill extend to England only; clauses 2 to 38 and schedules 2 to 4 extend to England and Wales. A detailed table showing the territorial extent of clauses in the Bill is set out in Annex A of the Explanatory Notes on page 19.

The following library briefing papers are of relevance to the Bill's provisions:

- CBP 7357, [Post-16 Area Reviews](#), 4 November 2016.
- CBP 7708, [Adult further education funding in England since 2010](#), 16 September 2016.
- CBP 7523, [The Apprenticeship Levy](#), 6 May 2016.
- CBP 03052, [Apprenticeships Policy, England 2015](#), 8 March 2016.
- CBP 7305, [Traineeships](#), 8 March 2016.

1. Background

1.1 Review of technical education

The [Post-16 Skills Plan](#) was published on 8 July 2016 in response to findings from Lord Sainsbury's [independent panel on technical training](#) in England. It is the first skills white paper since 2005 and in it the Government "unequivocally" accepted all of Lord Sainsbury's recommendations, "where that is possible within existing budgets."³

Two education routes for 16 year olds

The [Post-16 Skills Plan](#) proposed that two choices of education route be offered to 16 year olds (and also available to adult learners aged 19 and over): the academic option and the technical option. The focus of attention has been on the report's recommendations for technical education – as the academic option is already well established. Learners will have the option to move between the technical and academic routes through bridging provision after completing A-levels or equivalent qualifications.⁴ Applied general qualifications are not expected to be part of the technical education route.⁵

The technical option will continue to be delivered by a combination of college-based and employment-based routes, which will be "closely aligned", and it will be possible to move from one to the other.⁶ Employment-based provision will most commonly be delivered via an apprenticeship. Learners taking a college-based route will be entitled to a "high-quality, structured work placement".⁷

Box 1: Employer involvement

The Skills Plan states that the Institute for Apprenticeships will have a remit to "put employers in the lead of designing standards across all technical education – college-based as well as apprenticeships." Under the proposals, the Institute will convene panels of professionals for each route "to advise on the knowledge, skills and behaviours that individuals will need to meet the standards in each route, and on suitable assessment strategies for college-based learning."¹

15 new technical routes

It is proposed that there will be 15 technical educational routes:

- Agriculture, Environmental and Animal Care
- Business and Administrative
- Catering and Hospitality
- Childcare and Education
- Construction
- Creative and Design

³ Department for Business, Innovation and Skills and Department for Education, [Post-16 Skills Plan](#), July 2016, p7.

⁴ Ibid, p20.

⁵ Ibid.

⁶ Ibid, p23.

⁷ Ibid, p24.

- Digital
- Engineering and Manufacturing
- Hair and Beauty
- Health and Science
- Legal Finance and Accounting
- Protective Services
- Sales, Marketing and Procurement
- Social Care
- Transport and Logistics

It is expected that the following routes: Protective Services, Sales, Marketing and Procurement, Social Care and; Transport and Logistics will be primarily delivered through apprenticeships.

For learners “not ready to access a technical route at age 16” a transition year or traineeship will be available before choosing between a two year college-based or employment-based programme, including at least 20 percent college-based provision. The Skills Plan states that the Government will “carry out further work and consultation on the ‘transition year’ over the next six months.”⁸

Tech-level qualifications

Under the proposals, there will be nationally recognised certificates for each technical route at levels 2 and 3, with certificates achieved through college-based study likely to include a qualification. The Skills Plan argues that competition between awarding bodies can lead to a ‘race to the bottom’ and it can be confusing for parents and students to have to choose between a large number of competing qualifications. It therefore proposes that there will be “only one approved tech level qualification for each occupation or cluster of occupations within a route.” It is intended that exclusive licenses for the development of these tech levels will be granted following a competitive bidding process.⁹

There will be a wider range of qualifications at levels 4 and 5 as a reflection of the greater specialisation at tertiary level. However, the Government expects “to see a reduction in the number of regulated qualifications that exist at levels 4 and 5”.¹⁰

Institute for Apprenticeships

The Institute for Apprenticeships was established in May 2016 by the [Enterprise Act 2016](#). The body is due to go live as an independent employer-led body in April 2017. It will regulate the quality of apprenticeships. The [Post-16 Skills Plan](#) proposes increasing the remit of the Institute to cover all technical education from April 2018 onwards.

⁸ Department for Business, Innovation and Skills and Department for Education, [Post-16 Skills Plan](#), July 2016, p28.

⁹ Ibid, p24.

¹⁰ Ibid, pp25-7.

The Institute would accordingly be renamed as the “Institute for Apprenticeships and Technical Education”.

Regarding the expanded remit of the Institute the Government has said “we will ensure that the Institute has the resources it needs to do its job effectively at the heart of the system.”¹¹

Timetable for implementation of reforms

The Government intends to phase in the reforms to technical education progressively. A small number of ‘pathfinder’ routes will be established which can start developing standards this year for first delivery in September 2019. It is expected that additional routes will become available for teaching in phases between 2020 and 2022.¹²

It is anticipated that the Institute for Apprenticeships will be “fully operational” by April 2017 and until it takes over its broader remit, the Government hold the responsibility for setting the standards for the college-based element of the routes.¹³

Apprenticeship targets and funding

In the [2015 Queen’s Speech](#) the Government set out its intention to create a duty to report on progress to meeting the target of 3 million new apprenticeships by 2020. The [Enterprise Act 2016](#) introduced targets for apprenticeships in public bodies in England to contribute towards meeting the national targets.

The apprenticeship levy was originally announced in the [Summer Budget 2015](#).¹⁴ UK employers with a paybill over £3 million per year will have to pay 0.5% of their paybill over this amount as a levy. Employers will be able to spend their levy contributions on apprenticeship training.

Proposals for the new funding system were published on 12 August 2016 and were followed by a consultation which closed on 5 September. The Government published its final funding policy on 25 October 2016.¹⁵

Further Information is available in the Commons Briefing Papers:

- CBP 7523, [The Apprenticeship Levy](#), 6 May 2016.
- CBP 03052, [Apprenticeships Policy, England 2015](#), 8 March 2016.
- CBP 7305, [Traineeships](#), 8 March 2016.

¹¹ Department for Education, [The Technical and Further Education Bill: factsheet](#), October 2016.

¹² Department for Business, Innovation and Skills and Department for Education, [Post-16 Skills Plan](#), July 2016, p42.

¹³ Ibid.

¹⁴ HM Treasury, [Summer Budget 2015](#), HC 264, July 2015, p60, para 1.270.

¹⁵ GOV.UK, [New apprenticeship funding to transform investment in skills](#), 25 October 2016.

1.2 The further education sector

The FE sector is large and highly diverse. A report by the National Audit Office (NAO) in July 2015 provides an overview of the sector:

Further education (FE) is formal learning outside of schools and higher education institutions. Around 4 million people learn in the FE sector (the sector) each year. These include young people continuing their academic or vocational learning outside school; adults and young people seeking basic skills; and others who want to develop skills or get formal qualifications. The sector also offers vocational and skills training for apprentices, and provides some higher education courses.

In England, there are around 1,100 providers, including around 240 FE colleges delivering education and training to more than half of the sector's learners. Around 700 providers are commercial or charitable bodies, supporting most of the remaining learners.¹⁶

A summary of the main facts and figures relating to colleges in England is also available in a publication by the Association of Colleges, [College Key Facts 2016/17](#).

Most further education (FECs) and sixth form (SFCs) colleges are statutory corporations incorporated under the [Further and Higher Education Act 1992](#). They are also exempt charities regulated by the Secretary of State for Education.

FE funding

Over the last five years the FE sector has experienced a prolonged period of funding cuts. The Library briefing CBP 7708, [Adult further education funding in England since 2010](#), 16 September 2016 showed the scale of the reduction in funding:

The initial teaching and learning funding allocations for adult further education (FE) and skills in England fell from a 2010-11 baseline of £3.18 billion to £2.94 billion in 2015-16, a reduction of 8% in cash terms or 14% in real terms. The allocation for 2015-16 fell further as a result of the 2015 Summer Budget, which reduced the non-apprenticeship part of the Adult Skills Budget (ASB) by an additional 3.9%.¹⁷

Under the Spending Review 2015 settlement the Adult Education Budget is set to be held constant in cash terms at £1.5 billion up to 2019-20 and funding for apprenticeships and loans is set to increase by 92% and 140% respectively between the 2015-16 baseline and 2019-20.¹⁸ The Spending Review also announced the protection of the national base rate per student for 16-19 year olds at £4,000.

Financial sustainability of colleges

An NAO report in July 2015 which examined the oversight of the financial sustainability of the FE sector in England, expressed concern about the financial situation of some colleges:

¹⁶ National Audit Office, [Overseeing financial sustainability in the further education sector](#), HC 270, Session 2015-16, 20 July 2015.

¹⁷ CBP 7708, [Adult further education funding in England since 2010](#), 16 September 2016, p3.

¹⁸ Ibid.

The financial health of the FE college sector has been declining since 2010/11. In 2013/14, the sector was in deficit for the first time and 110 colleges recorded an operating deficit, up from 52 in 2010/11. In the same period, the number of colleges assessed by the SFA to have 'inadequate' financial health rose from 12 colleges (5% of colleges) to 29 colleges (12%). The SFA defines a college with inadequate financial health as being in financial difficulty, with a significant risk of being unable to fulfil its contractual duties. Trends in financial health over the last 4 years vary substantially by college size and region (paragraphs 2.2 to 2.5 and 2.7, and Figure 2 to Figure 5).

The decline in the financial health of the sector has been quicker than indicated by colleges' plans, and current forecasts suggest that the number of colleges under strain is set to rise rapidly. In particular, the SFA anticipates that the number of colleges it rates as financially inadequate will continue to grow. On current trends, it could be around 70 colleges by the end of 2015/16, based on the SFA's modelling in May 2015 of the sector as a whole rather than forecasts for individual colleges. This estimate is sensitive to a number of assumptions around funding projections, recruitment levels and colleges' ability to reduce costs (paragraphs 2.4 and 2.6).¹⁹

The report also noted that there was currently no insolvency procedure for colleges in financial difficulty:

Under the *Further and Higher Education Act 1992*, colleges are incorporated with exempt charity status, giving them financial independence and powers to own assets, employ staff, award contracts and buy services. Colleges may make financial surpluses or deficits. In cases of financial difficulty, however, there is no provision for colleges to enter an insolvency regime such as administration.²⁰

1.3 Restructuring the FE sector

Area-based Reviews of post-16 education

The Government is currently conducting a national review of FE provision through a system of Area-based Reviews. This process aims to restructure and streamline the post-16 education sector. The rationale for these Reviews was set out in a Government guidance document:

Purpose of the reviews

Each area review should establish the best institutional structure to offer high quality provision based on the current and future needs of learners and employers within the local area. Reviews should deliver:

- **Institutions which are financially viable, sustainable, resilient and efficient, and deliver maximum value for public investment.** This is likely to result in rationalised curriculum; fewer, larger and more financially resilient organisations; and, where practicable, shared back office functions and curriculum delivery systems.
- **An offer that meets each area's educational and economic needs.** This will mean (a) Local Enterprise

¹⁹ National Audit Office, [Overseeing financial sustainability in the further education sector](#), HC 270, Session 2015-16, 20 July 2015, p6, paras 8 and 9.

²⁰ Ibid, p3, para 1.6.

