



clerks training materials

this pack includes

- user's guide
- introduction
- values and ethical framework
- the main statutory framework
- the wider legal framework
- working relationships
- managing the process of governance

a professional development programme
for corporation clerks in FE colleges



clerks training materials

user's guide

a professional development programme
for corporation clerks in FE colleges

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www.LSDA.org.uk

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Note

The Learning and Skills Development Agency
was formerly known as FEDA.

How to use this pack

Welcome to the *Clerk Training Materials*.

This guide will give you some ideas on how to get the best out of this self-study pack. If it is feasible, you will find it very useful to discuss some of the activities in the pack with other clerks. If you are part of a clerks' network, you could consider organising some formal or informal study sessions for yourselves using the materials.

Who is the pack for?

This pack is aimed at new and experienced clerks of further education colleges.

Clerks play a vital role in the operation of every college yet there has recently been a high turnover of clerks in the further education sector. Good governance is essential for the smooth running of a further education college and the skills and expertise of an effective clerk add significant value to the quality of governance. Professional development for clerks helps to enhance the skills and expertise that are integral to the role and to ensure that this professional expertise is properly recognised by others.

As well as opportunities to nurture and develop professional qualities, clerks also need the confidence to influence events in ways that are commensurate with the expertise they have. One purpose of this pack is to explore skills that can help ensure that the clerk's voice is heard, the clerk's views are acknowledged and, where appropriate, the clerk's advice is implemented. The pack seeks to enhance the influence, status and professional standing of the clerk.

Using the modules flexibly to develop your knowledge and skills in key areas will help you to play a full part in the work of your governing body with confidence and purpose.

Aims of the pack

The pack is designed to help and support clerks and increase the effectiveness of college governing bodies. The specific aims are to:

- improve your knowledge of the ethical and legal framework within which governing bodies must work
- develop your skills in advising the governing body on constitutional and procedural questions

- increase your skills in managing working relationships
- develop your expertise in managing the process of governance
- provide easy-to-use learning materials that you can work through in your own time and at your own pace.

What's in the pack?

The pack consists of six modules which are designed to give you a thorough overview of your responsibilities for the work of the governing body, along with this User's guide, containing tools to help you get the most out of using the pack.

The sections of the User's guide are:

Check your current skills and knowledge

This section provides an outline of what is in each module, presented in a form that will help you to check what you already know, and decide which topic areas you would find it useful to work on.

Action planner

This provides you with space to note down useful learning points as you work through the modules and queries, issues or ideas for action that you would like follow up within your own college. It also contains a section for you to note areas in which you would like more information, training or development and to plan how you might tackle these needs.

Useful resources

This section lists useful sources of further information for college governors – organisations, publications, websites, etc.

The self-study modules

The modules vary in length from around 32 to 44 pages.

The topics covered are:

- 1 Introduction**
- 2 Values and ethical framework**
- 3 The main statutory framework**
- 4 The wider legal framework**
- 5 Working relationships**
- 6 Managing the process of governance**

Modules 1, 5 and 6 are freestanding. *Modules 2, 3 and 4* cover the ethical and legal framework which underpin the work of further education governing bodies. The modules can be studied in any order, though you may find it useful to begin with the *Introduction* module. Each module also provides helpful cross-references to relevant material in other modules.

Each module is broken up into short sections, to make it easier to learn in short chunks of time and consists of:

- a short introduction, which includes aims, a list of contents and a list of documents you will need to complete the self-study activities
- topic sections which contain information, discussion, case studies or checklists and activities to help you think about how you can apply your learning to your own college
- a module review which includes a reminder of the aims, summary of key learning points and general guidance on action planning.

Using the pack for self-study

The pack is designed to be used flexibly and you will need to decide how to use the modules in the way that is most effective for you. We all study differently. Some people prefer to work all the way through a module from beginning to end, others choose to skim or dip into sections on topics they are familiar with, and pick out sections on topics that they want to know more about for detailed study.

Study time

Individual study times vary widely: you might need to spend anything between one and four hours working on a module of average length, depending on how quickly and in how much detail you choose to work. You may need to allow up to six hours each to work through the whole of *Modules 3 and 4*, which deal with quite technical legal information.

As a rough guide, if you work through all the modules, you will need to set aside between 10 and 30 hours total study time. You also need to allow additional time for activities that involve reading other documents, discussion with other people, or observing meetings.

Doing the activities

Each module contains activities which will help you to apply ideas from the pack to your own college and to your work as a clerk. Do make a point of tackling as many of the activities as you can. Cover over the viewpoints which follow the activities and reflect or write your own thoughts down before you read our comments.

You may find you disagree with some of the viewpoints. There is often no right or wrong answer – the aim of the viewpoints is to suggest possibilities, enable you to compare the suggestions with what actually happens in your own college, and encourage you to apply any ideas that you find useful to your own work.

You could keep all your notes from activities in a separate notebook or on loose-leaf sheets that can be stored in a ringbinder, along with the module, for future reference.

Preparation for some activities

Some of the activities ask you to review or answer questions about documents or information that you should have on file. It is a good idea to try and gather as many of these as possible before you start work on a module.

If some documents are difficult to get hold of or not available, we suggest you consider the questions in the activity and whether they are useful to apply to documents that you might receive in future.

Possible routes through the material

If you are a new clerk...

You may find it useful to work through the whole of the *Introduction* module, and then plan which modules or sections of modules you want to study. When you have finished the module, use the *Check your current skills and knowledge* section in this guide to decide on your priorities.

If you are an experienced clerk...

You could skim the *Introduction* module to check what is covered, and then plan the modules or sections you want to work on using the *Check your current skills and knowledge* section to decide which are priorities for you.

Action planning

We hope you find that there is much in the pack that you can apply immediately to your own college and governing body. Working through the modules should:

- raise questions in your mind
- help clarify issues that concern you
- provide a new or different perspective on recurrent problems
- suggest possible approaches or solutions to difficulties and dilemmas that you or your governing body is facing.

The *Action planner* sections are intended to help you plan how you will follow up these reflections with practical action. Some things you may be able to take further on your own, but there are likely to be issues that you want to raise with the principal or chair, or perhaps the governing body as a whole.

We also suggest you keep a reflective diary. Several activities in the pack ask you to reflect on and analyse past events so that you can pursue alternative strategies for managing similar incidents next time they surface. A reflective diary adds continuity to this process, providing a tool through which you can monitor your own self-development. In the longer term we will be exploring ways in which these materials could count towards a professional qualification. Starting a reflective diary now could help you provide evidence for assessment for future accreditation.

Check your current skills and knowledge

This section enables you to check what you already know about the clerk's role in college governance, and to identify the topic areas in which you want to develop your knowledge and skills.

- 1 Work through the checklist and assess yourself by ticking the appropriate column.
- 2 Where you have identified gaps in your knowledge or practice as clerk, number these in order of priority from 1–3 where 1 = most important to address and 3 = least important.
- 3 You can then choose whether to work on those modules in which you have identified a number of high priorities, or to pick out priority sections from several different modules.

Module 1 Introduction	<i>Not at all</i>	<i>Partly</i>	<i>Fully</i>	<i>Priority 1–3</i>
I can describe the range of provision in the further education sector				
I can summarise the role and responsibilities of governing bodies				
I can summarise the role and responsibilities of the clerk				
I can explain the clerk's role in ensuring that governors take part in training programmes				
I can explain the clerk's responsibilities for ensuring public access to information about the work of the governing body.				

Module 2 Values and ethical framework	Not at all	Partly	Fully	Priority 1–3
I understand how the Nolan Committee's seven principles of public life impact on the activities of the governing body and my role as clerk				
I can explain my role in relation to the governing body's code of conduct and conflicts of interest				
I understand the reasons for having a whistleblowing policy				
I can outline the governing body's role in ensuring that the college promotes equal opportunities				
I understand the clerk's responsibilities in relation to whistleblowing, equal opportunities and human rights				
I can identify when specialist advice needs to be sought.				
Module 3 The main statutory framework				
I can explain the legal structure of my college and how it affects the governing body's activities				
I understand the implications of a college's charitable status				
I can explain my college's powers and the consequences of acting outside them				
I understand the need for caution when setting up subsidiary companies or entering into a joint venture				
I understand my responsibilities under the instrument and articles				
I can identify the occasions when the corporation seal should be used				
I can specify the lines of accountability regulating my college.				

Module 4 The wider legal framework	Not at all	Partly	Fully	Priority 1–3
I can summarise the nature of the legal relationship between the college and its staff				
I can explain the role of the governing body in determining the pay and conditions, disciplinary and grievance procedures, and the dismissal of staff				
I can outline the legal relationship between the governing body and the students of the college, and its responsibilities towards students				
I can explain the governing body's responsibilities in relation to the student union				
I can explain why it is important for colleges to have policies dealing with email and internet use				
I can outline the college's responsibilities under the Data Protection Act				
I can summarise the effects of the legislation on freedom of information, health and safety and intellectual property law				
I can state the thresholds for the buying of goods or services which trigger the application of EU procurement regulations				
I can summarise the main responsibilities of a company secretary.				

Module 5 Working relationships	Not at all	Partly	Fully	Priority 1–3
I can apply assertiveness skills to help manage difficult situations				
I can identify common barriers to communication and strategies to help				
I am aware of the diversity of perspectives and interests represented on the governing body and can select strategies to help a sense of common purpose				
I am aware of key processes and skills for working with groups				
I can analyse skills for self-management and apply these to my own interactions				
I can identify sources of stress in my work and select strategies to help.				
Module 6 Managing the process of governance				
I can outline the differing roles of the chair, the principal and the clerk				
I can explain to the governing body and others the arrangements for: <ul style="list-style-type: none"> • the appraisal of the clerk • appointing a new principal • establishing a special committee • appointing the chair and vice-chair of the governing body 				
I ensure the governing body maintains the register of interests in line with statutory requirements and good practice				
I can assist governors in assessing the performance of the governing body and producing the annual report of the audit committee				
I can set up and maintain an intranet site for the governing body				
I am able to manage meetings efficiently and effectively				
I can draft standing orders and terms of reference.				

Action planner

This section provides you with some simple tools to follow up and apply ideas arising from your work on the modules in the *Clerk Training Materials*:

- an action points form to note follow-up action within your own college
- a plan for further learning.

Planning points for action within your own college

You are likely to have a number of ideas for further action as you work through the materials.

The 'Action points' form below provides you with a framework for noting down any issues, queries, ideas or practical action that you want to follow up within your own college. The planner enables you to gather them together in one place as you work, and then to prioritise them and decide what action you will take. Use the planner in whatever way you find most useful. Below is a fictitious example of how an action point might be addressed.

Action point example: Organise a formal appraisal

After working through the *Introduction* and *Module 6*, a new clerk decided on a strategy for securing a formal appraisal – something which the outgoing clerk had never had. The clerk sent a short note in writing to the chair and principal, suggesting the idea and offering to draw up a detailed proposal for them to consider if they would find this useful. When neither responded, the clerk decided to be assertive (see *Module 5*). Carefully choosing a time when the chair was in an expansive mood, the clerk asked for a yes or no answer.

The chair's response was positive and so the clerk set out a proposal based on the principles and suggestions set out in *Module 6 Section 2*. By this time the clerk had also made contact with the college's human resources department and the local ACRA network, and asked colleagues in both places to look at the draft and add further useful suggestions. The proposal was put to the governing body, agreed and an appraisal panel set up. Because the clerk was new to the further education sector and wanted early feedback, the panel agreed to a mid-year appraisal in the first year.

The kind of action points you identify are likely to vary from one module to another. For example you might decide that you will:

- frame a question to put to the principal or chair
- ask the governing body to amend the code of conduct
- tackle an issue that you are concerned about by seeking a meeting with the chair and principal
- seek legal advice on a matter arising from *Module 4*
- propose to the governing body that they review their self-assessment procedures through the tabling of an outline programme.

As with any action planning, it is useful to prioritise the ideas that you have noted. Points for action can be prioritised in various ways, for example:

- important and urgent/important but not urgent/urgent but not important
- requiring short-term, medium-term or long-term action to see results
- simple/complex to achieve
- can be done on your own/requires action by a committee or the whole governing body.

It may be a good idea to start with something simple and short-term that you can achieve on your own. A small early success will help to build up your confidence to tackle bigger issues. Set yourself a feasible limit of, say, no more than three priorities at the outset.

Developing a plan for further learning

Developing the knowledge and skills that you need to be an effective clerk is a continuing process of personal development. We hope this pack has taken you some steps further and that you can build on your learning in your day-to-day experience.

