Developing an insolvency regime for the further education and sixth-form sector

Response of the Association of School and College Leaders

1 The Association of School and College Leaders (ASCL) represents more than 18,500 education system leaders, heads, principals, deputies, vice-principals, assistant heads, business managers and other senior staff of state-funded and independent schools and colleges throughout the UK. ASCL members are responsible for the education of more than four million young people in more than 90 per cent of the secondary and tertiary phases, and in an increasing proportion of the primary phase. This places the association in a strong position to consider this issue from the viewpoint of the leaders of schools and colleges of all types.

2 ASCL welcomes the opportunity to comment on this matter, but it has to be said that the consultation has not been properly handled; these complex and highly significant proposals were issued in July with a deadline only four weeks ahead, a period almost entirely within the typical college summer vacation. It has therefore not been possible to properly consult college principals and finance directors, and still less governing bodies. Further consultation is clearly needed before proceeding if there is not to be a significant likelihood of unforeseen consequences.

3 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. It seems strange that the FE sector has been singled out for this development when the situation is equally uncertain in the higher education sector; onlookers are likely to draw the conclusion that it stems from an expectation of financial failure in the FE sector, when in fact the great majority of colleges have extremely good financial management.

With reference to your specific questions

Question 1: Do you agree that only the SAR element of this regime should be applied only to Designated Institutions that are companies? Please give reasons for your answer.

4 It seems sensible to have the same rules apply to colleges and other institutions that perform a similar function. It is not clear why this should be limited to those which are formed as companies.

Question 2: Do you think any of the insolvency measures summarised in our proposals (Company Voluntary Arrangement, ordinary administration, compulsory liquidation and creditors' voluntary liquidation) should be available in the event of college insolvency as well as a Special Administration Regime? Please explain your answers.

5 It does seem sensible to align the rules for colleges as closely as possible with those for companies and charities. But colleges do perform a public service, it therefore seems reasonable for the Treasury or relevant government department (now DfE) to share some of the risk. Certainly the regime should put the protection of learners as the first priority. A degree of underwriting or guarantee from government would help to reassure creditors and enable colleges to operate cost-effectively.

6 As noted above the introduction of an insolvency regime will need to be handled very carefully if it is not to undermine confidence in the sector.

7 The point about alignment does raise the question of whether the rules for the HE sector are also to be aligned, and if not, why not.

Question 3: Does the proposed special objective sufficiently reflect the needs of learners and creditors? Please explain your answer.

8 It is clearly important to balance the needs of learners and creditors.

9 These changes will require colleges to renegotiate the terms of their loans, inevitably increasing the costs. These costs should be borne by government, not by colleges.

10 The situation with regard to pension schemes is unclear; colleges are members of local government pension schemes (LGPS) and the teachers' pension schemes (TPS). The latter does not create instability, but the former does, as valuations of debt are hard to predict and can be volatile.

Question 4: Do you have any comments on our proposals for SAR initiation?

11 No.

Question 5: What issues, if any, would you envisage in the event transfer of provision or assets/liabilities were required?

12 The position of sixth form colleges with land and buildings owned by a trust or church needs to be explicitly addressed. It is not covered in any clear way by the current proposals.

13 LGPS liabilities need to transfer along with staff to which they refer, just as debts underwritten by physical assets need to transfer along with those assets.

Question 6: Do you have any views on our proposals in relation to directors' and governors' liabilities?

14 There is a serious risk here of discouraging suitable people from taking on governance responsibilities or remaining as college governors. It has to be remembered that the position of most college governors is quite different from that of board members of companies in that they are unpaid volunteers performing a voluntary public service. Of course that does not absolve them from behaving with probity. But the demands made on governors has increased in recent decades, which has already made it hard for some colleges to recruit and retain suitable governors; if there is a perception that joining a college corporation carries risk to one's personal finances this will inevitably worsen.

Question 7: Do you agree that, as a matter of general principle, the insolvency law applying to companies on the avoidance of transactions should apply to colleges? Please explain your answer.

15 This seems to make sense, but there has been no time to make any careful examination of the issue, and it may be that there are circumstances where this would be wrong.

Question 8: Do you agree that only provisions of Part 3 of the Insolvency Act 1986 that deal with fixed charges should apply to colleges? Please explain your answer.

16 There has been no time to take advice on this.

Question 9: Do you have any other comments on the proposals set out in the consultation document?

17 No.

Do you have any other comments that might aid the consultation process as a whole?

18 The House of Lords Merits Committee has more than once recommended that consultations should not take place against overly tight deadlines, especially when the consultation period overlaps with holiday times. That advice has clearly not been followed in this case. It would be sensible to rework the proposals in the light of this consultation and then consult again, to a longer deadline and not during a vacation.

19 And please see paragraphs 2 and 3 above.

20 I hope that this is of value to your consultation, ASCL is willing to be further consulted and to assist in any way that it can.

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