Partnerships (LEPs) and local authorities setting out their economic vision for the area and the skills base it will require to succeed; and (b) each area considering how existing provision and delivery structures can be adapted to deliver provision more effectively and efficiently. We expect the reviews to provide a foundation for more effective joint local working, including with the development of local outcome agreements, and with greater devolution of responsibility for adult skills to local areas.

- **Providers with strong reputations and greater specialisation.** Providers should focus on what they can deliver effectively and to a high standard. An important outcome of each review will be the establishment of clear progression routes to higher level skills. In a number of areas, there is work being undertaken to look at the potential role of Institutes of Technology (IoTs).
- **Sufficient access to high quality and relevant education and training for all,** including 16-19 year olds, adults and learners with Special Educational Needs and Disabilities (SEND), both those with high needs and those with moderate and low levels of SEND. We will be publishing a data pack shortly setting out the templates that will be used to collect data from colleges.
- **Colleges well equipped to respond to the reform and expansion of the apprenticeship programme.** The government's reform and growth aims for apprenticeships will position these as the biggest part of the vocational market. From April 2017, a levy on large employers will put funding for apprenticeships on a sustainable footing, and employers will become the purchasers of apprenticeship training. The levy is likely to lead to significant employer demand for the new, employer-designed apprenticeship standards, which will replace frameworks over time. Colleges and other providers need to be ready to respond to this demand and re-work their business model to operate competitively in a more market-style environment, moving away from the current allocations-based funding system for apprenticeships. We expect to see further education colleges taking a greater share of the apprenticeship training market, alongside other types of providers.²¹

The Government expects the Reviews to enable a transition towards fewer, larger, more resilient and efficient providers and more collaboration across institution types.

However a report by the Public Accounts Committee [Overseeing financial sustainability in the further education sector, December 2015](#) questioned whether the Reviews would lead to a more robust FE sector:

It is unclear how area-based reviews of post-16 education, which are limited in scope, will deliver a more robust and sustainable further education sector. The departments appear to see the national programme of area-based reviews, which they announced in July 2015, as a fix-all solution to the sector's problems. But the reviews have the potential to be haphazard,

²¹ HM Government, [Reviewing post-16 education and training institutions, updated guidance area reviews](#), March 2016, p6.

and it is too early to speculate on whether they will lead to significant improvements in local provision. Each review only covers further education and sixth form colleges, and does not include school and academy sixth forms or other types of provider. If a review concluded, for example, that there was over-provision of education for 16- to 19-year-olds in an area, it is not clear that this conclusion would have any influence over decisions regarding provision by local schools and academies. The departments also lack effective powers in cases where college governors do not accept, or will not implement, a review's recommendations.

Recommendation: The departments need to demonstrate that the area-based reviews are taking a sufficiently comprehensive look at local provision taking into account all FE providers and school sixth forms, that they are fair, and that they result in consensus on sustainable solutions to meet local needs.

The Review process is being conducted in waves - wave 1 Reviews began in September 2015 and further waves will be carried out until the process is completed in March 2017. It is expected that the process will result in many college mergers and closures.

The Library briefing CBP 7357, [Post-16 Area Reviews](#), 4 November 2016 gives extensive detail on the Area Review process.²²

Devolution of skills

As part of the localisation agenda the Government is devolving powers to local governments in England – regional devolution agreements will include skills provision. The principle behind localism with regard to FE is set out in the 2016/17 [Skills Funding Agency](#) letter:

Localisation

We have in recent years established the principle that while providers should respond to demand, there is a wider public interest in ensuring that provision is aligned with both current labour market conditions and future economic development. That is why, as a condition of receiving funding, we currently require colleges to provide evidence that they are using their best endeavours to meet the needs of those LEAs in which they deliver significant amounts of learning. In future, so far as possible and practical, delivery agreements with providers should reflect local priorities which might include, for example, job outcomes and English and maths achievements. The Government's view is that the AEB funds what is essentially a local service and that in the right circumstances it can be better for funding and responsibilities to be held at local level rather than national level. This view is reflected in recent devolution agreements for areas including Sheffield City Region, the North East, Tees Valley, the West Midlands, and Liverpool City Region which provide initially for local influence over what is to be delivered by providers receiving block grant; and subsequently, subject to readiness conditions being met, these devolution agreements will provide

²² CBP 7357, [Post-16 Area Reviews](#), 4 November 2016.

for the full devolution of the AEB. I am asking the SFA to support the progress of these devolution deals, and others as they arise in future.

Skills devolution will take effect in stages; in 2016-17 skills provision will be devolved to certain combined authorities and in 2018-19 the Adult Education Budget will be devolved.²³

The following papers provide general information on regional devolution:

- National Audit Office, [English devolution deals](#), HC 948, 20 April 2016,
- Library briefing CBP 07028, [Devolution to local government in England](#), 19 July 2016

1.4 An new insolvency framework for colleges

At present, the [Further and Higher Education Act 1992](#) makes no provision for the treatment of insolvent FE and sixth form colleges. Where a college is insolvent, the hope is that an alternative provider can be found willing to accept its assets and liabilities and so allow it to dissolve.²⁴ In practice, this doesn't often happen, usually because the liabilities of the dissolving college exceed its assets. The current difficulty, if no willing third party can be found, is that it is unclear whether insolvency law relating to compulsory liquidation applies to colleges.

Section 221 of the [Insolvency Act 1986](#) provides that an unregistered company can be wound up by the court. However, it is unclear whether FE and sixth form colleges fall within the definition of an 'unregistered company' provided by section 220 of the [Insolvency Act 1986](#). According to the Government, "the legal arguments are finely balanced and ultimately only a court can determine the issue."²⁵ However, it has yet to be tested.

If the matter were to come before the court, and if the court were to decide that FE and sixth form colleges could be treated as unregistered companies for the purposes of the [Insolvency Act 1986](#), then it would be possible for an insolvent college to be wound up by the court. This would involve the realisation of assets and the orderly pari-passu²⁶ distribution of the proceeds to unsecured creditors

²³ [The Adult Education Budget - a significant reform](#), Association of Colleges, 28 January 2016.

²⁴ Under the [Further and Higher Education Act 1992](#), colleges are able to transfer their "property, assets and liabilities" to another willing party in order to dissolve.

²⁵ Department for Business Innovation and Skills, [Further Education and Sixth Form Colleges – Consultation on developing an insolvency regime for the sector](#), July 2016, paragraph 25.

²⁶ The use of the phrase "Pari-passu" in the context of insolvency law means a class of creditors being equal in all respects; being repaid at the same rate or proportion.

(assuming there are sufficient funds after paying secured and preferential creditors).

However, compulsory liquidation (or winding-up) is just one insolvency procedure. It would not be possible to provide, “the full range of insolvency procedures that would offer flexibility for colleges and their creditors or protections for their learners” .²⁷

Of course, the court might decide that insolvent colleges are not unregistered companies for the purposes of the [IA 1986](#). In which case, the risk is that there would be a disorderly outcome, with unsecured creditors claiming on an unequal “first past the post” basis.²⁸

It is the Government’s view that this legal uncertainty cannot continue indefinitely:

This uncertainty creates the risk of disorderly closures and potential detriment for learners as their courses are interrupted or terminated, as well as potential adverse outcomes for creditors, and the taxpayer. It can also result in distorted incentives for colleges when making commercial decisions.²⁹

Consultation process

In July 2016, the Government launched a consultation on the introduction of a new FE insolvency framework.³⁰ The consultation document, [Further Education and Sixth Form Colleges - Consultation on Developing an Insolvency Regime for the Sector](#) , with accompanying draft clauses, set out the Government’s proposals and stated the need for an insolvency framework post Area Reviews:

After the Area Reviews, colleges will need a legal framework within which to manage their finances independently and flexibly, with opportunities to restructure and protections for learners. Any framework will need to make provision for corporations to exit the market when appropriate and without undue detriment to learners, creditors and taxpayers.

The regulation of further education and sixth form colleges must evolve to champion independence and financial resilience, to protect learners and taxpayers and to provide clarity for college creditors. We plan to establish a comprehensive insolvency regime for the sector with a clear remit to provide flexibility where colleges can be rescued and clarity of process where they cannot.

This proposal reflects our mission to create resilient, responsive and independent further education and sixth form corporations and to protect our learners.³¹

The main factors influencing and underlying the consultation were:

²⁷ Department for Education, [The Technical and Further Education Bill: Factsheet](#), October 2016.

²⁸ Department for Business Innovation and Skills, [Further Education and Sixth Form Colleges – Consultation on developing an insolvency regime for the sector](#), July 2016.

²⁹ Ibid, p3.

³⁰ The *Higher Education and Research Bill* 2016-17, which is currently going through its parliamentary stages, introduces a student protection system for students in higher education.

³¹ Department for Business Innovation and Skills, [Further Education and Sixth Form Colleges – Consultation on developing an insolvency regime for the sector](#), July 2016, p4.

- Establishment of an orderly process which provides protections for creditors comparable with other relevant UK insolvency regimes
- Protection of the interests of learners by promoting continuity of provision
- Retention of independence and freedoms of colleges (as expanded by the *Education Act 2011*) whilst removing or mitigating any expectation of additional exceptional public funding
- Support for local and national education and training needs

The consultation ran for a month from 6 July to 5 August 2016 and received 63 responses. The Government [response to the consultation](#) which was published on 27 October 2016 stated that “overall most of the responses received were broadly supportive of the main proposals”.³²

The Government expects the Area Review process to “stabilise the financial position of the sector” and to leave “each continuing college in a financially resilient position”.³³ A restructuring facility will be available to support the implementation of the recommendations of Area Reviews, but no further [Exceptional Financial Support](#), will be available for colleges following the implementation of Review recommendations in the relevant area.³⁴ The Area Review guidance states that Area Reviews and the insolvency regime are a “coherent package to secure the future of a viable, sustainable and high quality college sector”:

The area reviews, the restructuring facility and the proposed new insolvency regime should be seen as part of a coherent package to secure the future of a viable, sustainable and high quality college sector. The area reviews and restructuring facility provide the time, space and resources to put the sector on a sustainable footing. The proposed insolvency regime is intended to provide part of a legal framework which ensures that the interests of learners and taxpayers are secured over the long term.³⁵

The Government response to the insolvency regime consultation stated that it was “important not to overstate the risk of college insolvency” and that the “risk of a college becoming insolvent was very low”.³⁶

It should be noted that the insolvency proposals are limited to dealing with the dissolution of insolvent colleges and the Government is not proposing changes to the current processes for dealing with the dissolution of solvent colleges.³⁷

³² Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector: Government consultation response](#), October 2016, p4.

³³ HM Government, [Reviewing post-16 education and training institutions. updated guidance area reviews](#), March 2016, p33.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector: Government consultation response](#), October 2016, p27.

³⁷ Ibid, p9.

1.5 Provision of information by FE providers

FE providers funded by the Skills Funding Agency (SFA) have a statutory duty under the *Further and Higher Education Act 1992* section 54 to provide information to the Secretary of State for Education. The duty requires the governing bodies of institutions within the FE sector to provide annually updated data on participation, achievements and employment outcomes of learners. This information, broken down by demographics, level, geography, provider type and provision type, is published on the GOV. UK website³⁸ and is also available on the Association of Colleges website.³⁹

The information supplied by providers may be used by the Government to analyse participation and outcomes in FE and skills training and to inform policy.

Under current provisions the devolution of the Adult Education Budget to certain combined authorities in England in 2018/19 could result in the loss of data from some FE providers and leave the Secretary of State for Education unable to account for performance of the publicly funded FE sector in the same way as is currently the case. Provisions in the Bill aim to redress this situation.