In some ways this pack has only scratched the surface of effective governance. You can make your contribution more effective by identifying gaps in your skills and knowledge and planning further learning, training or development to meet your needs. The second planning form in this section gives you a framework. Use it in whatever way you find most helpful.

Checklist: Planning further learning

You may find it useful to skim the modules you have done and any notes you have made as you develop your action plan.

In the relevant spaces on the *Plan for further learning* form, note down any topics from the modules you have worked through that you need to find out more about or develop further.

For the topics you have noted, number your top three priorities.

You may find it helpful to discuss this list with the principal and chair, as they are responsible for your appraisal and professional development.

Find out what you can do to develop your knowledge or skills in these topics. Likely sources of further learning include:

- a local or regional clerks' network that you could join
- shadowing a more experienced clerk
- a mentor (a more experienced clerk willing to offer practical advice, perhaps by phone or email)
- presentations on useful topics from subject specialists (eg head of finance, principal, etc)
- key documents (eg principal's reports, governing body papers, LSC Circulars, etc)
- *The College Governor*
- the *Governor Training Materials*.

ACTION POINTS

Queries/issues/ideas to follow up	What action I need to take/ Who I need to speak to	Priority 1–3	When I will do it by
Module 1 Introduction			
Module 2 Values and ethical framework			
Module 3 The main statutory framework			

ACTION POINTS

Queries/issues/ideas to follow up	What action I need to take/ Who I need to speak to	Priority 1–3	When I will do it by
Module 4 The wider legal framework			
Module 5 Working relationships			
Module 6 Managing the process of governess			

Plan for Further Learning

Topics I need to work on	Priorities 1-3	Action I will take
Module 1 Introduction		
Module 2 Values and ethical framework		
Module 3 The main statutory framework		

Topics I need to work on	Priorities 1-3	Action I will take
Module 4 The wider legal framework		
Module 5 Working relationships		
Module 6 Managing the process of governance		

Useful resources

Helpful organisations

This section provides contact details and information about a range of organisations involved in further education. An asterisk (*) shows those involved in the development of the *Clerk Training Materials*.

***Association of College Registrars and Administrators**

Association of Colleges
Fifth Floor
Centre Point
103 New Oxford Street
London WC1A 1DD

Tel: 020 7827 4600
Fax: 020 7827 4650

National organisation providing professional support to business managers and clerks in further education

Association for College Management (ACM)

10 De Montfort Street
Leicester
Leicestershire LE1 7GG

Tel: 0116 275 5076
Fax: 0116 255 0548
email: saramccaffrey@acm.uk.com

Independent professional association and trade union for college managers

Adult Learning Inspectorate

Third Floor
101 Lockhurst Lane
Coventry CV6 5SF

Tel: 0870 240 7744
Fax: 0870 242 1444
email: enquiries@ALI.gov.uk
www.ali.gov.uk

Responsible for inspecting and reporting on a wide range of government-funded adult learning activities

Association of Colleges

Fifth Floor
Centre Point
103 New Oxford Street
London WC1A 1RG

Tel: 020 7827 4600
Fax: 020 7827 4650
Email: aoc@aoc.co.uk

Represents further education sector colleges and seeks to raise the profile of colleges with the government and other agencies. Provides a range of services to members.

***Association of Colleges, South West**

Bishops Hull House
Bishops Hull
Taunton
Somerset TA1 5EP

Tel: 01823 335491
Fax: 01823 323388

email: john_graystone@swafet.org.uk
Represents further education sector colleges and provides a range of services to members

Basic Skills Agency

Tel: 020 7405 4017
Fax: 020 7440 6626
email: enquiries@basic-skills.co.uk
www.basic-skills.co.uk

The national development agency for improving basic skills

BBC Education

www.bbc.co.uk/education

Part of the BBC Online service with links to Adult Learning and Further Education

The Charity Commission

Charity Commission
Harmsworth House
13–15 Bouverie Street
London EC4Y 8DP

General enquiries 0870 333 0123
www.charity-commission.gov.uk

Government agency providing advice, publications, and guidance on charity law and best practice

Clerk's Mailbase

email: fe-clerks-request@jiscmail.ac.uk

Clerk's email network which any clerk or deputy clerk may join by contacting the email address above.

Department for Education and Skills (DfES)

Tel: 020 7925 5000
Fax: 020 7925 6000
Publications Line: 0845 602 2260
email: info@dfes.gov.uk
www.dfes.gov.uk

The government department which contributes to the agenda of social cohesion and economic competitiveness through investment in knowledge, skills and employability

Eversheds (Education Group)

Cloth Hall Court
Infirmary Street
Leeds LS1 2JB

Tel: 0113 243 0391
Fax: 0113 245 6188
email: johnhall@eversheds.com
sallypelham@eversheds.com
www.evershedseducation.com

Leading firm of legal advisors to the education sector in the UK.

Further Education National Training Organisation (FENTO)

Fourth Floor
1–6 Ely Place
London EC1N 6RY

Tel: 020 7242 4662
Fax: 020 7242 4460
email: enquiries@fento.ac.uk

The national training organisation for further education

Higher Education Funding Council for England (HEFCE)

Northaven House
Coldharbour Lane
Bristol BS16 1QD

Tel: 0117 931 7317
Fax: 0117 931 7203
www.hefce.ac.uk

The funding council for the higher education sector

The Home Office

www.homeoffice.gov.uk

Useful guidance on a number of issues such as human rights, freedom of information, equal opportunities.

The Information Commissioner

www.dataprotection.gov.uk

Provides guidance on data protection issues

KPMG

2 Cornwall Street
Birmingham B3 2DL

Tel: 0121 232 3000
www.kpmg.co.uk

Leading firm of auditors and advisers to the education sector in the UK. National advisory practice for governance is based in Birmingham.

Learning and Skills Development Agency

3 Citadel Place
Tinworth Street
London SE11 5EF

Tel: 020 7840 5400
Fax: 020 7840 5401
email: enquiries@LSDA.org.uk
www.LSDA.org.uk

Leading research and development organisation in the field of post-16 education

Learning and Skills Council (LSC)

Cheylesmore House
Quinton Road
Coventry CV1 2WT

Tel: 0247 658 2761
Fax: 0247 658 2738
www.lsc.gov.uk

The funding council for the post-16 education and training sector in England

National Institute of Adult Continuing Education (NIACE)

21 De Montfort Street
Leicester LE1 7GE

Tel: 0116 255 1451
Fax: 0116 285 4514
email: information@niace.org.uk
www.niace.org.uk

Leading non-governmental organisation for adult learning in England and Wales

Office for Standards in Education (OFSTED)

Alexandra House
33 Kingsway
London WC2B 6SE

Tel: 020 7421 6800
Fax: 020 7421 6707
www.ofsted.gov.uk

Non-ministerial government department with a remit to improve standards of achievement and quality of education in schools. Role extended from April 2001 to the new post-16 sector.

Qualifications and Curriculum Authority (QCA)

83 Piccadilly
London W1J 8QA

Tel: 020 7509 5555
Fax: 020 7509 6666
www.qca.org.uk

Oversees curriculum, assessment and qualifications across the whole of education and training

Learndirect

Third Floor
Arnhem House
31 Waterloo Way
Leicester LE1 6LR

Freefone: 0800 100 900
Fax: 0116 201 8920
www.learndirect.co.uk

A private-public partnership to stimulate lifelong learning among businesses and individuals.

Useful periodicals and journals

These publications provide a useful overview of current trends and issues in further education. You can get hold of copies from your college.

Times Educational Supplement
Times Higher Education Supplement

Further reading

You may find the following publications useful for further information. FEFC publications are available online at www.fefc.ac.uk

Module 1

College Governance: A Guide for Clerks published by the FEFC in 1996, particularly *Annex B* (pages 64–65) contains a helpful list of questions intended to help governors review their own procedures, and *Annex C* (pages 66–67), outlining the key function of the clerk. The Guide was distributed to all colleges.

Also useful is *The College Governor*, published by the FEFC in 2000, particularly *Section A* on governance matters. This section covers the role of the governing body, the conduct of business and the role of chair, clerk and principal.

Module 6 of the FEFC *Governor Training Materials* deals specifically with the role of the clerk. *Section 5* of *Module 6* contains a helpful summary of the clerk's role in dealing with difficulties.

Governance Issues: Raising Student Achievement, published by the Learning and Skills Development Agency in 2001, contains useful chapters on the performance of governing bodies, the role of governors in raising student achievement and the type of information governors might receive.

Copies of colleges' inspection reports are obtainable from the appropriate inspectorate.

Module 2

The Committee on Standards in Public Life has its own website at www.public-standards.gov.uk. You may find it useful to look at:

The Second Report of the Committee on Standards in Public Life May 1996 Volume 1: Report (Cm 3270-I) published by The Stationery Office, or you can access the full text, abstract or summary online.

The Fourth Report of the Committee on Standards in Public Life: Review of standards of conduct in executive NDPBs, NHS Trusts and local public spending bodies November 1997 is available online as an abstract or summary.

To order free copies of summaries of the Committee's reports and other free documents, telephone Freefone: 0800 692 1516

Module 3

The Eversheds *Annotated Office Copy of the Instrument and Articles of Government of Further Education Colleges* is a useful reference guide available through the Eversheds Governance Subscription Service. For details please contact Fiona Gilmore on 0161 832 6666, email fionagilmore@eversheds.com or look on the website at www.evershedseducation.com

Module 4

The following agencies have useful websites on legal issues (for website addresses see *Useful resources* above):

The Charity Commission

The Information Commissioner (guidance on data protection)

The Home Office (guidance on freedom of information and other rights)

Module 5

Cary Cooper has written widely on understanding and tackling stress in organisations. Useful works are:

Cooper, CL *Theories of Organisational Stress* OUP 1998

Cooper, CL et al *Stress Prevention in the Workplace*

Office of Official Publications of the European Communities 1996

Worrel, L & Cooper, CL *The Quality Of Working Life*

Institute of Management 1999

Module 6

Raising Standards in Further Education: The work of college governors published by FEFC in 2000 contains useful examples of good practice in the sector.

All clerks will find it useful to read Sir Joseph Lowry's *Report on Cricklade College, Hampshire* FEFC 2000.

Acknowledgements

The *Clerks training materials* were produced by a partnership of national organisations involved in further education:

ACRA The Association of College Registrars and Administrators is a national organisation which provides professional support to business managers and clerks. The services for clerks include seminars, conferences and network meetings to share good practice and become familiar with new initiatives.

LSDA The Learning and Skills Development Agency is one of the leading research and development organisations operating in the field of post-16 education. Its mission is to be a strategic national resource for the development of policy and practice in post-16 education and training.

AoCSW The Association of Colleges, South West is the regional arm of the national Association of Colleges (AoC) which represents further education colleges and provides a range of services to members.

Eversheds is one of the leading firms of legal advisers to the education sector in the UK, working with over 300 further education colleges.

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user's guide



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module

1

introduction

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*For suggestions on how to get the most out of these self-study materials, see the **User's guide**.*

Introduction

Welcome to *Module 1* of the *Clerk Training Materials*.

The job of a clerk is interesting, exciting and rewarding. It is interesting because of the wide range of activities and issues with which you deal; exciting because you are at the centre of your governing body's response to a wide range of government initiatives; and rewarding because of the contribution you make to successful governance. The past few years have seen an increase in the status of clerks as the importance of their key role has been recognised by government, by funding bodies and, crucially, by governing bodies themselves.

This module is for new clerks and for more experienced clerks who wish to review their roles and responsibilities. The module is divided into short sections. Each one can be studied independently. The module will take two to three hours to complete if you work through all of it.

If you are a newly appointed clerk from outside further education you will find it useful to work through *Sections 1* and *2* of this module. These are based on *Module 1* of the *Governor Training Materials*, published by the Further Education Funding Council (FEFC). These sections describe funding and provision in the further education sector, and the roles, responsibilities and membership of governing bodies. If you are an experienced clerk you may want to skip these sections, or simply skim through the whole module to decide which topic areas to concentrate on in other modules.

Aims

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

- describe the range of provision in the post-16 education and training sector
- summarise the role and responsibilities of governing bodies
- summarise the role and responsibilities of the clerk
- explain the clerk's role in ensuring that governors take part in training programmes
- explain the clerk's responsibilities for ensuring public access to information about the work of the governing body.