³⁸ GOV.UK, [FE data library: further education and skills](#); and Data GOV.UK [Further Education and Skills in England: Annual Data](#).

³⁹ Association of Colleges, [Data Sources](#).

2. The Bill

2.1 Part 1: Technical Education

Clause 1 renames the Institute of Apprenticeships as the “Institute for Apprenticeships and Technical Education”. The clause refers to Schedule 1 which extends the remit of the Institute accordingly alongside other provisions.

The Institute is expected to be established in April 2017, initially with only apprenticeships functions. Until its remit is broadened, the Government will hold the responsibility for setting the standards for the college-based element of the routes.⁴⁰

Schedule 1 enables the Secretary of State to specify broad groups of occupations with shared training requirements (these may be referred to as ‘routes’). The Institute will be required to map occupations in relation to these routes. The Institute must also publish information to show how standards for occupations relate to the occupational map.⁴¹

The Institute will also be required to publish standards for occupations and describe for each standard the occupation and the expected outcomes required to successfully achieve the standard. Standards must be drafted by groups approved by the Institute.⁴² The Institute must publish the criteria to be used in deciding whether to approve or reject a group who wish to develop a standard and the standard itself. It may also take into account other matters outside the published criteria in individual cases where appropriate.

Those developing apprenticeship standards must set out who will evaluate assessments for each standard, and how they will do it. It will be possible to ask the Institute to fulfil this quality assurance function, as well as Ofqual, professional bodies and others. Some or all of the bodies that carry out this function (including the Institute) may charge for doing so. The regulations may prescribe restrictions such as the amount of the fees, or a maximum amount the Institute may charge.⁴³

The Schedule also allows the Institute to approve technical education qualifications in relation to one or more occupations:

only if satisfied that by obtaining the qualification a person demonstrates that he or she has attained as many of the outcomes set out in the standards as may reasonably be expected to be attained by undertaking a course of education.⁴⁴

The Institute may withdraw approval of a qualification or modify an approved qualification without having to withdraw and reapprove it. The Institute may make any appropriate arrangements for ensuring that

⁴⁰ Department for Business, Innovation and Skills and the Department for Education, [Post-16 Skills Plan](#), July 2016, p42.

⁴¹ Schedule 1, paragraph 7.

⁴² Groups may be commissioned if it is considered that a standard would be otherwise unavailable.

⁴³ Schedule 1, paragraph 12

⁴⁴ Schedule 1, paragraph 15

the qualifications are available to be approved, including the transfer of copyright for relevant course documents to the Institute.⁴⁵

The Institute must maintain a list of approved technical education qualifications and ensure that it is available free of charge. The list must indicate the standard or standards to which each qualification relates as well as the additional education, types of training or other steps that a person may need to undertake in order to progress into employment and to be awarded a technical education certificate.⁴⁶

Provisions in this Part apply to England only.

2.2 Part 2: Insolvency regime for FE bodies

Outline of provisions

Part 2 of the Bill would establish an insolvency framework for the FE sector. Insolvency measures are set out through seven chapters.

Chapter 1 (**clause 3**) defines an FE body as:

FE education corporations in England and Wales, sixth form college corporations in England and companies in England and Wales which conduct further education institutions designated under section 28 of the [Further and Higher Education Act 1992](#).⁴⁷

Insolvency is taken to mean that the FE body is “unable, or likely to become unable, to pay its debts” (as defined by section 123 and Paragraph 11(a) of Schedule B1 of the [Insolvency Act 1986](#)).

In respect of FE colleges in England and Wales that are statutory corporations and sixth form colleges’ corporations in England, Chapter 2 would apply normal insolvency procedures broadly in line with those provided for companies under the [Insolvency Act 1986](#). The crucial point to note is that ordinary insolvency procedures do not offer explicit protections on the continuity of the education provision for learners of an insolvent college.⁴⁸

However, Chapter 4 would also create a Special Administration Regime (abbreviated to “SAR”) for insolvent FE bodies. In a nutshell, SAR is designed to:

- protect learners from disruption to their courses;
- help the rehabilitation of the college, where possible; and
- provide an orderly winding up procedure if a college becomes insolvent.

Key to the SAR, is the creation of a new procedure - ‘education administration’. Only the appropriate national authority (the Secretary of State or, for bodies in Wales, Welsh Ministers) can apply to the court for an education administration order. If the application is successful,

⁴⁵ Schedule 1, paragraphs 22 and 23.

⁴⁶ Schedule 1, paragraph 21.

⁴⁷ Technical and Further Education Bill Explanatory Notes, [Bill 82-EN](#).

⁴⁸ Department for Business Innovation and Skills, [Further Education and Sixth Form Colleges – Consultation on developing an insolvency regime for the sector](#), July 2016.

ordinary insolvency procedures would not be available in respect of an insolvent college.

It is the Government's view that the application of ordinary insolvency procedures (as provided for by chapters 2 and 3 of Part 2) and the establishment of a SAR (as provided for by Chapter 4), would provide for a range of possible outcomes for insolvent FE bodies, which would give protection for learners, an orderly outcome for creditors and benefit taxpayers:

The benefit of the SAR is to protect learner provision and therefore provide more time than normal insolvency procedures to mitigate the risk that a college is wound up quickly and in a way which, by focusing only on creditors, would be likely to damage learners. In addition, it will protect taxpayers by not propping up failing colleges indefinitely.⁴⁹

The Government intends for this new insolvency regime to be in place around the start of the 2018/19 academic year.⁵⁰

Application of normal insolvency procedures to FE statutory corporations

Chapter 2 of Part 2 would make available normal insolvency procedures to FE colleges in England and Wales that are statutory corporations, and sixth form colleges' corporations in England. As set out at **clause 5**, these insolvency procedures are:

- voluntary arrangements,
- ordinary administration,
- creditors' voluntary winding up (CVL), and
- compulsory liquidation (or winding up by the court)

The procedures are broadly in line with those currently afforded to companies under the [Insolvency Act 1986](#). However, the constitution of an FE body that is a statutory corporation will be different to the constitution of a company. To allow for this fact, **clause 5** provides a power for the Secretary of State to modify⁵¹ or omit⁵² provisions in the relevant insolvency legislation.

Importantly, **clause 5** also provides for the law relating to receivers and managers of property to be applied to FE or sixth form college corporations (again, subject to necessary modifications because they are

⁴⁹ Department for Business Innovation and Skills, [Further Education and Sixth Form Colleges – Consultation on developing an insolvency regime for the sector](#), July 2016, paragraph 68.

⁵⁰ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector – Government consultation response](#), October 2016.

⁵¹ The Explanatory Notes ([Bill 82-EN](#)) which accompany the Bill provide examples of the sort of modifications which may be made, including those which are necessary to deal with the interaction between the insolvency procedures applied by **clause 5** and the SAR which is established by Chapter 4. For example, the power can be used to interchange references to 'company' to 'further education body' and reference to 'directors' to 'members' (or governors).

⁵² For example, the Secretary of State might use the power provided by **clause 5** to omit provisions relating to floating charges, which cannot be granted by a FE or sixth form college corporation.

different to companies). In its published [response](#) to the BIS consultation document, the Government said that the ability for colleges to appoint a receiver would be subject to the Secretary of State's power to apply for a SAR:

Those creditors with fixed charges will continue to be able to appoint a receiver, but any such appointment will be subject to the Secretary of State's power to apply for a SAR; in the event that the court were to make an education administration order, any receiver would be required to vacate office. However receivership would only apply in terms of fixed charge⁵³ receivership as FE bodies are unable to create floating charges.⁵⁴

Clause 6 provides a power for the Secretary of State to make regulations so as to apply any legislation which relates to insolvency but is outside the [Insolvency Act 1986](#) to FE and sixth form college corporations. There is also power to amend or modify that legislation so that it makes sense for those corporations.

How an FE body in financial difficulties might use normal insolvency procedures is considered below. It is important to note that whereas voluntary arrangements and ordinary administration procedures provide the 'potential' for the rescue of the FE body, a CVL and compulsory liquidation do not.

Voluntary arrangements

When a Company Voluntary Arrangement (CVA) is used by a company in financial difficulty, it provides for a legally binding agreement for the repayment of debts between the company and its creditors. The arrangement is supervised by an insolvency practitioner (IP). In effect, the arrangement allows the company to avoid liquidation and can be used as part of a wider financial restructuring.

In respect of an FE and sixth form college corporation in financial difficulty, a voluntary arrangement might be an attractive option because they do not generally require court intervention. Potentially, a voluntary arrangement would give more control to both the college (as governors remain in control) and the unsecured creditors (as they can vote against the agreement if they wish).

⁵³ A **charge** is security over an asset which gives the lender the right to have the particular asset and its proceeds of sale appropriated to the discharge of the debt in question. A **fixed charge** is a charge over a particular asset where the charge (i.e. the lender) controls any dealing or disposal of the asset by the charger (usually a company). A fixed charge ranks before a floating charge in the order of repayment on an insolvency. A **floating charge** is a charge taken over all the assets or a class of assets owned by a company from time to time as security for borrowings or other indebtedness. The advantage of a floating charge is that before insolvency it allows the charged assets to be bought and sold during the course of a company's business without reference to the chargeholder (usually a bank). The floating charge 'crystallises' if there is a default or similar event. At that stage, the floating charge is converted to a fixed charge over the assets which it covers at that time. If a default occurs, depending on when the floating charge was created, the chargeholder may be able to appoint an administrative receiver or an administrator.

⁵⁴ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector – Government consultation response](#), October 2016.

Ordinary administration

An outline of the main features of a company administration is provided in **Box 2** below.

Box 2: Ordinary administration

An ordinary administration involves the appointment of an administrator (a licenced IP), who puts together proposals for the insolvent company. The administrator must perform his functions with the statutory objective of:⁵⁵

- Rescuing the company as a going concern (i.e. with as much of its business as possible); or failing that
- Achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (liquidated) (without first being in administration); or failing that
- Realising (i.e. selling) company assets in order to make a distribution to one or more secured or preferential creditors.

In addition, the administrator must perform these functions in the interest of the creditors as a whole.

It is envisaged that ordinary administration would operate for an FE body that is a statutory corporation, as for companies. The appointed administrator would have 12 months in which to devise and execute his proposals (although a time extension can be given by the court or by general agreement).

Whilst proposals are being worked up by the administrator, the college would continue to function. Administration does not automatically terminate employment contracts, so college staff could be retained in order to continue the college's operations and minimise the disruption to students (at least in the short term).

Indeed, on appointment of an administrator, a statutory moratorium would be automatically imposed to prevent creditors enforcing claims. This moratorium would give the administrator a breathing space in which to examine the opportunity to save the college (perhaps by restructuring its financial affairs or, if more appropriate, by selling assets). The administrator would be expected to prepare a statement of proposals to share with the college's creditors. In some circumstances, the college's creditors would then get to vote on the proposals. If asked, over 50 per cent (in value), must vote in favour to approve the proposals. If approved, the proposals would be taken forward and the college would continue to operate under the administrator. If rejected, the administrator would look to the court on how to proceed.

Ordinary administration provides for a number of possible outcomes:

- the college could be restructured (including via a voluntary arrangement),
- it could be sold as a 'going concern' in its entirety or in part, or
- the administrator could decide to put the college into liquidation (compulsory or creditors' voluntary liquidation)

Obviously, liquidation would involve the closure of the college. This would protect the interests of creditors, but may not allow the

⁵⁵ The [Enterprise Act 2002](#) sets out this hierarchy of statutory objectives for a company administration.

administrator to take action to protect existing students. In contrast, the new education administration that is part of the SAR (as set out in Chapter 4 of Part 2), would ensure that the interests of learners are given priority (see below).

Creditors' Voluntary Liquidation (CVL)

In the case of companies, a CVL is the voluntary liquidation of a company at the instigation of its directors. A liquidator (an IP) is appointed at a creditors' meeting. A CVL is quite different to a compulsory liquidation which is forced upon an insolvent company by the court via a winding up order.

If we apply the CVL procedure to an FE body that is a statutory corporation, the governors (equivalent to company members) could resolve to wind up the college. The CVL would be managed by a liquidator (an IP) nominated by the creditors or, if no creditor nomination is made, by the governors. It would be the liquidator's responsibility to collect in and realise the college's assets for distribution to creditors.

Compulsory liquidation (or winding up)

An outline of the main features of a company compulsory liquidation is provided in **Box 3** below.

Box 3: Company compulsory liquidation

- Compulsory liquidation occurs when an insolvent company is wound up by an order of the court, usually on the petition of a creditor.
- The purpose of the winding-up order is to appoint an IP as 'liquidator' to administer the insolvent estate. Assets are realised and creditors are paid in accordance with a strict order of priority set out in insolvency legislation.
- At the end of the liquidation, the company is formally dissolved – it will no longer exist.

If the court were to make a compulsory liquidation order against an FE body that is statutory corporation, a liquidator (an IP) would be appointed. The role of the liquidator would be to realise all assets and distribute the proceeds to the college's creditors in the following strict order of priority prescribed by the [Insolvency Act 1986](#):

- any secured creditor holding a fixed charge over an asset⁵⁶
- expenses of the liquidation
- preferential creditors (e.g. employees owed arrears of wages and other contractual payments subject to statutory limits)
- all unsecured creditors

The benefit of compulsory liquidation is that it would allow for an orderly winding up of an insolvent college where its creditors have been unable to secure payment by other means. However, a compulsory liquidation order would inevitably result in an immediate break in service provision since the winding-up order would automatically terminate all

⁵⁶ But not floating charges – the general consensus is that FE colleges and sixth form colleges do not have the power to create floating charges.

employee contracts with immediate effect.⁵⁷ Even if the liquidator sought to continue operating the college, he would have to rehire the necessary staff, including teachers, on short term contracts to carry out the functions required. Furthermore, there are only limited grounds on which a liquidator can continue to trade. In all likelihood the liquidator would shut down the college on his appointment.

In any event, at the end of the liquidation process, the expectation is that the college would be formally dissolved. The outcome would be the same whether we are dealing with voluntary or compulsory liquidation.

Restrictions on use of normal insolvency procedures to FE statutory corporations

In respect of an FE body, **chapter 3 (clauses 7 to 12)** provides restrictions on the use of normal insolvency procedures through its interaction with the new education administration. In a nutshell, it ensures that the appropriate national authority (the Secretary of State or, for Wales, the Welsh Ministers) are given prior notice of the use of those procedures and can then decide whether or not to initiate an education administration (SAR) instead. The consideration period is limited to 14 days and would be triggered only where there was an application through the courts or outside the courts by a creditor or the college itself for a normal insolvency procedure.

Following on from this, **Chapter 3** includes a provision creating a moratorium on security. This means that no-one can take a step to enforce security over a property of a FE body without giving 14 days' notice to the appropriate national authority. Again, the purpose of this moratorium is to give the national authority the opportunity to apply for an education administration order where appropriate (if this happens, a moratorium will apply for the term of the order).⁵⁸

It is clear that Chapter 2 of Part 2 would make available "a full suite of tools" to deal with an insolvent college. However, for existing students, ordinary insolvency procedures do not offer explicit protections on the continuity of the education provision.⁵⁹

The other key point to note is that the options of voluntary arrangements, ordinary administration, creditors' voluntary liquidation and compulsory liquidation would only be available if the appropriate national authority did not apply for a SAR in the case of an insolvent college. (For example, a SAR might be avoided if the college was able to be rescued through using ordinary administration provisions, perhaps combined with a voluntary arrangement). However, it is the Government's view that the SAR would be applicable in most cases of an insolvent college:

In such cases [of an insolvent college], it makes sense to keep the insolvency procedure used as straightforward as possible, and

⁵⁷ These measures are in line with procedures for companies where the directors are dismissed from office when a liquidator is appointed.

⁵⁸ Paragraphs 43 and 44 of Schedule B1 to the [IA 1986](#) (as it is applied and modified by Schedules 3 and 4 to the Bill, so that it applies to FE bodies).

⁵⁹ Department for Business Innovation and Skills, [Further Education and Sixth Form Colleges – Consultation on developing an insolvency regime for the sector](#), July 2016.

having a wide range of options available for dealing with insolvent colleges will offer flexibility for a rescue to be achieved where possible, and orderly, well understood and cost effective procedures to be followed where it is not. It is, however, more likely than not that should any college become insolvent, there would be learners involved whose education needed to be managed. We would therefore expect that the SAR would apply in most cases. The Government has been clear that its priority in the event of insolvency would be learner protection.⁶⁰

The Special Administration Regime (SAR)

Chapter 4 of Part 2 would create a SAR for FE bodies. The stated aim being to:

[...] provide an alternative to any normal insolvency procedure and create an orderly regime for students, creditors and others, with a special objective which provides some overarching protection for the studies of existing students.⁶¹

SARs are already used in other sectors (such as energy and postal services⁶²) to protect an overriding public policy objective (such as continuing to provide an essential service).

Key to the SAR, is the creation of a new procedure to be known as 'education administration'. Only the appropriate national authority (the Secretary of State or, for bodies in Wales, Welsh Ministers) can apply to the court for an education administration order. As set out in **clause 13(2)**, the main features of an education administration are that:

- (a) it can be used where a FE body is unable to pay its debts or is likely to become unable to pay its debts,
- (b) the court appoints an education administrator (who must be qualified to act as an insolvency practitioner (IP)) on the application of the appropriate national authority, and
- (c) the education administrator manages the body's affairs, business and property with a view to avoiding or minimising disruption to the studies of existing students.

The fact that an education administration would only be used where a college is insolvent (**clause 17**), means that it would only be relevant in the case of a college which had failed financially.

Objective of an education administration

The education administration would be governed by a 'special objective' focused on protecting the continuity of learner provision. As set out in **clause 14(1)**, the overarching 'special' objective for an education administration is to:

- avoid or minimise disruption to the studies of the existing students of the FE body as a whole, and

⁶⁰ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector – Government consultation response](#), October 2016.

⁶¹ Ibid.

⁶² See [Postal Services Act 2011](#) and the [Energy Act 2011](#).

- to ensure that it becomes unnecessary for the body to remain in education administration for that purpose

Existing students covers a person who:

- is a student at the college when the administration order is made, or
- has accepted a place on a course at the college when the administration order is made

It is clear that the appointed education administrator's primary focus is on the studies of existing students. In particular, he must take into account the needs of existing students who have special educational needs.⁶³ In addition, the education administrator must, so far as is consistent with the special objective, carry out their functions in a way that achieves the best result for the FE body's creditors as a whole.

The Government outlined the position of creditors in its [response](#) to the BIS consultation:

The Government recognises that, as the SAR proposal recognises the interests of learners and creditors but prioritises the former, there are circumstances in which realisations for creditors might be lower than in ordinary administration (perhaps because the costs of the administration are increased by a need to maintain provision for learners for longer than might be the case in an ordinary administration). This is a common feature of special administration regimes, where it is inherent that there is some special interest that needs to be protected over and above normal insolvency principles."⁶⁴

Clause 14(2) sets out the ways the education administrator could achieve the special objective including:

- rescuing the FE body as a going concern,
- transferring some or all of its undertakings to another body,
- keeping it going until existing students have completed their studies, or
- making arrangements for existing students to complete their studies at another institution

Depending on the nature of the case, there may be other options available. For this reason, clause 14 is not intended to limit the actions an education administrator might take to achieve the special objective.

Of course, even with the application of the SAR, the ultimate result may be the winding up and dissolution of a college once the special objective of protecting learners has been met.

Grounds for education administration order

To begin an education administration requires a court order, appointing a person (a qualified IP) to be the education administrator of an FE

⁶³ Clause 22(3).

⁶⁴ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector – Government consultation response](#), October 2016.

body.⁶⁵ **Clause 16** provides that only the appropriate national authority can apply to the court for such an order.⁶⁶ Whilst **clause 17** states that an order can only be made if the court is satisfied that the FE body is insolvent.⁶⁷ An order cannot be made if the FE body has already entered into ordinary administration or has gone into liquidation.⁶⁸

Powers of the court on hearing the application

Clause 18 outlines the powers of the court on hearing the application for an education administration order. Specifically, the court may:

- grant or dismiss the application
- adjourn the application conditionally or unconditionally
- make an interim order (including restricting the powers of the FE body)
- treat that application as a winding-up petition and make any order the court could make under section 125 of the [Insolvency Act 1986](#), or
- make any other order that it thinks appropriate

Assuming the application is successful, the education administration order will come into force:

- at the time appointed by the court, or
- if no time is appointed by the court, when the order is made.⁶⁹

If more than one education administrator is appointed, the order must set out which of the functions are to be carried out jointly and which by a particular appointee alone.⁷⁰

It is important to note that if the court makes an education administration order then the court must dismiss any outstanding application for ordinary administration in relation to that FE body.⁷¹

Status and functions of education administrator

In terms of status, the appointed education administrator would be an officer of the court and as such, would be answerable to the court.⁷² In carrying out functions in relation to an FE body, the education administrator would act as its agent.⁷³

The role of the appointed education administrator is to manage the affairs, business and property of the FE body for the duration of the education administration order (**clause 22 (1)**). In effect, even though

⁶⁵ Clause 15.

⁶⁶ The authority making the education administration order must notify the FE body and any other person specified in rules. (For example, this might include the supervisor of a voluntary arrangement relating to the FE body).

⁶⁷ Pursuant to clause 17(1), this means that it is “unable, or likely to become unable, to pay its debts” (this is the definition of insolvency given in section 123 and Paragraph 11(a) of Schedule B1 of the [IA 1986](#)).

⁶⁸ Clause 17(2).

⁶⁹ Clause 18(3).

⁷⁰ Clause 19.

⁷¹ Clause 20.

⁷² Clause 21(1).

⁷³ Clause 21(2).

the governors would not automatically be dismissed, from the date of his appointment the education administrator would take over the management of the FE body. As provided for in **clause 22**, the education administrator must carry out his functions:

- For the purpose, if possible, of achieving the special objective (avoiding or minimising disruption to the studies of the existing students of the FE body, and ensuring that it becomes unnecessary for the body to remain in education administration for that purpose) (subsection (2)).
- In pursuing the special objective, the education administrator must, in particular, take into account the needs of existing students who have special educational needs (subsection (3)).⁷⁴
- Where the FE body is a statutory corporation, the education administrator must also, so far as it is consistent with the special objective, carry out their functions in a way that achieves the best result for the FE body's creditors as a whole (subsection (4)).
- Where the FE body is a company, the education administrator must also, so far as it is consistent with the special objective, carry out their functions in a way that achieves the best result for the company's creditors as a whole and, subject to that, the company's members as a whole (subsection (5)).