Contents

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

To do *Done*

- | | | |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | Section 1 Post-16 education and training in further education colleges |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 2 An overview of governance |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 3 The role and responsibilities of the clerk – an introduction |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 4 Training and ongoing support for governors |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 5 Providing information about the work of the governing body |

Working on the self-study activities

These materials have been designed for flexible use, so that you can work through sections and activities in your own time and at your own pace if you would find it difficult to attend external training sessions. Several clerks point out the value of working on at least some of the suggested activities together with another clerk or group of clerks, as there is much potential to learn from each other's experience. You might find it useful to become involved in a local or regional clerks' network in which training materials might be used.

For suggestions on how to organise this kind of support for yourself, see the *User's guide*.

What you will need

To complete activities in this module you will find the following documents useful:

- your college's instrument and articles of government (which set out the membership and legal responsibilities of the governing body) – new updated statutory instruments and articles came into force on 1 April 2001
- your governing body's standing orders and code of conduct
- your college prospectus, annual report and publicity materials
- *The College Governor* published by the FEFC in 2000
- *Governor Training Materials* published by the FEFC in 2000, particularly the *Introduction (Module 1)* and *Clerk to the Corporation (Module 6)*
- *Raising Standards in Further Education: the Work of College Governors* published in 2000 by FEFC Inspectorate

- *Governance Issues: Raising Student Achievement* published by the Learning and Skills Development Agency in 2001.

You may also find it helpful to obtain a copy of *College Governance: A Guide for Clerks* published by the FEFC in 1996.

Where you need to make notes in response to activity questions, we suggest you do this in a notebook or on separate sheets of loose-leaf paper, and store the information you compile along with the module for future reference.

Section 1 Post-16 education and training in further education colleges

This section describes the broader context in which clerks work: it sets out some facts and figures about the organisation of post-16 education and training in England, including details of the structural changes which came into effect in April 2001. Of around 420 colleges in the further education (FE) sector, over 90% are FE corporations. Much of what follows about governance describes the position of FE corporations; whilst this applies broadly to all colleges, clerks of former voluntary aided or controlled colleges, or of designated institutions, should be aware of different arrangements which apply to these colleges.

Post-16 education and training in England

The Department for Education and Skills (DfES) has responsibility for policy on education and training in England. After the age of 16 when education is no longer compulsory, young people have several choices. They can stay in full-time education at school or at an FE college (around 70%); enter a place on a government sponsored training programme; or go to work. Most young people who choose to stay on in education attend an FE college. The majority of students in FE are adults studying full-time.

The organisation and funding of post-16 education and training changed in April 2001. Up to then the FEFC provided the bulk of funding to colleges as well as to a number of other designated institutions; Training and Enterprise Councils (TECs) funded work-based training and were involved in a wide range of training projects; and local education authorities (LEAs) provided funding to school sixth-forms and for adult non-vocational leisure courses. From 1 April 2001:

- responsibility for the funding of post-16 education and training (outside higher education) was transferred to the Learning and Skills Council (LSC) with its network of 47 local Learning and Skills Councils

- the Adult Learning Inspectorate (ALI) was established to inspect post-19 education and training and work-based learning
- the Office for Standards in Education (OFSTED) expanded its role to cover 16–19 year olds in further education.
- ALI and OFSTED replaced the FEFC inspectorate and the Training Standards Council, which previously had these responsibilities.

The LSC provides funding to FE colleges and other providers of post-16 education and training. These include private training providers (these may be private companies or not-for-profit companies) funded previously by TECs; adult education institutions funded previously by LEAs; and voluntary organisations funded previously by LEAs and TECs. From April 2002, the LSC will have responsibility for determining the funding of school sixth forms, which will be allocated through LEAs.

Several other agencies have a stake in post 16-education and training. Business-led regional development agencies (RDAs) were set up in 1999 with a statutory responsibility to develop regional skills strategies in the context of improving regional economic development. Local authority-led regional assemblies/chambers also take a keen interest in skills development. There are different arrangements in London.

The Employment Service funds the New Deal aimed at unemployed young people and adults and the European Social Fund (ESF) is aimed at developing training opportunities for disadvantaged young people and adults.

In his statement '*Colleges for Excellence and Innovation*', launched at the November 2000 conference of the Association of Colleges, the Secretary of State for Education and Employment set out four key objectives for colleges:

- to provide high and improving standards of education for 16–19 year olds, ensuring increased participation and achievement on broad and balanced programmes of study
- to play the leading role in providing the skills the economy needs at craft, technician and equivalent levels, through initial technical and vocational education for young people and skills upgrading or re-training for adults – thus equipping individuals with the skills they need for personal prosperity
- to widen participation in learning, enabling adults to acquire the basic skills they need for employability, effective citizenship and enjoyment of learning, and to help build the capacity of local communities through developing links with ICT learning centres and other community-based provision, and playing a key role in local learning partnerships
- to provide a ladder of opportunity to higher education, with a key focus on foundation degrees, built on partnerships and networks with higher education institutions, and with *learnirect* to share and make learning resources widely available.

The key pillars of government policy are widening participation, raising standards, improving skills and developing partnerships. An important target for FE is that by 2004/5, 50 per cent of general FE colleges will have an established vocational specialism for which they are regarded as a centre of excellence locally, regionally or nationally.

Some facts about colleges

There are around 420 FE colleges with a total annual budget of around £4 billion. In 1999-2000, they received £3.4 billion of this from the FEFC. The rest was earned from a variety of sources including the Higher Education Funding Council for England (HEFCE), TECs, successful bids for European and other funding, research projects, full-cost courses, and commercial activities.

In 1999-2000, colleges catered for 3.7 million students – 2.9 million of these were enrolled on courses funded by FEFC. Around 3.1 million students were part-time, usually adults, often in employment. On average, each student studied for around three qualifications.

Colleges differ in terms of the range of courses they offer, their size and their method of operation. However, all draw much of their funding from the LSC, all are run by independent governing bodies and the attendance of students is voluntary. Many colleges attract students from an area wider than their local LSC. Some general FE colleges run specialist courses with a national or European reputation. In specialist land-based or art and design colleges, many if not most of their courses are offered nationally.

Funding of colleges

Although colleges in general receive the bulk of their funding from the Learning and Skills Council, there are other important sources of income. Sources of funding therefore include:

- the Learning and Skills Council
- the Higher Education Funding Council
- fees from courses
- the European Social Fund
- other European funding
- the Employment Service
- full-cost courses for business
- commercial activities such as consultancy, farm shops and restaurants
- college-owned companies
- successful bids for funds from government projects

- successful bids to the regional development agency for skills development funds.

The amount and sources of income received vary widely between colleges.

The largest part of a college's budget is spent on teaching and other staff, management and administration. Other significant costs include equipment, buildings, running costs, maintenance and educational supplies.

Activity College funding

Identify the funding sources and overall income and expenditure profile for your college.

How does the profile affect the information required by the governing body?

Viewpoint

Your college's balance of income and expenditure will be different from every other college. You will find it useful to obtain your college's latest audited accounts. You can then compare your college with others through summaries of colleges' published accounts produced by the funding council. The financial profile of the college will influence the types of financial information the governing body expects to receive. A governing body may, for example, have decided to reduce the college's reliance on funding from the LSC and have set an appropriate target. Governors will require information on the achievement of this target.

Types of colleges

There is a wide range of further education colleges, with a variety of titles such as further education college, college of technology, tertiary college, sixth-form college, institute, college of arts and technology, college of further and higher education, college of agriculture and horticulture, college of art and design, or just plain college. They may be divided as follows:

- general further education colleges, offering a wide range of academic and vocational courses both full- and part-time
- tertiary colleges, in areas where courses for people over the age of 16 were placed in one institution and schools did not have sixth-forms
- sixth-form colleges, offering mainly academic courses such as General Certificate of Education (GCE) Advanced (A) level and Advanced Subsidiary (AS) level, and General Certificate of Secondary Education (GCSE) courses, although increasingly offering a wider variety of vocational courses

- voluntary aided and controlled sixth-form colleges, also offering mainly GCE A and AS level, and GCSE courses, although increasingly offering a wider variety of vocational courses
- agricultural and horticultural colleges, offering courses aimed at land-based industries
- art and design colleges, offering art and design courses
- specialist designated colleges established to fulfil particular purposes, usually serving an area well beyond the immediate locality of the college and often nationally.

Between different types of college there are minor differences in the membership and responsibilities of governing bodies set out in the instruments and articles of government. The key variations are between general further education colleges (which include tertiary colleges, agricultural and horticultural colleges and art and design colleges); sixth-form colleges; and voluntary controlled sixth-form and specialist designated institutions, usually having charitable status.

The main differences cover the membership of the governing body:

- in sixth-form colleges and voluntary aided and controlled sixth-form colleges, parent governors are mandatory but are optional for FE colleges
- voluntary aided and controlled sixth-form colleges have foundation members/trustees (this is not the case for general FE and sixth-form colleges)
- FE colleges are required to have an academic board (this is not the case for either type of sixth-form college)
- institutions designated to receive funding from the LSC are likely to have governing bodies conforming to membership set out by the Charities Commission under the Charities legislation
- a few governing bodies are unincorporated – this has implications for the legal status of the governing body.

In all categories of college, the governing body will have responsibility for appointing the clerk.

Activity Types of college

- 1 What differences, if any, are there between the type of college you work in and other colleges in the area? Do you know how the membership and responsibilities of your governing body differ from those of neighbouring colleges? How does the type of college you work for affect your work?
- 2 What are the governance arrangements for other providers of post-16 education and training such as private training providers, voluntary organisations, adult education institutions and school sixth forms?

Viewpoint

- 1 Differences in the make up of membership of the governing body and the broad responsibilities of governors may lead to some differences in culture and style, although the principles of good governance will still apply. All governors serve as individuals, not as representatives. However, the high number of foundation governors, staff, student and parent governors in a sixth-form college may lead to a different style of operation from that in another college without foundation or parent governors. The setting up of an academic board to advise the principal on a range of academic matters may influence the way a governing body considers the services provided by the college. And a governing body with a maximum of three staff governors and three student governors may operate in a different way from a governing body with a minimum number of these governors. You could get more information about other governing bodies from their clerks, if you belong to a clerks' network.
- 2 Other providers will have very different governance. Private training providers may be companies limited by guarantee or limited companies. They may be sole traders or not-for-profit organisations. Their governor arrangements may be subject to the various Companies Acts or to Charities Acts. Many voluntary organisations are charities subject to legislation covering charities (see *Module 3 Section 3*). Adult education institutions may be run by local education authorities with governing bodies appointed by the LEA, and school sixth forms will be part of a school whose governance arrangements are set out under legislation covering schools.

Although they are not representatives, staff, student and parent governors add a unique staff, student or parental perspective to the governing body's work. The academic board required of FE colleges will advise the principal on standards, planning, development and oversight of the academic work of the college. This advice may be reported to the governing body. Sixth-form colleges lacking an academic board will ensure that there are different arrangements in place for the principal to receive advice on academic matters. Governing bodies with foundation governors may operate in slightly different

ways from other governing bodies by, for example, discussing the relationship between the trust and the college when setting out the college's mission and strategic plan.

Section 2 An overview of governance

The clerk's job is to make sure that the work of the governing body is done efficiently, that the governing body operates within its powers, and that it follows the proper procedures. To do this, you need a sound understanding of the principles of governance. This section reviews the key functions of planning, managing and monitoring, and how the governing body and principal carry out these functions. It then briefly explains the powers of the governing body, its composition and its committee structure.

Governance is about taking independent collective decisions to enable the college to cope with change. Typically these decisions fall into two categories:

- **planning**
- **monitoring.**

In summary, the governing body is responsible for determining the college's future strategy and for the overall conduct and oversight of the college's business; the principal is responsible for the day-to-day management of the college.

This responsibility split, which is laid down in the college's articles of government (or equivalent document) is fundamental to the process of effective governance. The articles provide for specific lines of responsibility for decision-making and these lines must not be blurred or interchanged. This responsibility split forms part of a system of checks and balances, which are essential to counter any potential abuse or misuse of power.

The main business of the governing body, whatever the category of college, is to determine the educational character of the college and ensure its overall well-being and financial solvency. In brief, the responsibilities of the governing body are to:

- determine the educational character and mission of the college and ensure that there are effective means of monitoring whether college management is fulfilling the mission
- ensure the solvency of the college and the safeguarding of its assets
- approve annual estimates of income and expenditure

- oversee the appointment, grading, suspension, dismissal and the determination of pay and conditions of senior postholders and the clerk to the governing body – if the clerk is also a member of the college staff, the governing body's responsibilities apply to the whole of the clerk's employment (see below)
- set a framework for the pay and conditions of service of all other staff.