As already mentioned, the main aim of the education administrator is to develop a credible proposal to secure continuity of provision for learners. If rescue of the college as a going concern is not possible, another option might be to arrange for transfer of provision to another provider. **Clause 23**, with **Schedule 2**, gives an education administrator the power to make transfer schemes. Specifically, the administrator may make a scheme for the transfer of property, rights and liabilities from the FE body ("the transferor") to one or more persons or bodies prescribed for the purposes (the "transferee").⁷⁵ However, a transfer scheme can only be made by the education administrator if:

- the transferee consents, and
- the appropriate national authority has approved the scheme.⁷⁶

It is open to the appropriate national authority to modify a transfer scheme before approving it - but only with the consent of the education administrator and the transferee.⁷⁷ It is also possible for the appropriate national authority to modify a transfer scheme after it takes effect - but only with the consent of the transferor and the transferee.⁷⁸

It is important to note that transfer schemes can be used to override some third party rights. (For example, transferring a lease without the

⁷⁴ Clause 22(7) states that for the purposes of clause 22(3), an existing student has 'special educational needs' if he or she has a learning difficulty which calls for special educational provision to be made for him or her.

⁷⁵ Paragraph 1, Schedule 2.

⁷⁶ Paragraph 3, Schedule 2.

⁷⁷ Paragraph 4, Schedule 2.

⁷⁸ Paragraph 5, Schedule 2.

landlord's consent, to enable the transfer of students to another provider so as to achieve the special objective).⁷⁹

According to the [BIS consultation document](#), if there was to be a transfer of provision to an alternative provider, the education administrator would need to consider how best to accommodate any learners with special education needs and/or disability, or other high needs.⁸⁰ The education administrator would also need to take into account any reasonable travel to learn distances when assessing alternative provision (in the same way as they are currently considered in the Area Review process).⁸¹ Presumably, the education administrator would have the scope to ensure that any transfer of learners would take place at a natural break point in the academic year to minimise disruption.⁸²

Clause 24 provides that **Schedules 3** and **4** apply, with modifications, provisions of the [Insolvency Act 1986](#) which relate to ordinary administration (see above). The effect of those Schedules is to make an education administration for FE bodies, as far as possible, mirror an ordinary administration. However, for the following reasons some modifications are necessary:

- First, an FE corporation is very different from a company.
- Second, an education administration has a different objective to an ordinary administration. The appointed education administrator's primary focus is on the studies of existing students. In contrast, the primary focus of an administrator of an ordinary administration is on obtaining the best result for the creditors as a whole.

Education administration order: grants, loans, indemnities and guarantees

New funding is a common feature of special administration regimes.

Chapter 4 (clauses 25 to 28) sets out a spending authority under which the appropriate national authority can make grants or loans, or agree to indemnities or enter into guarantees, for the purpose of achieving the objective of the education administration.

Specifically, **clause 25** states that if an education administration order has been made, a grant or loan may be made to the FE body on whatever terms the appropriate national authority considers appropriate (including making the grant or loan repayable with or without interest).⁸³ The terms must specify how the loan and any interest are to be repaid on vacation of office by the education administrator. It should be noted that in order to provide additional flexibility the Government has removed the requirement, included in the draft clauses

⁷⁹ Paragraph 6, Schedule 2.

⁸⁰ Department for Business Innovation and Skills, [Further Education and Sixth Form Colleges – Consultation on developing an insolvency regime for the sector](#), July 2016, paragraph 66.

⁸¹ Ibid, paragraph 66, paragraph 64-66.

⁸² Ibid, paragraph 66, paragraph 64.

⁸³ Clause 25(2).

accompanying the [BIS consultation document](#), that loans from Government be made on a basis of priority to other creditors.⁸⁴

It is recognised by the Government that the role of education administrator is likely to involve insolvency practitioners (IPs) carrying out functions that they may not undertake in ordinary insolvency procedures, as they would be required to achieve the education objective to continue the operation of the college.⁸⁵ To ensure that IPs are willing to act in this capacity, **clause 26** enables the appropriate national authority to agree to indemnify the education administrator (and other related persons) against liabilities incurred and/or loss or damage sustained in connection with the carrying out functions by the education administrator. The indemnity agreement may be made in whatever manner, and on whatever terms, the appropriate national authority considers appropriate. However, the terms must be disclosed. As soon as possible after agreeing to grant an indemnity, the authority must lay a statement before Parliament or the National Assembly for Wales (as appropriate).

Where a sum is paid out under an indemnity agreed to under clause 26, the appropriate national authority can require the FE body to pay any amount towards the repayment of that sum. **Clause 27** also provides that interest may also be charged on amounts outstanding at whatever rates the appropriate national authority directs.⁸⁶ The Secretary of State must lay a statement before Parliament in the event that a payment has to be made under an indemnity agreed to under clause 26. Similar powers and obligations apply to the Welsh Ministers.⁸⁷

A national authority may also give guarantees in relation to the borrowings of an FE body subject to an education administration order. Specifically, **clause 28** provides that the appropriate national authority may guarantee:

- the repayment of any sum borrowed by the FE body while the education administration order is in force,
- the payment of interest on any sum borrowed by the body while that order is in force, and
- the discharge of any other financial obligation of the body in connection with the borrowing of any sum while that order is in force

In addition, the appropriate national authority may give the guarantees in whatever manner, and on whatever terms, it considers appropriate. However, as soon as possible after giving a guarantee, it must lay a statement before Parliament or the National Assembly for Wales (as appropriate).⁸⁸

⁸⁴ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector – Government consultation response](#), October 2016.

⁸⁵ Department for Business Innovation and Skills, [Further Education and Sixth Form Colleges – Consultation on developing an insolvency regime for the sector](#), July 2016, paragraph 72.

⁸⁶ Clause 27(2)(b).

⁸⁷ Clause 27(5).

⁸⁸ Clause 28(3).

Clause 29 applies where a sum has been paid out by the appropriate national authority under a guarantee that it has given under clause 28. The FE body must pay the appropriate national authority:

- (a) any amounts in or towards the repayment of that sum that the appropriate national authority directs, and
- (b) interest on amounts outstanding at whatever rates the appropriate national authority directs.

The payments must be made by the FE body at times, and in a manner, determined by the appropriate national authority.⁸⁹

The appropriate national authority must lay before Parliament or the National Assembly for Wales (as appropriate) a statement relating to the sum paid out under a guarantee as soon as possible after the end of the financial year in which the sum is paid out; and after the end of each subsequent financial year until the FE body has discharged the liability (including interest).

The effect of **clause 30** is that the Secretary of State has the power to make detailed procedural rules for an education administration (in the same way that they are made for ordinary administration under section 411 of the [Insolvency Act 1986](#)). Whilst **clauses 31 to 33** are technical clauses. **Clause 31** gives the Secretary of State the power to make regulations so as to apply legislation relating to insolvency (with or without modifications) to an FE body that is in education administration. **Clause 32** extends the scope of the powers contained in the [Enterprise Act 2002](#)⁹⁰ to enable amendments to be made to Chapter 4 of the Bill if deemed necessary in the future. **Clause 33** simply sets out definitions of the terms used in this Chapter.

Trust Property held by Sixth Form College Corporations

Chapter 5 clarifies that trust property held by certain sixth form college corporations⁹¹ cannot be used by the education administrator to meet the claims of creditors in the event the corporation is wound up under the [IA 1986](#). Instead, the trust property must be transferred to the trustees of the sixth form college.

Restrictions on Other Dissolution Procedures

As explained in the [Explanatory Notes](#)⁹² that accompany the Bill, **chapter 6** of Part 2 places restrictions on other dissolution procedures, by preventing FE bodies from taking action to dissolve the college where either normal insolvency or education administration procedures are already in progress. The aim being to prevent any disruption to those insolvency procedures.

⁸⁹ Clause 29(3).

⁹⁰ The [Enterprise Act 2002](#) amends the [IA 1986](#) and contains powers to make consequential amendments to other legislation.

⁹¹ A sixth form college corporation to which section 33J of the [Further and Higher Education Act 1992](#) applies.

⁹² [Bill 82-EN](#).

Disqualification of Officers

Those who become directors of a limited company are required to carry out their duties responsibly and exercise adequate care and skill, with proper regard to the interests of the company's creditors and employees. Under existing company and insolvency law, in appropriate cases (often following the insolvency of a company), the Secretary of State (acting through the Insolvency Service) will investigate misconduct and bring director disqualification proceedings.⁹³ Under the [Company Directors Disqualification Act 1986](#) (CDDA 1986), a director can be disqualified where the court is satisfied that his/her conduct makes them unfit to be concerned in the management of a company. In insolvency cases, the minimum period of disqualification as a director (whether by court order or undertaking) is 2 years and the maximum 15 years.

Chapter 7 of Part 2 of the Bill (**clause 37**), gives the Secretary of State the power, in relation to FE corporations and sixth form college corporations, to make regulations that have the same or similar effect to the [CDDA 1986](#). This will mean that, like company directors, members (i.e. governors) of those corporations can be disqualified from office. In addition, the power allows the Secretary of State to make provision so that when a person is disqualified as a director of a company they can also be prohibited from acting as a member of a FE corporation or sixth form college corporation.

In its [response](#) to the BIS consultation, the Government commented on the need for creditor protection in the FE sector:

The directors' duties regime is a key component of corporate insolvency and ensures protection of creditors. Creditor protection is important to retain lender confidence and the Government agrees it is right that this regime includes similar protections for those who deal with the FE sector. It is right that governors and principals act to ensure that colleges are run in a financially prudent way, and exhibit a clear duty to their creditors as well as their staff and students.⁹⁴

Extent of Part 2 of the Bill

Part 2 of the Bill extends to England and Wales only.

Box 4: Application of the insolvency regime to Wales

In the initial insolvency consultation it was envisaged that the insolvency regime would apply to FE and sixth-form colleges in England only. However, it also made clear that, because insolvency is a reserved matter, the regime could be applied to Wales and sought the views of Ministers in the Welsh Assembly. The Government's response to the consultation stated that Welsh Ministers wanted the regime to be applied to colleges in Wales too. Therefore, the regime will give Welsh Ministers the power to decide on whether to apply for a SAR in respect of an insolvent college in Wales, and whether to make "further operational decisions relating to a SAR for an insolvent college in Wales."⁹⁵

⁹³ An appointed insolvency practitioner may also use certain statutory provisions to seek compensation for creditors.

⁹⁴ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector – Government consultation response](#), October 2016.

⁹⁵ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector: Government consultation response](#), October 2016, p29.

2.3 Part 3 Further education information

Clause 38 extends the duty on the provision of information under the *Further and Higher Education Act 1992* section 54 to cover combined authorities; this will allow the provision of information to the Secretary of State to continue under any devolved arrangements. The provisions will, not create an “additional burden on FE providers or any other party”.⁹⁶

⁹⁶ Department for Education, [Technical and Further Education Bill: Impact Assessment](#), October 2016, p5.

3. Comment on the proposed reforms

At the time of writing there had been little direct commentary on the Bill itself. This may well be because stakeholders had already responded to the proposed reforms in the Post-16 Skills Plan and to the consultation on the insolvency framework. This section therefore provides more general commentary on the proposed reforms, drawing predominately on responses to the Skills Plan and the insolvency consultation. It also provides information on the Government's impact assessment on the Bill.

A selection of the small amount of stakeholder comment on the Bill is provided in section 4.

3.1 Impact Assessment of the Bill's provisions

Technical education

The Impact Assessment of the Bill states that extending the role of the Institute for Apprenticeships to cover technical education will be likely to have a positive impact on disadvantaged students:

Many of the reforms are likely to have a positive impact on individuals with protected characteristics, notably those with a special educational need and/or disability (SEND), those with low prior attainment and those who are economically disadvantaged.⁹⁷

Further detail is provided in the Government's assessment of equalities impacts, which was published alongside the Post-16 Skills Plan. This states, among other things, that:

- Although reforms outlined in the Skills Plan will primarily affect young people aged 16-19, a significant proportion will be adults. The Government expects the reforms will help adults access technical education.⁹⁸
- Individuals with special educational needs and/or disabilities (SEND) are expected to be over-represented on technical routes and on transition years. The new technical routes "will be accessible and inclusive in their design" and "provision will be sufficiently flexible to be adaptable to individual need, including SEND."⁹⁹
- Transition years will be "tailored to an individual's prior attainment and aspirations", which is an important component of provision for young people with SEND. The flexibility built into the

⁹⁷ Department for Education, [Technical and Further Education Bill: Impact Assessment](#), October 2016, p5

⁹⁸ Department for Business Innovation and Skills and Department for Education, [Technical education reform: assessment of equalities impacts](#), July 2016, p5.

⁹⁹ Ibid, p6.

transition year “will also allow students with SEND to be offered the additional support they need.”¹⁰⁰

- Young people on a technical route will complete work placements. It is expected that the “vast majority of young people with SEND are capable of sustainable paid employment with the right preparation and support.”¹⁰¹
- The transition year is likely to disproportionately affect young mothers and those pregnant. Moving towards two-year programmes could make it more difficult for people to re-enter education and it is expected that transition years will make this easier.¹⁰²

Insolvency framework

The Impact Assessment of the Bill states that the proposed insolvency regime is expected to “beneficially impact learners at colleges that become insolvent.” It further stated that the policy could have some positive equality impacts given that students from ethnic minority groups comprise a higher proportion of learners relative to the general population.¹⁰³

3.2 Reform of technical education: stakeholder responses

A blog posted on the Gov.uk website, [Growing support for Government's Post-16 Skills Plan](#), collated supportive comments from a number of organisations for the proposed reforms to technical education contained in the Post-16 Skills Plan. The Collab Group, formerly the 157 Group, for example, stated:

The Post-16 Skills Plan sets out the need for clear, coherent vocational pathways leading to a consistently-delivered, industry-tested, high-quality qualification. Too often there is no real guidance for learners making some of the most important decisions of their lives- What to study? Where to do so? What type of learning works best for them? Many learners are left confused and without a clear pathway that works best for them, so we are encouraged that this plan sets out the importance of informed choice between two equally valid routes.

We also welcome the mandate for providers and employers to collaborate on standards. These industry-led standards, with professionals advising on the knowledge, skills and behaviours needed to excel in a chosen occupation, mean that learners will finish their qualifications ready to work, ready to be productive immediately. Where this type of collaboration is already occurring, the benefits for the employers and the learners are vast and obvious. The potential economic impact of a workforce ready to work from the moment of finishing a qualification is immense both to the country and to the individual.

¹⁰⁰ Department for Business Innovation and Skills and Department for Education, [Technical education reform: assessment of equalities impacts](#), July 2016, p6.

¹⁰¹ Ibid, p7.

¹⁰² Ibid, p8.

¹⁰³ Department for Education, [Technical and Further Education Bill: Impact Assessment](#), October 2016, p5

We welcome a number of important proposals in the plan such as raising the standard of qualification, ensuring this system doesn't leave anyone behind and the bridging provision for those moving between the academic and technical pathways.¹⁰⁴

Similarly, Martin Doel, Chief Executive of the AoC, said:

Technical education has for too long been regarded as a poor cousin of academic study. The Government's Post-16 Skills Plan provides a welcome roadmap to redressing this longstanding anomaly.

The Plan rightly sees colleges being at the heart of the reforms with the new qualifications providing them with a cornerstone to build distinctive courses that meet the needs of employers, students and the economy.¹⁰⁵

The President of the Royal Society of Chemistry, Professor Sir John Holman, argued that the proposals in the Skills Plan "will make the available routes much easier for both students and employers to understand, and will make technical education more responsive to the skills needs of employers."¹⁰⁶

Neil Carberry, Director of Employment and Skills at the CBI, also welcomed the proposals as a "real step forward" in terms of creating a vocational route of equal attraction and prominence to A-Levels. He also welcomed the emphasis on employer involvement:

Giving young people clarity on where technical routes can lead them and the career opportunities they open up is essential if we are going to meet future skills needs.

It's also promising to see the employer role in this new system clearly set out – business engagement will be critical to ensuring these options are relevant to companies and lead to great careers.¹⁰⁷

Box 5: Previous reform of vocational education - 14-19 Diplomas

14-19 Diplomas were introduced in 2008 following recommendations in the 2004 Tomlinson Report, [14-19 Curriculum and Qualifications Reform](#). Diplomas were designed partly by employers and they aimed to increase post-16 participation in education by providing learners with a qualification which combined work-orientated skills and academic study.

14 diploma lines were introduced covering all major industries and sectors and these lines were available at three different levels - foundation, higher and advanced. The introduction of Diplomas was implemented in phases, the first five Diplomas in 2008 were: Engineering; IT; Society, Health and Development; Construction and the Built Environment; and Creative and Media. Further Diplomas were rolled out in 2009 and 2010.

Diplomas were a composite qualification, the three main components of the qualification were principal learning, generic learning and additional learning. Principal learning was a single qualification, based on the chosen specialism, generic learning covered functional skills in English, Mathematics, ICT and work experience and additional learning enabled students to include other qualifications in their diploma such as GCSEs or A levels.

OCR awarded its final 14-19 Diplomas in July 2014.

¹⁰⁴ [Growing support for Government's Post-16 Skills Plan](#), Gov.uk, 13 July 2016.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

A Binary choice for 16 year olds?

There has been support for the division between an academic route and 15 technical routes as proposed in the Skills Plan. The AoC, for example, stated that the Skills Plan provides a “welcome clarity of the routes, both academic and technical, that will lead people successfully towards their chosen careers.”¹⁰⁸ The Association of Employment and Learning Providers (AELP) similarly argued that the plan offers “potentially clear routes”.¹⁰⁹

Other commentators, however, have raised concerns about young people potentially being faced with a binary choice at 16 between academic or technical pathways.¹¹⁰ Gordon Marsden MP, Shadow FE and Skills Minister contended that “people will be worried it’s going to be another form of the 11-plus” and stated that more details were needed to reassure people that the technical route will be as prestigious as the academic route.¹¹¹ Mary Bousted, General Secretary of the Association of Teachers and Lecturers (ATL), stated that “forcing young people to choose the route to their future career at the age of 16 would institutionalise the divide between vocational and academic learning.”¹¹² The University and College Union (UCU) stated that it must be ensured that young people are not “pigeon hole[d] too early” and argued that the option to mix A-levels with vocational courses “has been helpful in widening participation.”¹¹³

In his Edge Foundation report, *14-19 Education*, Lord Baker, welcomed the Skills Plan as an “excellent plan for simplifying post-16 technical routes” but stated that he had “concerns about reinforcing an artificial divide at 16 between the academic and technical routes”:

However, while simplicity is more than welcome, I have concerns about reinforcing an artificial divide at 16 between the academic and technical routes. England is in a minority of European countries in making young people make such far-reaching choices at 16, and in expecting young people to narrow their curriculum quite so dramatically. I am convinced that many young people would benefit from taking a mixture of technical and academic programmes, in varying proportions according to their talents and ambitions, throughout the period from 14 to 18/19.¹¹⁴

Coverage of the 15 routes

Concerns have also been raised regarding the coverage of the 15 proposed technical routes. Martin Doel, Chief Executive of the AoC, said that the creative arts and sports were “under-represented” in the 15

¹⁰⁸ [Post-16 Skills Plan published by Government](#), Association of Colleges, 8 July 2016.

¹⁰⁹ [Tread carefully in taking forward Sainsbury, Tread carefully in taking forward Sainsbury](#), Association of Employment and Learning Providers, 20 July 2016.

¹¹⁰ [Skills Plan: is it a flash in the pan or lasting vocational reform?](#), City & Guilds, 22 July 2016.

¹¹¹ [Sainsbury review triggers 'biggest change to post-16 education in 70 years'](#), *TES*, 8 July 2016.

¹¹² [ATL comment on the post-16 skills plan and independent report on technical education](#), Association of Teachers and Lecturers, 8 July 2016.

¹¹³ [UCU responds to Sainsbury review recommendations](#), University and College Union, 8 July 2016.

¹¹⁴ Kenneth Baker, *14-19 Education A new Baccalaureate*, September 2016, p9.

pathways and Rob May, Director at YMCA Awards, stated that the “proposed technical routes cover only half of occupations, meaning they’re at risk of ostracizing an enormous part of the labour market.”¹¹⁵ Similarly, Mark Dawe, the Chief Executive of the AELP, raised concerns that a large proportion of jobs in the economy will be outside the scope of the 15 routes:

On the basis of the figures provided, we believe that 57% of jobs in our economy are outside the recommendation’s scope, so we are in danger of creating an elitist system that would deny many young people a work based learning route to level 2 or 3. Employers too in the unfavoured sectors will not be happy at the prospect of this option being closed off for new apprentices.¹¹⁶

Awarding bodies and quality of qualifications

As mentioned in section 1.1, the Skills Plan proposes that any technical education qualification at levels 2 and 3 will be offered and awarded by a single awarding body under an exclusive license.¹¹⁷ Schedule 1 of the Bill provides for the *Apprenticeships, Skills, Children and Learning Act 2009* to be amended to allow the Institute for Apprenticeships and Technical Education to approve “a technical education qualification in respect of one or more occupations.”¹¹⁸

There has been some support for the proposed simplification of technical qualifications. The Federation of Small Businesses (FSB), for example, welcomed the “move to streamline the immensely messy landscape of technical education.”¹¹⁹ The Managing Director of City and Guilds was more equivocal in welcoming the idea of streamlining qualifications, but questioned whether it was right to take away choice altogether:

At first glance, we would support the idea of streamlining qualifications so that there is one high quality route per occupation. While vocational options remain so fragmented and confusing they will never achieve parity of esteem among young people, or even with their parents, compared with the apparently simple and more recognisable academic routes. However, is it right to take choice away altogether in terms of awarding organisations who can deliver the pathways? We don’t with academic routes. Is there a risk that we fixate too much on rationalisation rather than quality as the driver for change, resulting in some unintended consequences and wrong behaviours?¹²⁰

The Skills Plan proposes one qualification per occupation or cluster of occupations within a route. There may, therefore, be more than one qualification per route.

(See: [Lead DfE civil servant debunks Skills Plan ‘myth’](#), *FE Week*, 4 Nov 16.)

¹¹⁵ [Sainsbury review triggers ‘biggest change to post-16 education in 70 years’](#), *TES*, 8 July 2016; and [Government’s Post-16 skills plan overlooks a number of key issues](#), *FE News*, 8 August 2016.

¹¹⁶ [Tread carefully in taking forward Sainsbury](#), Association of Employment and Learning Providers, 20 July 2016.

¹¹⁷ Department for Business, Innovation and Skills and Department for Education, [Post-16 Skills Plan](#), July 2016, p24. See [PQ 49316](#), 3 November 2016, for more on the Government’s rationale for the change.