Under revised articles of government implemented on 1 April 2001, the governing body is responsible for the employment of the clerk and for the clerk's employment in any other capacity in the college. For example, if the clerk is also employed as the head of estates in the college, the governing body would be responsible for the appointment, grading, suspension, dismissal and determination of the pay of *both* posts.

The governing body has powers of delegation but cannot delegate:

- the determination of the educational character and mission of the institution
- the approval of annual estimates of income and expenditure
- responsibility for ensuring the solvency of the college and the corporation and the safeguarding of their assets
- the appointment and dismissal of the principal or senior postholders (although the chair or vice-chair may dismiss a senior postholder in certain serious circumstances)
- the appointment and dismissal of the clerk
- the modification or revocation of the articles.

The principal of a further education college is the chief executive officer, exercising overall responsibility for executive management of the college, including the management of budget and resources within estimates approved by the governing body, and is personally accountable to the governing body for the exercise of this function. Further education colleges (but not sixth-form colleges) are also required to have an academic board whose role is to advise the principal on certain academic matters.

This split in responsibility is reflected in each key decision-making function set out in the articles of government. For example, in the determination of the college's character and mission:

- **the principal**
proposes
- **the governing body**
determines (non delegable)

- **the principal**
implements
- **the governing body**
monitors.

However, in practice the dividing line between the responsibilities of the governing body and those of management can become blurred. There have been a small number of well-publicised cases in the FE sector where governance has failed due to the fact that the demarcation between governance and management has not been respected; where the principal acting alone, or with the chair, has been allowed to dominate the decision-making process thereby reducing the function of the governing body to that of a rubber stamp; or where the governing body has usurped the function of management.

An effective clerk can help prevent the blurring of this division by: ensuring that the college conducts its business in accordance with the division of responsibility as set out in the articles; providing constitutional advice; liaising closely with the chair and principal; and in effect helping to manage the relationship between those two and the governing body.

The role of governors

Voluntary members of the governing body may be compared to non-executive directors of a board of a public company. A board of directors is, however, accountable to the company's shareholders – its owners – who can appoint and dismiss the directors. A college's governing body may give an account of its activities to its local community but is not accountable in the way a board is to its shareholders. Colleges receive considerable amounts of public funds and governors are responsible for ensuring that funds received from the funding council are used in accordance with the financial memorandum agreed with the funding council. The Secretary of State has powers to intervene in the affairs of the governing body in certain circumstances. Thus although colleges are local institutions, primarily serving the needs of their local communities, they receive the bulk of their funding from the LSC and have to take account of the educational policies of national government.

If the role of governors may be compared with that of non-executive directors, the duties of the clerk may be compared with those of the company secretary.

Activity When does a proper involvement by the governing body in the college become meddling in management?

Read through the examples below of governor behaviour. Which do you consider to be appropriate or unacceptable and why?

- 1 A governor visits the college every day.
- 2 A governor requests more detailed reports on achievement and retention rate.
- 3 Governors wish to attend college open days and other official functions.

Viewpoint

- 1 It is not usually appropriate for a governor to visit the college every day, unless there are unique circumstances. While visiting the college is important in helping governors understand how the college operates, too many visits run the risk of undermining the executive authority of the principal and senior managers. Also what can a governor contribute to the success of the college by daily visits? A chair might be expected to visit the college more frequently than other governors but daily visits would usually be beyond expectations unless there were serious concerns about the college or a matter of great importance requiring regular attendance over a short period of time.
- 2 A key responsibility of governors is to seek regular monitoring information on key aspects of college performance, of which achievement and retention are central. Governors need to decide the level of detail. It would be inappropriate for governors to receive detailed information on all courses run in a college (some colleges run more than 1,000 different courses). However governors and managers need to decide the type of information the governing body will receive – possibly at programme area level. More detailed analysis can be carried out by the governing body's quality committee. An important part of the clerk's responsibilities is to ensure that the governors pay proper attention to the quality of the college's educational provision including the setting and monitoring of targets for retention and achievement.
- 3 College managers, staff and students welcome governors' attendance at college functions. These occasions are excellent opportunities for governors to meet staff and students of the college. Some governing bodies expect each governor to attend at least one function per year.

The powers of the governing body

The governing body – the legal term is corporation – ‘conducts’ the college. The governing body has the power to:

- provide further and higher education
- provide secondary education to persons who would if they were pupils at a school be in the fourth key stage
- supply goods or services in support of the provision of education
- conduct an educational institution
- subscribe or otherwise acquire shares in or securities of a company
- acquire and dispose of assets.

The legal power of the governing body resides with the governing body as a whole, not with individual governors. This places constraints on what governors can do:

- as a corporate body, governors should support decisions taken collectively at formal meetings
- no governor should speak on behalf of the governing body unless specifically authorised by the governing body
- all governors share responsibility for decisions
- all governors must respect confidentiality.

For more detailed information about the powers of the governing body see *Module 3 Section 4*.

The composition of the governing body and its committees

There are variations in categories of members for different types of college. These are summarised in Table 1. The aim of these membership categories is to ensure that the governing body includes people from a range of backgrounds reflecting the community that the college serves. The size of a governing body varies between 12 and 20 members.

Table 1 Membership of the governing body

Category	General FE colleges		Sixth-form colleges	
	Minimum	Maximum	Minimum	Maximum
Business	4	7	4	7
Co-opted	0	3	0	3
Staff	1	3	1	3
Students	1	3	1	3
Parents	0	2	1	2
Local authority	1	3	1	3
Community	1	3	1	3
Principal	1*	1*	1*	1*

*Note that the principal (chief executive) is normally a member of the governing body but can choose not to be.

In former voluntary aided and controlled sixth-form colleges, there are some governors nominated from foundations or trusts ('foundation governors'). In former voluntary aided colleges, foundation governors form the majority; in former voluntary controlled colleges, a minority. The constitution of other institutions designated to receive funding council funds – known as designated colleges (examples include the Workers' Educational Association and the Working Men's College) – will vary.

In addition to the categories in Table 1, the Learning and Skills Council has the power to appoint up to two members to serve on a governing body. The Secretary of State is encouraging governing bodies to include those from higher education to serve as governors.

The clerk has an important responsibility in ensuring that membership conforms to what is required in law and that the appointment of governors is always properly carried out. The clerk also has a duty to advise on the composition of the governing body, and this may include ensuring that the gender and ethnic balance reflects that of the local community.

There is flexibility in the standard model and, if they wish, governing bodies can modify or replace their existing instrument and articles of government with the agreement of the Secretary of State.

Committees

Governing bodies are required to have an audit committee, a search committee and, when the occasion arises, a special committee, and to appoint the members of these committees. They are also entitled to set

up any other committee and to appoint its members. With the exception of the special committee, members can be drawn from within and outside the governing body and college. Governing bodies are able to delegate a wide range of matters to these committees.

The **audit committee** advises on matters relating to the governing body's audit arrangements and systems of internal control. The committee must consist of at least three people, including one person with relevant financial/audit expertise, and may include college employees other than senior postholders. Members of the audit committee should not include members of a finance or equivalent committee (if the governing body have such a body), the chair or principal. A clerk with significant financial responsibilities should not act as clerk of the audit committee.

The **search committee** advises the governing body on the appointment of governors and any other matters relating to membership and appointments that a governing body delegates to it. Most governors cannot be appointed by the governing body unless the advice of the search committee has first been heard. The exceptions are the principal and elected governors (staff, students and parents). Each governing body is expected to make rules for the conduct of the search committee.

The **special committee** is convened where it is considered appropriate by the chair, vice-chair (in the absence of the chair) or a majority of the members of the governing body to dismiss a senior postholder. The special committee must consist of at least three governing body members (excluding the chair, vice-chair, principal, and staff and student members).

Some governing bodies prefer to have as few committees as possible to ensure that the governing body as a whole is involved in all decisions. Others prefer to set up committees and working/task groups that can carry out more detailed work remitted to them by the governing body. It may be desirable for the governing body to have a committee with responsibility for financial matters (sometimes called the finance and general purposes committee). The government has strongly recommended that each governing body should have a committee with responsibility for overseeing academic standards and quality. As clerk, you may be expected to advise governors about the most appropriate model.

Activity Reviewing governance

- 1 Write down what in your view are the key differences between planning, managing and monitoring. Note examples of each from an organisation with which you have worked.

- 2 What sort of committee structure does your governing body prefer – more or fewer committees or working groups? What would your preference be if you were asked for advice, and why?

Viewpoint

- 1 The distinction between planning, management and monitoring varies between different types of organisation. Governors determine the strategic direction of their college taking account of proposals from the principal and senior managers. The principal has overall responsibility for managing the delivery of the agreed strategy, to ensure that targets set are achieved. The governors monitor progress through the receipt of regular reports from the principal and ensure action is taken if parts of the plan are not being achieved. In practice there is a grey area between planning, management and monitoring but all parties must be clear of and comfortable about their respective roles in the process. For more detailed discussion of the relationship between the clerk, the chair of governors and the principal see *Module 6 Section 1*.
- 2 There may be advantages in having in a range of committees or working groups to work on the detail of delegated duties, provided this structure does not become unwieldy. Fewer committees can work well, or can make it difficult to get through all the necessary detail of committee business. If you think there may be a value in looking at ways of making your committee structure more efficient, note down your ideas on the *Action planner* sheet in the *User's guide*.

Section 3 The role and responsibilities of the clerk – an introduction

This section describes how the clerk is employed and what the clerk's key responsibilities are. If you are a new clerk, it provides you with the opportunity to review your areas of responsibility and identify potential training or development needs.

Employment of the clerk

The clerk may be described as the professional officer employed by and serving the governing body. The contract of employment (as with all college employees) will be between the clerk and the governing body. The principal cannot be employed as the clerk. As with senior postholders, the governing body has direct employment responsibility for the clerk; it oversees the appointment, grading, suspension and dismissal of the clerk and determines the clerk's pay and conditions. As a result of changes from 1 April 2001,

the governing body has direct responsibility for the **entire** employment of the person who is the clerk if that person also has another post within the college.

Where this is the case, the usual practice is for the individual to have a single contract of employment but to have separate job descriptions for each post. These should clearly differentiate the responsibilities and accountabilities of the clerk from those of any other post held within the college. (As the clerk is required to act independently from senior management, separate job descriptions help to demonstrate that independence.)

The clerk's job description should set out:

- your duties and to whom you are responsible
- arrangements for your appraisal (normally it is the chair, another governor or group of governors approved by the governing body who carries out the clerk's appraisal)
- the amount of time that you are expected to spend on clerkship duties (this varies considerably: some clerks spend one day per week, whereas others are employed full-time).

It is good practice for the clerk's contract and/or job description to specify the hours to be spent on clerkship duties, especially where the clerk also holds another post within the college.

The governing body may decide to appoint a deputy clerk to assist in the clerking duties. The responsibilities of the deputy clerk need to be agreed by the governing body and reflect those of the clerk. For example, the deputy clerk might chair committees where the clerk's managerial responsibilities might conflict with those of the clerk.

The clerk's responsibilities

The job of the clerk is to ensure that:

- the business of the governing body is conducted smoothly and efficiently
- the governing body operates within its powers
- the governing body follows agreed and proper procedures.

In addition, the clerk should ensure that the governing body:

- receives and considers appropriate information on the college's finances, curriculum and student performance
- sets and regularly monitors targets for student enrolments, retention and achievement

- carries out financial forecasts and financial monitoring in line with the financial memorandum agreed with the LSC.

Four core responsibilities are set out in the instrument and articles of government:

- 1 to receive written notice that a member has been disqualified from continuing to hold the office of a member of the governing body
- 2 to receive written notice that a member wishes to resign from membership of the governing body
- 3 to maintain a register of the financial interests of members and to make this available during normal office hours at the college to any person wishing to inspect it
- 4 to summon meetings of the governing body by sending to members written notice of the meeting and the proposed agenda at least seven calendar days before the meeting.

The actual responsibilities of the clerk are much wider than those listed above and will vary according to the needs of the individual governing body. The checklist in the next activity provides a typical example of the range.

Activity Key elements of the clerk's responsibilities

- 1 Which of the responsibilities below do you think are most important for the clerk? Note these with an 'I' in the appropriate tick box.
- 2 Which activities do you think might pose most risk for the clerk? Note these with an 'R'.