¹¹⁸ Schedule 1, paragraph 15.

¹¹⁹ [Small firms support streamlining of technical education](#), Federation of Small Businesses, 8 July 2016.

¹²⁰ [Skills Plan: is it a flash in the pan or lasting vocational reform?](#), City & Guilds, 22 July 2016.

In its response to the Skills Plan, the Federation of Awarding Bodies (FAB) rejected that a market-based approach had led to large numbers of competing qualifications and raised concerns that “single licences will create monopolies with all of the associated disincentives and perverse results.” It further argued that the likely impact would be that “specialist niche awarding organisations will be squeezed out which is particularly damaging as they are typically trade and professional bodies with the strongest links to employers.”¹²¹ An article in the *TES* reported similar concerns that the plans could lead to many smaller awarding bodies going out of business.¹²²

In a blog for the Centre on Skills, Knowledge and Organisational Performance, Professor Ewart Keep, questioned what the future role of Ofqual would be under the proposals:

This rationalisation of the qualifications system is long overdue, but it will not be achieved without considerable angst and is going to fundamentally alter the number and structure of awarding organisations. It is also, in passing, not at all clear what the future role of Ofqual is in all this. It garners not a single substantive mention in the Plan, and its functions as they relate to technical/vocational learning appear to be being allocated to the IfA. It too appears to face an uncertain future.¹²³

Funding of technical education

Some responses to the Bill raised the issue of funding for further education. For example, the Association of School and College Leaders (ASCL) offered support for the aim of boosting technical education but stated that “it is essential that the Government backs up these plans with sufficient resources.”¹²⁴ Similarly, in its response to the Skills Plan the UCU stated that the “government will need to invest in colleges and address the falling value of lecturers’ pay if it wants to ensure that the new routes are high-quality and delivered by expert teaching staff.”¹²⁵

The AoC welcomed the Government’s acknowledgment that additional funding may have to be provided to colleges to support work placements:

However, if we truly want a world class system our colleges will need the additional funding to provide world class resources. The plan’s provision for everyone to have work experience alone would cost hundreds of millions of pounds and require much input from employers nationwide to be a success. We therefore welcome the Government’s acceptance of the need to review the level of funding for college-based technical education and the

¹²¹ [Post-16 skills plan and the Report of the independent panel on technical education \(Sainsbury Review\) released](#), Federation of Awarding Bodies, 8 July 2016.

¹²² [Qualifications cull could kill off awarding bodies](#), *TES*, 15 July 2016.

¹²³ [Easy to say, hard to do..... – some reflections on the Skills Plan](#), SKOPE, 11 July 2016.

¹²⁴ [Technical education plan must be backed up with funding](#), Association of School and College Leaders, 27 October 2016.

¹²⁵ [UCU responds to Sainsbury review recommendations](#), University and College Union, 18 July 2016.

Sainsbury Panel's specific suggestion that the intended work placements should receive additional funding.¹²⁶

Timetable for implementation of reforms

Some commentators have questioned the proposed timescale for implementing the reforms. The UK Managing Director of City and Guilds, for example, highlighted this as their major concern with the Skills Plan:

Probably the point that concerns me the most right now is the totally unrealistic timing set out in the Skills Plan. The system will need to move very quickly to create these new pathways by 2019 and I worry about the very short amount of time given between approval of qualifications and first delivery. We know from our recent experience with the technical qualifications approval process that it's extremely tough to go from approval to ready for delivery in six months, especially when the focus needs to be on getting the quality model for this right first. After all we are not talking here about a few tweaks to an existing set of frameworks, we are talking about whole eco-system change – a change that is so potentially exciting and radical but only if we can put the time and thinking into it and not rush to meet unrealistic deadlines.¹²⁷

David Hughes, chief executive of the AoC, stated that while the "timescale seems reasonable at one level...there's a lot of other stuff going on in Whitehall, not least Brexit and all of that sucking out [of the civil service], so there are some real worries about whether there's enough infrastructure, enough capacity in the system to do this." He additionally questioned whether the Institute for Apprenticeships was equipped to deal with its new responsibilities:

It's giving a really big new job to an organisation that doesn't yet exist...that hasn't got any staff, and it's suggesting that's all going to be set up to run the apprenticeship levy from next April as well as implementation of the Sainsbury review and the skills plan. And it doesn't exist.

Even when it's up and running, it's suggesting it will have 100 people in it – 100 people to do all of that?...Sorry, I just can't see it, I don't think that will work.¹²⁸

Gordon Marsden MP, Shadow Minister for FE and Skills contended that, given the implications of Brexit, the implementation schedule was "wildly optimistic, if not to say ludicrous."¹²⁹

¹²⁶ [Post-16 Skills Plan published by Government](#), Association of Colleges, 8 July 2016. See also, Department for Business, Innovation and Skills and Department for Education, *Post-16 Skills Plan*, July 2016, pp50-1.

¹²⁷ [Skills Plan: is it a flash in the pan or lasting vocational reform?](#), City & Guilds, 22 July 2016.

¹²⁸ [Not enough 'capacity' to implement Sainsbury review, warns AoC leader](#), *TES*, 15 September 2016.

¹²⁹ [Sainsbury review triggers 'biggest change to post-16 education in 70 years'](#), *TES*, 8 July 2016.

3.3 The new insolvency framework: stakeholder comment and Government response

The Government published its response to the BIS consultation, [Developing an Insolvency Regime for the FE and Sixth Form College Sector](#), on 27 October 2016, alongside the Bill.¹³⁰ This section provides information on the issues raised in the consultation and the Government's response to them.

A total of 63 responses were received to the consultation exercise, including from the main college representative bodies, the [Association of Colleges](#) (AoC), [157 Group](#) (a membership organisation of 32 leading UK colleges, now called the Collab Group), and the [Sixth Form Colleges Association](#), as well as from local authorities and the main lenders to the sector.¹³¹

The Government's response to the consultation stated that most of the responses received were broadly supportive of the main proposals:

Most recognised that there is a case for introducing a clear legal framework so that an insolvent college can be dealt with in an ordered way, in line with existing company insolvency practices, as well as a Special Administration Regime (SAR) which is designed to protect the interests of learners in the event of a college becoming insolvent.¹³²

However, a number of issues and concerns were raised, which are outlined below.

Impact on the reputation of colleges

Some responses to the consultation highlighted a risk that confidence in the sector could be undermined by the introduction of an insolvency regime. The AoC, for example, stated that there is a risk that the extension of insolvency law to colleges "may create the perception that the financial problems are acute and thus discourage potential partners from working with colleges."¹³³ The ASCL emphasised the need for careful management around the publication of a regime so as not to damage colleges' reputations:

There is a danger that the introduction of this regime will undermine confidence in the sector at a time when its government funding is in sharp decline but the need for its service likely only to grow. Careful management of the publication of such a regime will be needed if it is not to damage colleges' reputation with partners and make their relationships with banks and other lenders more expensive.¹³⁴

¹³⁰ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector: Government consultation response](#), October 2016, p6.

¹³¹ A full list of respondents is included at [annex A](#).

¹³² Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector: Government consultation response](#), October 2016, p6.

¹³³ [The college insolvency consultation](#), Association of Colleges, 5 August 2016.

¹³⁴ [Developing an insolvency regime for the further education and sixth-form sector](#), Association of School and College Leaders, 5 August 2016.

Members' voluntary liquidation

It was suggested by some respondents to the consultation that a members' voluntary liquidation (MVL) should be included among the company insolvency procedures made available to colleges. However, the Government dismissed this suggestion on the basis that there was already adequate provision for the dissolution of solvent colleges within the [Further and Higher Education Act 1992](#):

The Government's proposals are limited to dealing with the dissolution of insolvent colleges, and it is neither proposed to remove the provision available for dealing with solvent colleges, nor to revise it beyond what is necessary to allow the SAR or another insolvency procedure to apply.¹³⁵

Protection for learners

Of particular interest to respondents was the proposed introduction of the SAR, and the special objective that would require the education administrator to avoid or minimise disruption of the studies of the existing students, and ensure that it became unnecessary for the FE body to remain in education administration for that purpose. Although many respondents were supportive of the need and 'ambition' for the special objective, almost two-thirds questioned whether it sufficiently reflected the needs of learners and creditors.¹³⁶

In its response, for example, the ATL stated that the proposed SAR, in focusing on the student as a consumer, did not recognise "the individual and societal benefits of further education" or "the instability and disruption to learners and their studies that they will inevitably experience as a result of their college going into administration". The response argued that "investing in colleges would be much more beneficial to the learners and wider society, than imposing an administration regime".¹³⁷

Examples of other issues relating to student protection raised by respondents included:

- That the proposal did not fully address all classes of students, particularly 14-16 year olds in FE colleges and students undertaking learning sub-contracted to other providers.
- That the special objective should be extended to prospective and future learners, it being argued that this was particularly relevant to learners in rural areas.
- That the Government would have to keep colleges open in rural areas where there was no alternative college within a reasonable travel distance.¹³⁸

¹³⁵ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector – Government consultation response](#), October 2016.

¹³⁶ Ibid.

¹³⁷ [ATL response to FE insolvency regime proposals](#), Association of Teachers and Lecturers.

¹³⁸ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector: Government consultation response](#), October 2016, pp10-11.

- The importance of the education administrator ensuring the quality of provision, whether in terms of college rescue, or the transferring of learners to an alternative provider.¹³⁹

In its response to the consultation, the Government stated that the special objective applied to “all students who are studying, or have accepted a place, at a college when an administration begins, whatever their age”, including students whose learning had been sub-contacted to another provider. However, it rejected extending the special objective to students who had not yet accepted an offer at a college:

Where a student has accepted an offer of a place from a college, this constitutes a binding arrangement between the parties, and the student should therefore be treated in the same way as those students already studying at the college. It would be unfair to do otherwise. No such arrangement exists in the case of individuals who have not accepted an offer, and we therefore do not intend to extend the special objective to these individuals.¹⁴⁰

Impact of SAR on creditors

Other respondents to the consultation questioned the negative effect that a special objective biased towards learners would have on creditors. It was argued that this could “cause considerable adverse effects on creditors’ ability to recover amounts they have advanced” and could result in them reducing their lending to the sector.¹⁴¹ It was suggested that this was more likely to be an issue in areas with lower property values.¹⁴² Some respondents also contended that colleges could change their behaviour by “acting to conserve cash and cut capital spending instead of investing.”¹⁴³

One lender suggested that instead of creating a SAR, a better option for colleges, creditors and learners as a whole would be for ordinary corporate insolvency regimes to be supplemented, if necessary, by a duty on administrators to seek to protect existing students.¹⁴⁴

In its response, the Government said that it recognised that in introducing a special objective into the SAR that put the protection of learners ahead of the rights of creditors, there was a risk that creditors may be less willing to lend to the sector, or may change the basis on which they do so. However, it was the Government’s view that the priority given to the special objective in a SAR was critical to enabling learners to be protected. In any event, the interests of creditors were recognised in the SAR proposal on the basis that the education administrator would have a duty to carry out their functions so as to achieve the best result for the college creditors as a whole, so far as this was consistent with the special objective.¹⁴⁵

¹³⁹ [ATL response to FE insolvency regime proposals](#), Association of Teachers and Lecturers.

¹⁴⁰ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector: Government consultation response](#), October 2016, p14.

¹⁴¹ *Ibid*, p10.

¹⁴² *Ibid*, p26.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid*, p10.