Checklist: The clerk is typically responsible for –

- ☐ Ensuring the governing body fulfils legal, statutory and public responsibilities
- ☐ Providing advice and briefings to the governing body and acting as the reference point for enquiries
- ☐ Determining the calendar of meetings, summoning meetings, preparing agendas, reports and minutes of meetings including committees of the governing body
- ☐ Ensuring the cycle of business is carried out efficiently and effectively
- ☐ Ensuring that the governing body receives appropriate information on the college's financial and academic performance

- ☐ Checking the quoracy of meetings of the governing body and committees
- ☐ Advising the governing body on issues relating to membership
- ☐ Facilitating communication on governing body matters between the chair, principal and senior postholders
- ☐ Attending (or by delegation to a named person) all meetings of the governing body and its committees
- ☐ Holding the college's seal and preparing documentation to be executed under the seal
- ☐ Providing administrative support to the chair, committee chairs and, where appropriate, individual governors
- ☐ Ensuring compliance with the law regarding public access to governors' papers
- ☐ Ensuring safe custody of the official records of the governing body's business and keeping a record of outstanding business
- ☐ Administering any scheme for the reimbursement of governors' expenses
- ☐ Taking appropriate action if and when the governing body, chair or a committee is at risk of acting outside their powers or proposing unlawful actions
- ☐ Acting as correspondent for the governors
- ☐ Issuing letters of appointment for new governors
- ☐ Keeping under review standing orders, membership and terms of reference of the committees
- ☐ Maintaining the register of members' interests (other than financial)
- ☐ Facilitating governor training including the induction of new members
- ☐ Monitoring the public interest disclosure procedure, suggesting amendments and (where the governing body requires this) being the lead assessor in reviewing the proposed disclosure
- ☐ Supporting the governing body in the annual review of its performance.

Viewpoint

Each person will respond differently to this question. It may be argued that all of these responsibilities are crucial for the successful performance of the governing body and the achievement of the clerk's duties. Many will overlap with each other. To fall short in any one might put at risk the effective governance of the college. Some responsibilities occur regularly (for example, providing advice and briefings for the governing body, ensuring governors receive appropriate information on the college's academic and financial performance), others occur at certain times of the year (for example, supporting the governing body in the annual review of its performance), and some only from time to time (for example, issuing letters of appointment for new governors).

The clerk will need continually to check the membership of, and attendance at, committees to make sure that the committees are working effectively and have clear reporting lines to the governing body.

In addition to the points listed below, a clerk needs to have the ability to interpret and advise on statutory regulations, have good communication skills both orally and written, be well organised and able to manage a varied workload, and always maintain independence of judgement (see *Module 6*).

Activity Reviewing your broader responsibilities

Look again through the list of the key responsibilities above. Mark with a ✓ the areas in which you are reasonably confident, mark with a ✗ those in which you feel less confident and mark with a ? those about which you require further information.

Viewpoint

Doing this activity may have helped you identify areas in which you feel you would like further training or development. Clerks have a range of different backgrounds and experience. Some have a wide knowledge of FE, some have experience in clerking other public bodies, while others are knowledgeable about the law underpinning the responsibilities of governing bodies. Note down any areas you want to clarify or follow up through training in your *Action planner* form.

Demonstrating your independence

The governing body needs to know that the advice given by the clerk is unbiased and impartial on all occasions. The clerk will need to sign the register of interests in the same way as governors and senior managers. The clerk is the servant of the governing body and when inspectors examine how a college is governed, they look closely for evidence of the clerk's independence. This is especially important if the clerk also holds another post within the college. As noted earlier in this Section it will be important for the clerk to have a clear job description setting out responsibilities and duties as well as accountabilities. There is more detailed discussion about the independence of the clerk in *Module 6 Section 2*. By way of introduction, the activity below suggests some of the ways in which you might provide evidence of your independence.

Activity Are you independent?

There are a number of ways in which the clerk can be judged to be independent of the senior management. Can you answer 'yes' to all the questions below?

- 1 Do you have a clear job description in which independence is identified?
- 2 Have you completed the register of interests?
- 3 If you have management duties within the college, do you have a clear written statement clarifying your respective roles of clerk and senior manager?
- 4 If you have management duties within your college, are there clear and separate means of appraising your performance?
- 5 Could you show an inspector that you provide independent advice to the governing body and work independently from the principal? If the answer is yes, how would you demonstrate this?

Viewpoint

A clerk needs to be able to answer 'yes' to all these questions. The kind of evidence you might provide for an inspector could include your job description, arrangements for your appraisal and examples of situations where you gave advice directly to the governing body. If this activity has made you aware of further action you could usefully take to demonstrate your independence, note this down in the appropriate section of the *Action planner*.

Appraisal

Appraisal is a process which allows individuals and those with whom they work, usually their line manager, to review their performance, and strengths and weaknesses, and identify areas for improvement, training and development needs, and targets to aim for in the future. Because of the pace of change in further education and the need continually to improve the governance process, an annual appraisal of the clerk's performance is a good idea.

There is more information about the areas in which the clerk's performance is likely to be appraised, and the appraisal process, in *Module 6 Section 2*. At this point, you may find it useful simply to work through the activity below, which provides a quick checklist of the kind of appraisal arrangements that should be in place in your college.

Activity How does your governing body appraise your performance?

Work through the questions below.

- Has your governing body arranged for your appraisal?
- Who carries out the appraisal?
- How often does it take place?
- Is a formal record of the appraisal agreed and kept by the appraiser and the clerk?
- Does the appraisal include the setting of targets for the next year or longer?
- Is the governing body told when the appraisal takes place and about the outcome?
- Is there a mechanism for a mid-year review of progress?

Viewpoint

There is no single model of good practice for governing bodies. If you found it difficult to answer two or more of the questions above, you might need to remind the governing body of the importance of ensuring a review of your performance and that this review is reported back to them. The review might typically be carried out by the chair or another governor/group of governors as agreed by the governing body. The principal should not carry out this review.

Getting professional support

The job of clerk can be an isolated one. There is only one of you in the college. If you have a deputy clerk, you may be able to talk over professional issues together. If you are a newly appointed clerk, you may want to get professional support by establishing links with other clerks. There is likely to be a clerks' network in your area. Many are members of the Association of College Registrars and Administrators (ACRA). This is the professional association which represents clerks, organises local network meetings and can offer advice on professional development – details below.

Association of College Registrars and Administrators

Association of Colleges

Fifth Floor

Centre Point

103 New Oxford Street

London WC1A 1DD

Tel: 020 7827 4600

Fax: 020 7827 4650

National organisations including ACRA organise regular conferences and briefings for clerks, which are useful opportunities to exchange information and good practice. Some clerks have colleagues who are clerks in other colleges whom they can contact for advice or to share good ideas.

Section 4 Training and ongoing support for governors

This section looks at the clerk's crucial role in facilitating governor training. This will include the induction of new members, the updating of more experienced members and briefing governors who take on key responsibilities such as chairing committees.

Using open learning materials

The funding council has produced *Governor training materials* set out in eight modules. These materials have been designed for flexible use so that governors can work through sections and activities in their own time and at their own pace. Governors have been encouraged to use the materials together with other governors or groups of governors. Each college has been allocated £2,000 for governor training under the standards fund, to be spent by the end of July 2001.

The topics covered by the eight modules are:

- 1 Introduction
- 2 Strategy and educational character
- 3 Curriculum and quality
- 4 Financial management
- 5 Human resources
- 6 Clerk to the corporation
- 7 The audit committee
- 8 The search committee

The training policy for governors should have clear aims and objectives, address key issues facing the governing body and be geared to the needs of individual governors. It should have an annual budget and be monitored to ensure that the training is effective. The clerk has an important role in making sure governors draw up and take part in an effective training programme.

Other training activities

Training activities might include the following:

- induction for new governors, including an induction pack and special training sessions held at the college
- briefing sessions before meetings of the governing body or at other times convenient to governors
- input from curriculum leaders in the college at or before meetings of the governing body
- residential away days or weekends, which provide an opportunity for governors and senior managers to consider the long-term direction of the college
- presentations by key local, regional and national figures with expertise in education and training
- a mentor system in which experienced governors provide support and advice to newly appointed governors
- individual governors linking with curriculum areas to become more familiar with the work of the college
- training for governors who have taken on specific duties, such as chair or member of key committees
- attendance at outside conferences.

The induction of new governors is of particular importance. Governors, unlike magistrates, are not required to undergo initial training. However induction is strongly recommended as a way of ensuring that new governors understand their roles and responsibilities and get to know about their college.

Induction arrangements should be overseen by the clerk. These might include a formally arranged event in the college with inputs from senior staff, the clerk or outside facilitators, visits to various curriculum areas of the college and attendance at external events. In many colleges, all new governors receive an induction or welcome pack containing information about the governing body and college.

In some colleges there is pre-induction for those expressing an interest in becoming a governor. This ensures that new governors are aware of the responsibilities they are taking on.

Planning a training and development policy

If your governing body does not have a formal training and development policy, you might consider the following steps:

- carry out a skills audit of existing members to determine the level of expertise and experience within the governing body
- carry out a survey of each governor to identify areas for development and the method and type of approach they would prefer
- identify previous training opportunities and obtain feedback on their success
- consider key areas affecting the college which might have an impact on governor development
- identify action plans set out in inspections.

You may wish to discuss with the chair and principal the amount of money to be allocated to the development programme, the time in which the programme should take place and ways in which it should be monitored and reviewed.

You may also wish to monitor members' progress with their training and if there are difficulties, to look flexibly at alternative arrangements for delivery.

Activity Reviewing your governing body's training and development arrangements

Governors decide that they wish to review the training and development arrangements for the governing body. Using the suggestions in this section and your own ideas, draw up a list on a separate sheet of paper of at least three or four practical steps you would like to take as part of this review.

Viewpoint

Your list of action points will depend on the training and development arrangements that are already in place – reading this section may have helped you spot areas for improvement. You may need to check whether the governing body has previously considered its training needs in a formal way, and whether a policy exists. If a policy does exist, you may need to review its progress and propose improvements. You may also need to check that governors have received copies of *The College Governor* and the *Governor Training Materials* (for full details see *Further reading* at the end of the module).

Finally, you might also want to consider your own training and development. The governing body has responsibility for the clerk's development and *Module 6 Section 2* provides more information about identifying your training needs and

planning how to meet them. You may want to use the *Action planner* in the **User's guide** to note down any points from this activity that you want to follow up.

Section 5 Providing information about the work of the governing body

The clerk is responsible for ensuring public access to information about the work of the governing body. This section looks at the clerk's role in dealing with enquiries about governing body business, in organising the annual public meeting, and in advising the governing body on confidentiality.

Enquiries from the public

The clerk will on occasions have to deal with enquiries from the public about the work of the governing body and decisions taken by governors. You have responsibility for carrying out the governing body's duty of ensuring that the public has access to the agendas, minutes and papers of governing body meetings, with the exception of those items that have been agreed as confidential.

You will need to make sure that minutes are available in the college. Keeping them locked in a filing cabinet in a difficult-to-reach place may unreasonably restrict access for members of the public and be against the spirit of openness enshrined in legislation. In addition, you have responsibility for ensuring that, if the governing body agrees to have an annual report, this report is published and made widely available.

Enquiries about governing body business may come from:

- members of the public
- business and commerce
- local employers
- Members of Parliament and Members of the European Parliament
- other elected representatives such as local councillors
- organisations including voluntary and community organisations
- the press and media
- college customers
- staff and students
- researchers
- governors from other colleges
- inspectors and auditors.

How the governing body responds to enquiries depends on the type of enquiry, where it comes from, and the governing body's policy on lines of communication. The clerk is not automatically a spokesperson for the governing body. Typically, the clerk might deal with general enquiries about governing body business. It might be the chair, the principal (as chief executive) or a designated governor who responds to media requests for interviews or for comments on the work of the governing body.

A procedure should be drawn up clarifying responsibilities for dealing with enquiries. The procedure may be set out in the governing body's code of conduct. The procedure may identify types of enquiries, the source of enquiries and how should they be handled. For example, an enquiry from the national press or MP on a potentially damaging incident might be dealt with by the chair, advised by the principal and clerk. A routine enquiry from a member of the public about the composition of the governing body, or a request for information from an educational researcher might normally be dealt with by the clerk. Enquiries from inspectors or auditors might be dealt with by the chair, principal or clerk, depending on the nature of the enquiry.

Members of staff may wish to contact individual governors on particular matters. In general, this kind of request should be channelled to the chair or to the clerk and the procedure should be set out in standing orders. However, you may also wish to encourage governors to develop links with staff by, for example, inviting them to attend open days and prize-giving ceremonies, as well as visiting key curriculum areas.

Activity Dealing with public criticism

After recent negative press coverage of the college, fuelled by a member of the public who has recently left the employment of the college, the governing body wishes to restrict public access to the agendas, minutes and papers of the governing body's meetings. The governors recognise the importance of openness in their activities but have been bruised and annoyed at the recent treatment. They turn to you for advice. What do you do?

Viewpoint

This is a sensitive matter and one which clerks in several colleges have faced. To make meetings secret and to restrict access to agendas, minutes and papers is against the statutory responsibilities of the governing body and could render the governing body open to legal action. Your advice should

reflect this point. In addition, you may have thought of various courses of action along these lines:

- advise governors to get professional advice from the college's solicitors on the matter
- suggest calling in a public relations agency or a national organisation representing colleges used to advising institutions facing adverse publicity
- propose that the college's marketing section is fully briefed and prepared to deal positively with the press and encouraged to work hard to improve relationships.

It is highly likely that a decision to restrict access will lead to further adverse publicity locally and even nationally, if the issue is of sufficient importance. The reputation of the college might be further diminished.

The annual public meeting

The 1996 Committee on Standards in Public Life chaired by Lord Nolan recommended that governing bodies should conduct their business in as open a way as possible. Key proposals were that governing bodies should:

- hold an open annual meeting at which governors could be questioned by the press and public
- publish an annual report including information on the role and remit of the governing body, its strategy and membership, and where to obtain further information.

Many governing bodies now organise an annual public meeting (APM). Experience shows that attendance varies considerably and that APMs need to be carefully organised to ensure good attendance. A successful APM can be an important public relations opportunity for the college as well as an opportunity for governors to meet and be asked questions by members of the community served by the college.

The clerk on behalf of the governing body should oversee the organisation of the APM or ensure that the arrangements are well planned – for example, booking speakers and rooms, and organising car parking. The meeting needs to be well-publicised in the local press and media and invitations sent to key local businesses and other key organisations. Some governing bodies invite a keynote external speaker to address the meeting and in others the APM coincides with another attractive event such as prize giving, an open day or a ceremony recognising achievement. Some colleges organise the event away from college premises.

A typical event might include a presentation from a keynote speaker, short presentations by the chair on the annual report and by the principal on the future direction of the college. These might be followed by a question and answer session from the floor and a buffet that enables governors to meet members of the public in an informal setting. Members of the governing body will be expected to attend the meeting

Holding an annual public meeting is not a legal requirement. APMs are, however, a good means of demonstrating openness in the work of the governing body and making sure the public are aware of the services provided by the college.

Confidential issues

There will always be matters that must remain confidential to the governing body. These might normally include issues concerning individual staff and individual students, sensitive commercial transactions and negotiating positions with trade unions. However, the onus is on governors to be as open as possible in their business. The governing body is subject to the Freedom of Information Act 2000 and the clerk has a responsibility to advise the governing body so that confidentiality is not used unreasonably. For more information about the Freedom of Information Act see *Module 4 Section 7*. For more detailed discussion about the use of confidentiality, see *Module 6 Section 10*.

Activity Arranging the annual public meeting

The governing body decides to hold its first annual public meeting. From your own experience and the suggestions in this section, note down what arrangements you would make to ensure it runs smoothly and efficiently.

Viewpoint

Your answer will depend to some extent on what support is available to you in the college. You may be able to delegate some of the tasks we suggested, or you may have to do them yourself. You may already have experience of organising public meetings in a different context. If your college has a good marketing department, this could be a useful source of ideas and advice. You might find it useful to contact clerks in other colleges who have held successful APMs to find out what works well and what does not. Having a well-known keynote speaker may help to draw an audience, although it is important to ensure the person is carefully briefed. Publicity for the event should be sent out in good time, with reminders if necessary, and possibly follow-up telephone calls. A poorly attended APM might reflect badly on the college.

Module Review

This module has looked at the role of the clerk. If you have worked through the whole module you should be confident that you can:

- describe the range of provision in the post-16 education and training sector
- summarise the role and responsibilities of governing bodies
- summarise the role and responsibilities of the clerk
- explain the clerk's role in ensuring that governors take part in training programmes
- explain the clerk's responsibilities for ensuring public access to information about the work of the governing body.

Summary of key learning points

The funding and inspection arrangements for post-16 education and training changed in April 2001, as part of the government's goals for further education colleges to widen participation, raise standards, improve skills and develop partnership.

There are several types of further education college and differences in legal status. The constitution and membership of the governing body varies slightly from one type to another. The principles of good governance remain the same, but there are likely to be differences in the style and culture of governing bodies.

To advise effectively, the clerk needs a clear grasp of the differences between planning, managing and monitoring, and of the governing body's decision-making and monitoring role. The clerk also needs to be thoroughly familiar with the statutory powers of the governing body and its committee structure.

The clerk is employed directly by the governing body. Governors are responsible for the clerk's appointment, grading, suspension and dismissal, and for making arrangements for appraisal (which should be a regular, formal process). The clerk should have a separate job description if also employed in another post within the college.

The clerk's four core responsibilities are set out in the instruments and articles of government. These translate into a wide range of day-to-day responsibilities and a newly appointed clerk may want to seek further training or development in some areas of responsibility.

The clerk must be able to demonstrate independence. This is especially important if the clerk holds another post within the college.

The clerk is responsible for ensuring that governors draw up and take part in training programmes. Training can be offered through open learning materials and a range of different training events. The induction of new governors is a key element of this training responsibility. The clerk should ensure the governing body has a formal training and development policy and a plan for flexible delivery.

The clerk is responsible for ensuring public access to information about the work of the governing body. This includes having clear lines of communication to deal with enquiries from the public, advising the governing body so that reasonable public access is maintained at all times, and organising an annual public meeting.

Where next?

You have now completed work on *Module 1 Introduction*. If there are areas in which you need more guidance or information, they may be covered in other modules in the pack. Turn to *Check your current knowledge and skills* in the ***User's guide***. This self-assessment questionnaire will help you to decide which modules or sections of modules may help to fill these gaps. Tick the useful sections for further study.

If you cannot find the information you need within this pack, turn to the *Action planner* in the ***User's guide***. Note down what further information, support or guidance you would like. The Action Planner gives advice on who may be able to help, and how.

Putting it into action

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

Further reading

You may find it useful to refer to *College Governance: A Guide for Clerks* published by the FEFC in 1996, particularly *Annex B* (pages 64–65) which contains a helpful list of questions intended to help governors review their own procedures and *Annex C* (pages 66–67) outlining the key function of the clerk. The *Guide* has been distributed to all colleges.

Also useful is *The College Governor*, published by the FEFC in 2000, particularly *Section A* on governance matters. This section covers the role of the governing body, the conduct of business and the role of chair, clerk and principal.

Module 6 of the FEFC *Governor Training Materials* deals specifically with the role of the clerk. *Section 5* of *Module 6* contains a helpful summary of the clerk's role in dealing with difficulties.

Governance Issues: Raising Student Achievement, published by the Learning and Skills Development Agency in 2001, contains useful chapters on the performance of governing bodies, the role of governors in raising student achievement and the type of information governors might receive.

Acknowledgements

The *Clerks training materials* were produced by a partnership of national organisations involved in further education:

ACRA The Association of College Registrars and Administrators is a national organisation which provides professional support to business managers and clerks. The services for clerks include seminars, conferences and network meetings to share good practice and become familiar with new initiatives.

LSDA The Learning and Skills Development Agency is one of the leading research and development organisations operating in the field of post-16 education. Its mission is to be a strategic national resource for the development of policy and practice in post-16 education and training.

AoCSW The Association of Colleges, South West is the regional arm of the national Association of Colleges (AoC) which represents further education colleges and provides a range of services to members.

Eversheds is one of the leading firms of legal advisers to the education sector in the UK, working with over 300 further education colleges.

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1

introduction



clerks training materials

module

2

values and ethical framework

a professional development programme
for corporation clerks in FE colleges

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Note

The Learning and Skills Development Agency
was formerly known as FEDA.

*For suggestions on how to get the most out of these self-study materials, see the **User's guide**.*

Introduction

As clerk to the governing body you are responsible for ensuring that:

- the business of the governing body is conducted smoothly and efficiently
- the governing body operates within its powers
- the governing body follows agreed and proper procedures.

To carry out these responsibilities you need a firm grasp of the ethical values which the governing body must adhere to. As custodian of public funds, the governing body should strive to maintain high standards, act with integrity and behave ethically at all times. The work of the Nolan Committee (which we will look at in *Section 1*) has raised awareness of these issues and many governing bodies have now adopted codes of conduct to ensure this happens.

Ethical and moral values go hand-in-hand with the legal responsibilities of governing bodies which we will look at in *Modules 3 and 4*. Indeed these values have influenced the development of the law, both through legislation and through the way in which the courts develop the law. Many of the values that we look at in this module (freedom of speech, whistleblowing, equal opportunities and human rights) are now grounded in the statute book. These values need to be embraced by the governing body and brought to the heart of everything it does. You as the clerk can help governors to achieve this.

Finally, an important caveat: bear in mind that some of the legal issues covered in this module are extremely complex. The aim is to give you an overview and awareness of these issues. It is not an exhaustive guide nor is it a substitute for appropriate legal advice.

Aims

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

- explain how the Nolan Committee's seven principles of public life impact on the activities of the governing body and your role as clerk
- describe your role in relation to the governing body's code of conduct and conflicts of interest
- set out the reasons for having a whistleblowing policy

- explain the governing body's role in ensuring that the college promotes equal opportunities
- explain the clerk's responsibilities in relation to whistleblowing, equal opportunities and human rights and identify when specialist advice needs to be sought.

Contents

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

To do Done

- | | | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Section 1 The Nolan Committee's seven principles of public life |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 2 The code of conduct and register of interests |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 3 Whistleblowing |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 4 Equal opportunities |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 5 Human rights |

Working on the self-study activities

These materials have been designed for flexible use, so that you can work through sections and activities in your own time and at your own pace if you would find it difficult to attend external training sessions. Several clerks point out the value of working on at least some of the suggested activities together with another clerk or group of clerks, as there is much potential to learn from each other's experience. You might find it useful to become involved in a local or regional clerks' network in which training materials might be used.

For suggestions on how to organise this kind of support for yourself, see the *User's guide*.

What you will need

To complete activities in this module you will need a copy of the following documents:

- the governing body's code of conduct
- the college's whistleblowing procedure
- the college's sexual harassment procedure
- the college's disability statement
- the college's equal opportunities policies and procedures.

Where you need to make notes in response to activity questions, we suggest you do this in a notebook or on separate sheets of loose-leaf paper, and store the information you compile along with the module for future reference.

Section 1 The Nolan Committee's seven principles of public life

Public concern about the financial probity of members of parliament and other holders of public office led to the setting up in 1994 of the Committee on Standards in Public Life (chaired first by Lord Nolan and later by Lord Neill). The Nolan Committee made important recommendations for the governance of further education colleges including:

- the appointment and training of governors
- openness
- codes of conduct
- conflicts of interest
- whistleblowing
- the limits of commercial confidentiality.

At the heart of these recommendations is the notion that colleges are entrusted with public funds and so should demonstrate high standards in corporate governance and the conduct of public business. The Committee drew up seven principles of public life as a yardstick against which public service may be measured:

'Selflessness'	holders of public office should take decisions solely in terms of the interest of the public. They should not do so in order to gain financial or other material benefits for themselves, their families or their friends.
'Integrity'	holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.
'Objectivity'	in carrying out public business, including making public appointments, awarding contracts, and recommending individuals for rewards and benefits, holders of public office should make choices on merit alone.

'Accountability'	holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
'Openness'	holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands this.
'Honesty'	holders of public office have a duty to declare any private interest relating to their public office duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
'Leadership'	holders of public office should promote and support these principles by leadership and example.

The Committee's work has had a significant impact on the further education sector. Many of its recommendations have been adopted and these core values underpin various provisions in the instrument and articles of government. You can help encourage a positive approach to governance by closely following the spirit of the Nolan principles in the way you apply the legal rules set out in your college's governing instruments.

Activity Conflicts of interest

The search committee wants to recommend the appointment of Mrs Khan as a business member of the governing body. She appears to have all the skills the governing body needs; her son attended the college and she knows it well; and her appointment would help redress the current gender and racial imbalance in the governing body. Mrs Khan works on a part-time basis for a law firm which the college instructs from time to time. She has never done any work for the college.

Are there any issues about this appointment which you would want to raise with the search committee?