¹⁴⁵ *Ibid*, p12.

Some respondents suggested that the special objective should be amended to limit the length of time a college can be in education administration. However, the Government opposed this on the basis that it would have a negative impact on its overall objective to protect learners:

“[...] the length of time a college may need to be in special administration will depend on the particular circumstances relating to that college, and to impose an inflexible, universal time limit on the SAR is likely to mean that the administrator will be constrained in the action they can take to protect learners.

While we do not consider that the education administrator needs to safeguard the interests of 100% of the students in order to have met the special objective, we would expect the significant majority of students to have been given the opportunity to complete their learning, whether at another institution or by keeping open the existing college, before the special administration is ended, and the education administrator therefore needs to have sufficient time to either transfer or ‘teach out’ existing students.

The Government recognises that, as the SAR proposal recognises the interests of learners and creditors but prioritises the former, there are circumstances in which realisations for creditors might be lower than in ordinary administration (perhaps because the costs of the administration are increased by a need to maintain provision for learners for longer than might be the case in an ordinary administration). This is a common feature of special administration regimes, where it is inherent that there is some special interest that needs to be protected over and above normal insolvency principles.”¹⁴⁶

The Government also drew attention to the fact that substantial public funds and other support is currently made available to the FE sector through its programme of Area Reviews (including the restructuring facility). Therefore, whilst the SAR would provide a necessary safety net for colleges and their learners, the Government thought it would be used only in exceptional cases.

Requirement for Government funding of the SAR

Respondents to the Government consultation noted that “in order to mitigate against the impact of giving learners priority, it might be necessary for Government funding to be available to assist in funding the special administration process.”¹⁴⁷ In their consultation responses, some banks noted the proposed powers for the Government to provide grants, or loans for the purpose of achieving the objective of the education administration (clause 25 of the Bill) and “sought clarity about how it was intended that this power might be used” and whether it might mitigate their concerns with regards to recovering funds in the event of insolvency.¹⁴⁸

In its response, the Government stated that “the need for new funding is...a common feature of special administration regimes; and it is

¹⁴⁶ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector – Government consultation response](#), October 2016, p12.

¹⁴⁷ Ibid, p11.

¹⁴⁸ Ibid, p26.

recognised that in practice this may come from Government.” However the response stated that the Government did not intend to put in legislation how funding would be provided:

However, the Government does not intend to commit, now or through proposed legislation, that funding will be provided on any particular terms or to achieve any particular outcome for creditors. It is to be expected that the Government will want any special administration to be successful, and the extent and terms of any Government funding which are needed to achieve this are matters which will be considered on the facts of the particular case.

In reaching this view we have taken into account that some lenders (and other stakeholders) dealing with colleges might find it helpful to have greater certainty, now, as to how a special administration would be funded. This is understandable, but an advance commitment would be unusual in the context of special administration regimes in other sectors; and any advantage of greater certainty for lenders and others would have to be balanced against the potential future cost to taxpayers which, whilst not expected to be significant in amount, would be uncertain and unlimited in time.¹⁴⁹

Impact on Local Government Pension Scheme

The local government pension scheme was the issue most raised by respondents who offered other comments on the consultation. 60% of respondents (mainly pension funds) expressed concerns about the proposals, “in particular that local government pension scheme funds would have the status of unsecured creditor and that the cost of unfunded liabilities would fall on the other employers in the fund.” It was stated that any unfunded liabilities might have to be mitigated, for example, “by other colleges paying higher contributions.” Some respondents suggested that the Government should “provide the sort of [guarantee](#) of pension liabilities that it currently provides in relation to academies.”¹⁵⁰

In its response, the Government acknowledged that in the event of a college insolvency, “as pension funds would be an unsecured creditor (unless they had taken out security), any shortfall in funding would be need to be met from other employers in the fund.” With regards to providing similar guarantees to those provided to academies, the response stated:

Academies are public bodies on the Government’s Balance Sheet, and the guarantee is a reflection of that fact. Colleges, on the other hand, have financial and other freedoms and flexibilities to be independent of Government and are therefore classified as private sector. Accordingly, any guarantee would neither reflect nor be appropriate to that status.¹⁵¹

¹⁴⁹ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector: Government consultation response](#), October 2016, p13.

¹⁵⁰ Ibid, p25.

¹⁵¹ Ibid, p28.

Difference with the higher education system approach to learner protection

Some respondents to the consultation commented on the different approach being taken by the Government with regards to higher education. The *Higher Education and Research Bill*, currently before Parliament, provides for universities to be under a duty to guarantee student protection, but does not outline what happens in the event that this fails.¹⁵² In its response to the consultation, the ASCL contended that the different approaches stemmed from “an expectation of financial failure in the FE sector, where in fact the great majority of colleges have extremely good financial management.”¹⁵³

In its response, the Government highlighted the differences between the further and higher education sectors, noting that higher education students “tend to be more geographically mobile and therefore able to transfer to another provider in the event of institution closure.” The response stated that “given that the two sectors have different characteristics, the Government adopts approaches to insolvency which are considered appropriate for each sector.”¹⁵⁴

Impact of the insolvency regime on recruitment of college governors

The Government’s intended insolvency regime for FE and sixth form colleges broadly follows the principles of a company insolvency, including potential liability for college governors in respect of wrongful and fraudulent trading. Of those who responded, over half supported the inclusion of governors’ liability within the insolvency regime, including both fraudulent and wrongful trading. However, there were some respondents who saw potential difficulties in recruiting or retaining governors (particularly those with professional expertise), if the perceived risks of being a college governor were felt to have increased. There was also a common call for guidance on governors’ duties.

In its response, the Government said that provisions setting out the full extent of governors’ liabilities would be a matter for secondary legislation. The Government would ensure that, when this is developed, “it will be clear on whom the duties fall”:

As a position of principle, however, we intend that any governor or member of college staff who was knowingly party to activity intended to defraud creditors may be subject to a charge of fraudulent trading and liable for any penalty the court may impose. This reflects the position which applies to companies, and, given the seriousness of fraudulent trading, should not be a factor which dissuades any person from joining a college.

We further intend that governors should be liable for wrongful trading. It is also intended that principals should fall within the

¹⁵² For further information on the requirements in the *Higher Education and Research Bill*, see pages 19-20 of the [Library Briefing on the Bill](#).

¹⁵³ [Developing an insolvency regime for the further education and sixth-form sector](#), Association of School and College Leaders, 5 August 2016.

¹⁵⁴ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector: Government consultation response](#), October 2016, pp27-8.

scope of this liability even in the unusual case that they are not a governor, given their critical position in the college and their accountability for the use of public money. In unusual circumstances liability may also extend to shadow governors and de facto governors (which could include the Chief Financial Officer if he acted as if he were a governor).¹⁵⁵

However, the Government said it would ensure that clear guidance on governors' duties and liabilities under insolvency law is published before the new insolvency regime for the FE sector came into force.

Impact Assessment of the Bill provisions on insolvency

The Equality Impact Assessment on the Bill states that the introduction of a new insolvency regime for FE colleges:

...is expected to beneficially impact learners at colleges that become insolvent, including those with protected characteristics. As students from ethnic minority groups comprise a higher proportion of learners relative to the general population, this policy could have some positive equality impacts. There is no evidence to suggest that this policy would have a differential impact on people with any other protected characteristic.¹⁵⁶

¹⁵⁵ Department for Education, [Developing an Insolvency Regime for the FE and Sixth Form College Sector: Government consultation response](#), October 2016, p20.

¹⁵⁶ Department for Education, [Technical and Further Education Bill: Impact Assessment](#), October 2016, p5.

4. Reaction to the Bill

As mentioned above, there has been little specific commentary on the Bill from stakeholders. A selection of the few available comments are set out below. At the time of writing there had been no direct comment on part 3 of the Bill relating to information sharing.

Gordon Marsden MP, Shadow FE and Skills Minister

It looks like, stung by criticism of the potential negative effects on students of some of their rushed area reviews in FE and recent failures in the sector, such as the West London Vocational College, the Government are cobbling together material already in their skills plan with promises of student protection in this new bill.

Despite fine words about technical education they have left the FE sector, not least with their cuts in ESOL and Adult Skills funding, in quite a perilous state. We have been urging the Government for some time to spell out their technical plans in legislation so now they are promising to do that we will scrutinise it very carefully.

FE Colleges, students and providers need protections that are robust but not micro-managed via Whitehall civil servants who don't have the background or resources to do so.¹⁵⁷

David Hughes, Chief Executive of the Association of Colleges (AoC)

We are pleased that the Government is continuing to take forward the measures outlined in the Post-16 Skills Plan with the Technical and Further Education Bill.

The move to incorporate technical and professional education in the remit of the Institute for Apprenticeships reinforces the need for coherence between the workplace and colleges.

This will help to ensure that young people are able to obtain clear guidance on career progression and benefit adults who want to train in their current job or retrain to progress their career.

We will continue to work with the Government and the new Institute for Apprenticeships and Technical Education to develop the new post-16 structure for technical and professional education.¹⁵⁸

Malcolm Trobe, Interim General Secretary of the Association of School and College Leaders

The Education for All Bill has clearly been overtaken by events and it is no surprise that it has been dropped. We support the government's aim of boosting technical education. It is vital for the life chances of young people and for the future of the country, and we look forward to working with the government over these plans. However, post-16 education is very poorly

¹⁵⁷ [Sector response to the Technical and Further Education Bill](#), *FE News*, 27 October 2016.

¹⁵⁸ [Technical and Further Education Bill](#), Association of Colleges, 27 October 2016.

funded and it is essential that the government backs up these plans with sufficient resources.¹⁵⁹

Jill Stokoe, education policy, Association of Teachers and Lecturers

Although we support the Government's aim of boosting technical education, it is vital that the role of the Institute for Apprenticeships (IfA) is clarified further, particularly in light of the proposal that its remit will be extended to cover all technical education.

The expertise and experience of developing standards and assessments currently resides with the awarding bodies who already work closely with employers to develop their qualifications. The apprenticeship standards that have been approved so far have caused some concern in the sector, particularly because, in some cases, the award does not contain a vocational qualification.

Ultimately, employers need to know that the awards apprentices receive have been reliably and validly assessed and apprentices need to be assured that their apprenticeship is both valuable and portable in the fast-changing world of work. Fortunately, this Bill presents the opportunity to ensure that these concerns are addressed.¹⁶⁰

James Kewin, Deputy Chief Executive, Sixth Form Colleges Association

In principle, we agree with the introduction of an insolvency regime. Since incorporation, there has been an ad hoc and rather chaotic approach to dealing with colleges in serious financial difficulty. It is rare for Sixth Form Colleges to find themselves in this position, but the combination of funding cuts and cost increases mean that an increasing number of Sixth Form Colleges find themselves in a parlous financial state.

We are concerned about the potential knock on effect of an insolvency regime on bank support. Existing loans and overdrafts may have to be renegotiated with potentially serious increases in costs and new support harder to obtain. In both cases this will act as a further drain on college finances. Ministers have previously said that the freedom to borrow commercially is one of the great advantages of being in the private sector, and have told us this offsets funding inequalities such as the absence of a VAT rebate. Well, the ability to borrow is an increasingly theoretical freedom.

¹⁵⁹ [Technical education plan must be backed up with funding](#), Association of School and College Leaders, 27 October 2016.

¹⁶⁰ [ATL comment on launch of the Technical and Further Education Bill](#), Association of Teachers and Lecturers, 28 October 2016.

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