Viewpoint

The fact that Mrs Khan is employed by one of the college's professional advisers puts her in a position where she may have a conflict of interest. This may be addressed by her declaring an interest in any matter under discussion where the conflict is apparent – such as appointing or instructing

legal advisers, or any matter where the governing body is considering legal advice given by her firm. This however may not be sufficient. It may not always be apparent when a conflict will arise. It could be argued that Mrs Khan's membership is in itself a conflict of interest and undermines the principles of integrity and selflessness. It may be better and simpler for Mrs Khan and the governing body if they did not put themselves in a position where their integrity could be unwittingly compromised.

Responsiveness

One aspect of openness and accountability is that governing bodies need to be responsive to key stakeholder groups such as students, staff, the local community and local authorities. (Responsiveness is not the same thing as accountability which we will look at in *Module 3 Section 11*.) Concerns that colleges were too isolated from their local community led to the changes to the instrument of government in 1999. These changes made it obligatory to have staff, student, local authority and local community governors and reduced the proportion of business governors from one-half to one-third.

Below are some of the ways in which governing bodies have further increased their responsiveness, going beyond what is required of them in their instruments of government:

- holding an annual public meeting at which the college's annual report and accounts are presented (see *Module 1 Section 5*)
- developing a process for self evaluation (see *Module 6 Section 7*)
- placing a limit on the number of terms governors should normally serve
- ensuring that decision-making is open and transparent
- doing a systematic review of responsiveness and publishing the outcomes of the review in the annual report.

Section 2 The code of conduct and register of interests

The Nolan Committee recommended that all governing bodies have a code of conduct (and subsequently so did the Department for Education and Employment (DfEE) in the consultation paper *Accountability in Further Education*). This typically sets out how the governing body and individual governors are expected to carry out their responsibilities. It might include the recognition that each governor should:

- work co-operatively with other governors

- act as an individual and not as a delegate or representative
- not use the position for personal benefit
- take up opportunities for training and development
- seek to attend meetings of the governing body and committees.

It may also set out the roles and responsibilities of governors, how governors should behave in meetings and the meaning of openness and confidentiality.

As clerk you are responsible for ensuring that high standards of conduct are kept and maintained. As part of this process, the clerk maintains a register of interests of governors and should make this available to anyone wishing to inspect it. The register must be regularly updated and reviewed. If governors feel that their independence and judgement might be affected on any item, they should report this before the meeting to the clerk or the chair, or during the meeting to the chair. If the chair rules that there is a conflict of interest, the governor may be asked to take no further part in the discussion or to leave the meeting for that agenda item. When in doubt, a governor should always declare an interest.

Not all conflicts of interest are financial. For example, a governor may:

- know or be related to a candidate for a senior postholder's position or a person seeking membership of the governing body
- be a member of a trade union seeking recognition in the college
- be in a position as a local authority member or member of a business to use information as a governor to shape decisions affecting the college
- be related to someone who has an interest in a matter being discussed.

The clerk is also required to declare an interest where this is appropriate.

The next activity looks at a situation where you might be called on to give advice about the status of the code of conduct.

Activity Signing up to the code of conduct

A member of staff is appointed to the governing body after a rather contentious election, with some strong views expressed by various candidates. The new staff governor is willing to sign the register of interests as she believes in openness and transparency in the business of the college. But she expresses reservations about one section in the code of conduct which states that governors must abide by the collective decisions taken by the governing body as a whole. She claims this would infringe her right to freedom of speech under the Human Rights Act 1998.

You are unsure of the implications of the Act for individual members of governing bodies. You know that a refusal to sign a code of conduct may be grounds for removing a governor but you are uncertain about how this might be done. You are aware that there will be very strong feelings amongst the staff if it appears that an elected staff member is being discriminated against. The governing body turns to you for your advice.

- 1 How could you check out the areas you feel uncertain on?
- 2 Is the refusal to sign the code of conduct grounds for removing the governor?
- 3 What damage-limiting action could you take if the member of staff is removed or decides to resign?
- 4 How could you prevent this kind of situation arising in future?

Viewpoint

- 1 You need to ensure that appropriate legal advice is provided to the governing body. If you are unsure of the legal position (and the implications of the Human Rights Act 1998 are still unclear) then get professional advice from the college's solicitors.
- 2 The college is legally required by statute to maintain a register of interests disclosed to the governing body but not a code of conduct (although it will usually be the code of conduct which determines what interests other than financial interests should be disclosed). The grounds for removing a governor from office are very limited (see *Module 3 Section 8*). Would refusing to sign up to the code render this staff governor 'unfit to serve'? The test is subjective (ie is the governing body satisfied that she is 'unfit to serve'?) so this may be a difficult and controversial route to go down.
- 3 In the event that the staff member is removed or decides to resign, you will need to consider the impact on staff. It will be important to communicate clearly to staff that the governing body is legally bound to maintain a register of interests and that they should also have a code of conduct.
- 4 In future, signing the code of conduct could be made a condition of appointment (ie if the selected governor refuses to sign the appointment does not have effect). You could take steps to ensure that anyone wishing to join the governing body is aware of the requirement to sign the code of conduct and complete the register of interests. This would

avoid embarrassment after the selection procedure is completed. When sending out information about vacancies, you might usefully point out this requirement to potential governors. You could also advise the search committee to include a question on this when interviewing potential governors.

Section 3 Whistleblowing

The term whistleblowing describes a situation where an employee or ex-employee publicly discloses wrongdoings within an organisation such as fraud, financial mismanagement, breach of health and safety or environmental laws, or any other danger.

This kind of public disclosure leaves the whistleblower extremely exposed because it is likely to breach obligations which are implied in all employment contracts (eg fidelity, trust, and most importantly, the duty not to use or disclose the employer's trade secrets or confidential information). (For more information see *Module 4 Section 1*.)

Until recently, it was common for colleges to extend these implied duties by explicitly adding confidentiality requirements or 'gagging clauses' to their contracts of employment. A breach of these conditions is often classed as gross misconduct justifying summary dismissal. Both the Public Accounts Committee and the second report of the Nolan Committee opposed the use of these clauses to inhibit the disclosure of maladministration or the misuse of public funds.

The need to protect whistleblowers from victimisation was recognised in the Public Interest Disclosure Act 1998 (PIDA). The PIDA is intended to encourage all employers to adopt procedures which promote openness and communication and which provide members of staff with clearly defined routes for making internal and external disclosures.

In summary, the PIDA protects a **worker** who discloses certain types of information within certain circumstances. The term 'worker' covers people who are self-employed as well as employees who work under a contract of employment or apprenticeship. To qualify for protection the worker making the disclosure must reasonably believe that one of the following **qualifying grounds** applies:

- that a criminal offence is being or is likely to be committed
- that a person has failed, is failing or is likely to fail to comply with a legal obligation
- that a miscarriage of justice has occurred, is occurring or is likely to occur

- that the health or safety of any individual is likely to be in danger or that the environment has been, is being or is likely to be damaged
- that information about a matter in one of the categories above has been, is being or is likely to be deliberately concealed.

If the disclosure fits these qualifying grounds, it is a **protected disclosure** provided that the worker has made it in good faith to a person or body specified in the PIDA, including:

- the employer
- some other responsible person if the worker believes that the relevant failure relates solely or mainly to the conduct of that person or to any other matter for which that person has legal responsibility (For example, a member of staff is concerned that health and safety requirements are being breached by a placement provider and that the safety of college students may be at risk. He may want to raise his concerns with the placement provider.)
- another person indicated in the procedure authorised by the employer
- a legal adviser in the course of obtaining legal advice.

Where the disclosure is made externally, (eg to the funding council, DfES, other public authority or the media) there are additional burdens placed on the whistleblower. These include showing reasonable grounds for believing the disclosure was substantially true, that it was not made for personal gain and that the disclosure was reasonable in all the circumstances. The additional requirements increase depending on whether the disclosure is made to a person or regulatory body as prescribed by the Secretary of State (such as the Inland Revenue, Data Protection Registrar or the Health and Safety Executive), and on whether it relates to some exceptionally serious failure, or is a general external disclosure.

The Nolan Committee recommended that further and higher education corporations should institute codes of practice on whistleblowing and this was endorsed by the report of the National Committee of Enquiry into Higher Education. A code of practice should encourage members of staff to raise genuine concerns about malpractice internally, without fear of adverse treatment. The procedure should balance safeguards for members of staff who raise genuine concerns about malpractice against the need to protect staff, the governing body, students and the college itself from unfounded allegations.

Activity Reviewing your whistleblowing procedure

Does your college have a whistleblowing procedure in place? If it does, get hold of a copy and consider whether it covers the following elements of good practice:

- ☐ There should be designated members of staff to act as an accessible first point of contact for those members of staff with concerns.
- ☐ Those staff members should receive training for this role.
- ☐ Their names should be made available to all staff members.
- ☐ They should interview those concerned with the complaint. The member of staff raising the concerns should be accompanied at all interviews by a local trade union representative or a work colleague if they so wish.
- ☐ Following the interviews, the designated staff members should make recommendations to the principal on a confidential basis.
- ☐ The principal should decide what further action, if any, to take and the member of staff who first raised the concerns should be notified of the decision.
- ☐ The procedure should remain confidential at all times.
- ☐ Where the allegations concern one of the designated members of staff or the principal, there should be arrangements within the procedure for discussing the matter with, or having it considered by, someone else.
- ☐ No disciplinary action should be taken against the member of staff because of a disclosure made by them in accordance with the procedure, nor should the staff member be victimised because of their actions.
- ☐ There should be a procedure for the clerk to refer unresolved concerns to the funding council, the DfES or appropriate public body.

Viewpoint

This activity may have suggested ways in which you might further develop your own governing body's procedure. If there is no procedure in place, this should be something you discuss with the principal and chair and then raise as an item to be considered by the governors. Having an appropriate procedure will help to ensure that the college's response to a whistleblowing situation complies with the law and adequately protects the people involved.

The next activity gives you an opportunity to consider how you would apply the whistleblowing procedure to a specific situation.

Activity Whistleblowing case study

You have just received a phone call from a rather irate chair of governors. He has received at his home an anonymous letter telling him that the principal of Learnwell College, Mr Larry Flash, (who is currently on holiday in Mauritius), has been fiddling his expenses. In particular, the letter claims that the cost of his current trip has been paid for by the college. Attached to the letter is a copy of an expenses claim form in the sum of £5,232 for travel to Mauritius for the purpose of interviewing a new personnel manager and a copy of a letter from AWOL Travel to the principal confirming reservations for a holiday for two in Mauritius at a cost of £5,232.

The chair informs you: 'If someone is not prepared to stand by these allegations and put their name to them then I do not believe it warrants any investigation. I have worked with Larry Flash now for six years and trust him implicitly. The best place for this letter is the bin. We don't want this sort of person working at the college'.

A whistleblowing procedure has been on the governing body's list of outstanding matters for a long time but has not yet been implemented.

- 1 What advice would you give the chair?
- 2 What practical steps would you take in response to the letter?
- 3 What would you do if there appeared to be some truth in the allegations?
- 4 What would you do if you or someone on the governing body found out who wrote the letter?

Viewpoint

Compare your own ideas with the suggestions below:

- 1 You must make it clear to the chair that he cannot simply ignore this matter and hush it up. The allegation concerns a potentially serious misuse of public funds and the college as custodian of these funds needs to investigate fully. If it is ignored, the sender of the letter may raise these concerns elsewhere – with the funding council, the local MP, or possibly the press.
- 2 As a first response, you could discuss with the chair how to make urgent preliminary investigations to establish whether the letter is a hoax or whether there is some truth in it. This could be done by checking the

original expenses claim and speaking to the relevant travel company. These investigations could be made by the chair with your help.

- 3 If there appears to be some truth in the disclosure, it must be properly investigated. Depending on the facts which come out in the preliminary enquiry, it may be something which can be dealt with internally, perhaps under the leadership of the chair, or it may be necessary to instruct the external auditors to prepare a report. You may want to inform the college's legal advisers and, after investigation, the governing body and possibly the funding council.

Depending on the circumstances it may be necessary to suspend the principal and to take disciplinary action against him.

- 4 If, during the course of the investigation, the identity of the sender is revealed, the sender may be protected under PIDA. If the sender had a reasonable belief that the principal was defrauding the college it would count as a qualifying disclosure, provided it was not made for an ulterior motive. Disclosing the information to the chair (in the absence of a policy stating otherwise) would count as a protected disclosure. Dismissing someone who makes a protected disclosure would be automatically unfair. The member of staff may also assert his or her right to freedom of speech. Care should therefore be taken before instigating any disciplinary action. If the letter is a hoax and sent as such then disciplinary action may be appropriate.

This situation shows how important it is to have a whistleblowing procedure in place. Such a procedure gives both the whistleblower and the college clear guidelines on the right course of action.

Section 4 Equal opportunities

The promotion of equal opportunities should be at the heart of everything a college does, from appointing members of the governing body to the relationships between the college and its staff, its students and the wider community. It is fundamental to the drive for social inclusion and the raising of standards in education. It is important that everyone, regardless of gender, race, background or disability, has access to further education.

Equal opportunities in itself is not a legal concept but it is supported by a raft of legislation of which the most important is:

- the Equal Pay Act 1970
- the Sex Discrimination Act 1975

- the Race Relations Act 1976
- the Disability Discrimination Act 1995
- the Human Rights Act 1998
- the Learning and Skills Act 2000
- the Special Educational Needs and Disability Act 2001
- the Race Relations (Amendment) Act 2001.

The law in this area is complex and you will certainly not be expected to be an expert on it. This section summarises some of the main legal provisions before looking at what the college should be doing to promote equal opportunities generally.

Sex and race discrimination

Under the Sex Discrimination Act 1975 (SDA) it is unlawful to discriminate against any person on the grounds of his or her sex. It is also now unlawful to discriminate on the grounds of a person's sexual orientation.

Under the Race Relations Act 1976 (RRA) it is unlawful to discriminate against any person on the grounds of colour, race, nationality or ethnic or national origins.

The provisions of these two acts apply to the college's dealings with its staff and with its students (including potential staff and students).

The Race Relations (Amendment) Act 2001 imposes a new duty on colleges to promote racial equality. It also extends the application of the RRA to all the activities of the college, not just its dealings with staff and students.

There are three types of discrimination: direct, indirect and victimisation

- **Direct discrimination** occurs when individuals are treated 'less favourably' than other people because of their sex or on racial grounds. The motive or intentions behind the 'less favourable' treatment are irrelevant. For example:
 - a female student on a work placement scheme in an all-male workplace is withdrawn 'to protect her from being hassled'
 - an Asian applicant who is well qualified for a post in a college department with an all-white staff is rejected 'because he won't fit in'.

Direct discrimination cannot be justified, although in the employment context there are circumstances where sex or ethnicity is regarded as a genuine occupational qualification. (See below).

- **Indirect discrimination** is discrimination against one sex or racial group which prejudices an individual, whether or not the intention is to discriminate. Colleges need to ensure they do not impose conditions on staff or students which might constitute indirect discrimination.

These conditions are illustrated in the following example of sex discrimination:

- a college imposes the same condition or requirement on both men and women staff (for example the requirement for all support staff to work full time) but the proportion of women who can comply with the condition or requirement is considerably smaller than the proportion of men who can. The requirement to work full time is not justifiable irrespective of sex or race. The requirement is to the detriment of a woman member of staff: for example she has to leave the college because she is unable to work full time.

Below is an example of indirect racial discrimination:

- a retail chain requires all students on work placement at its outlets to wear company uniform including a baseball cap. This requirement excludes a young male Sikh student who wishes to wear a turban on religious grounds. This could amount to indirect discrimination if it is applied as a blanket policy without considering a solution that takes account of the Sikh student's religion (eg a standard issue turban in uniform colours, as in the police force).
- Individuals who assert their rights under the SDA, RRA and the Equal Pay Act 1970 are also protected against **victimisation** (ie from being treated less favourably because they are asserting these rights). This protection extends to someone giving evidence or information on behalf of someone else asserting their rights (eg someone who attends an employment tribunal to help a colleague bringing a sexual harassment claim).

Sexual harassment is a form of sexual discrimination under the SDA. Sexual harassment is unwanted conduct of a sexual nature affecting the dignity of women and men, and can include physical, verbal or non-verbal behaviour. It is for the individual to decide what behaviour they find unacceptable and offensive.

Sex and race discrimination and college staff

Discrimination can occur at any stage in the relationship between the college and its staff: the advertising of vacancies; the recruitment and appointment of staff (including the terms of employment); access to training and other facilities or services; promotion and dismissal.

There are exceptions where selection for employment on the grounds of sex or race is permissible because it is a 'genuine occupation qualification'. These include where:

- the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or for reasons of authenticity in a dramatic performance or entertainment
- the job requires an individual of a certain sex to preserve decency or privacy, eg the requirement for a female attendant to work in a women's toilet and washroom area
- working in a restaurant or bar where a person of a particular racial group is required for reasons of authenticity, eg in a Chinese or Indian restaurant
- the job consists of providing people of a particular sex or racial group with personal services promoting their welfare and those services can be most effectively provided by a person of that sex or racial group (eg an Asian woman counsellor to provide counselling services to Asian teenage girls).

Under both the SDA and RRA a college governing body is legally responsible for acts of discrimination by its staff carried out during the course of their employment. This is known as vicarious liability (see *Module 4 Section 4*). This is so whether or not the discrimination took place with the college's knowledge or approval. It is a defence, however, to show that the college took reasonable practicable steps to prevent the staff member from doing the act complained of. This is why it is important that the college does everything it can to raise awareness of equal opportunities and to make it clear that discrimination of any kind will not be tolerated.

For example, if staff member Joe Bloggs sexually harasses staff member Mary Smith at work, the college is liable for that conduct (as is Joe) unless it shows that it has taken reasonable steps to prevent the harassment. As a bare minimum, the college will have to show that all members of staff have received equal opportunities training, that there is a well-enforced procedure in place, and that it has dealt promptly and harshly with any alleged sexual harassment by Joe or by any other member of staff.

Activity Sexual harassment

The European Code of Practice on Dignity of Women and Men at Work makes various recommendations on how to combat sexual harassment. Some key recommendations are set out below. How far does your college comply with them? Put a tick or cross in the boxes below.

- ☐ Do you have a policy which expressly states that all staff have the right to be treated with dignity, that sexual harassment at work will not be permitted and that staff have the right to complain about it should it occur? This should be in addition to any general equal opportunities policy.

- ☐ Are all staff made aware of the policy so that they know of their right to complain and how they should go about it? This should be in addition to any general equal opportunities policy.
- ☐ Do managers and supervisors receive training so that they are aware of the factors which contribute to a working environment free of sexual harassment?
- ☐ Does the policy designate individuals to provide help and assistance to staff?
- ☐ Are there formal and informal methods for dealing with allegations of sexual harassment?
- ☐ Does the college disciplinary code state that sexual harassment will be treated as a disciplinary offence?
- ☐ Does the policy (and the disciplinary code) explain what conduct could constitute sexual harassment? This might include physical contact, suggestions, comments or gestures, insults, inappropriate statements, comments or jokes of a sexual nature or the display of offensive material or publication of offensive graffiti.

Viewpoint

This activity may have helped you to identify gaps in your own college's sexual harassment procedure and/or other anti-discrimination measures.

Although there is no legal statutory requirement to have a sexual harassment policy in place, it is advisable to have one to raise awareness of the issues. An agreed and publicised procedure serves to curb offensive behaviour in the first place and enables the college to deal with any instances in a sensitive and effective manner. A college which has no policy and takes no steps to curb this behaviour is more likely to be found vicariously liable for sexual harassment committed by a member of staff. A word of warning, though – if your college does have a policy and procedure it is vital that it follows it!

Your governing body should also consider racial harassment and disability harassment procedures, if there are none in place.

Sex and race discrimination against students

A college might unlawfully discriminate against students:

- at the admission stage (including refusing a place or indirectly discriminating in admission requirements)
- in how it provides access to college benefits, facilities or services
- when excluding students.

In addition there is a general duty on colleges to ensure that facilities for education and any other benefits or services are provided without sexual or racial discrimination.

It is a good idea to consider sexual, racial and disability harassment procedures for students, to parallel those in place for staff.

Disability discrimination

In sex and race discrimination law, the emphasis is on ensuring that all social groups are treated equally. Disability discrimination law requires employers and providers of goods and services to demonstrate careful consideration of the *individual's* circumstances.

The Disability Discrimination Act 1995 (DDA) specifically covers the employment relationship and the general provision of goods and services (such as the college's creche provision for students) but excludes the provision of educational services to students.

However, under the DDA, the funding council must require colleges to publish a disability statement as a condition of funding. The disability statement should be approved by the governing body and published annually.

When the Special Educational Needs and Disability Act 2001 comes into force it will require colleges not to discriminate against people with disabilities in the way they provide educational and other services to students. The Disability Rights Commission will publish codes of practice which will give practical guidance on complying with these new duties.

Activity Reviewing your college's disability statement

Review your college's disability statement to make sure it complies with the Education (Disability Statements for Further Education Institutions) Regulations 1996. Check that it covers the following points:

- ☐ college policies on the provision of facilities for education
- ☐ the name of staff members with special responsibility for 'disabled persons'
- ☐ admission arrangements
- ☐ educational facilities and support
- ☐ arrangements for handling complaints and appeals
- ☐ additional support or special arrangements during examinations and assessments
- ☐ counselling and welfare arrangements
- ☐ physical access to educational and other facilities.

Viewpoint

If this review suggests that there are gaps in the scope of your college's disability statement, you may want to note down the areas for action in the *Action planner*, and discuss them with the principal or chair of governors.

Disability discrimination and staff

The meaning of 'disability' and 'disabled person' is crucial to the operation of the DDA. A person has a disability if he has a 'physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day to day activities'. A disabled person is a person with such a disability.

Under the DDA discrimination occurs if an employer:

- for a **reason relating to the disabled person's disability** treats that individual **less favourably** than a person without that disability and/or
- fails to comply with the duty to make reasonable adjustments and
- cannot show that such treatment or failure is justified (see below).

Such treatment or failure can only be justified if it relates to the individual circumstances of a particular case and it is a substantial reason. For example:

- an applicant who has psoriasis (a skin condition) is rejected for a job which involves modelling cosmetics on a part of her body which is severely disfigured by the condition. This would be justified if her appearance is incompatible with the purpose of the work.
- an employer does not shortlist a blind applicant for a job involving computers, believing that blind people cannot use computers but without making any effort to find out about the applicant's particular circumstances and skills. This would not be justified.

The college has a duty to take positive steps in certain circumstances to accommodate the requirements of individual disabled job applicants and members of staff. This is sometimes referred to as duty to make reasonable adjustments. Such steps include:

- allocating some of the disabled person's duties to another person
- altering the disabled person's working hours
- acquiring or modifying equipment
- providing a reader or interpreter
- arranging training
- making physical adjustments to premises.

The duty is to take such steps as are reasonable in all the circumstances. The college can therefore undertake a cost/benefit analysis when considering what adjustment to make.

Other types of unlawful discrimination

It is unlawful to refuse to employ someone because s/he is or is not a member of a trade union (the Trade Union and the Labour Relationship Consolidation Act 1992).

The Equal Pay Act 1970 is designed to ensure that men and women within the same employment receive equal pay for equal work. Governing bodies are responsible for ensuring that payment systems are legally compliant and fair.

The Human Rights Act 1998 considerably widens the discrimination laws in this country. We will look at the Act in more detail in *Section 5* below. However, it is worth noting that the following rights are secured under the Act.

- Respect for private and family life: this will cover discrimination by a college on the grounds of sexual orientation.
- Freedom of thought, conscience and religion: this will cover discrimination by a college on the grounds of political opinion or religious belief.
- The Act also provides that the rights and freedoms set out in the European Convention on Human Rights shall be secured 'without discrimination on **any** ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, in association with nationality, minority, property, birth or other status'.

This last point goes much wider than our existing discrimination laws. It does not however provide a **general** right to freedom from discrimination. Article 14 (the prohibition of discrimination in the enjoyment of Convention rights) can only be invoked in conjunction with one of the other Convention rights. For example:

- a mature student aged over 60 has been excluded from college. He believes the real reason he has been treated this way is because of his age. He can not bring a claim under Article 14 alone, but he may be able to argue that he his right to a fair hearing (Article 6) has been infringed and he has been discriminated against unjustifiably on the grounds of his age (Article 14).

What do equal opportunities mean in practice for the clerk?

To consider what this means for the clerk we need to look at the governing body's role in promoting equal opportunities. The governing body needs to consider how the college and its management are responding to the following responsibilities:

- ensuring there is no unlawful discrimination
- acting positively where appropriate
- ensuring awareness of diversity issues
- promoting the college's ability to respond to a diverse student body and community at large
- reporting on equal opportunities as required by the Learning and Skills Act 2000.

To avoid unlawful discrimination, the governing body needs to ensure that the job descriptions of key staff include a requirement to be aware of discrimination issues as they affect particular areas of college activity. The governing body also needs to ensure that all the relevant equal opportunities policies and procedures are in place, that staff and students are aware of them, and that key staff are trained in their importance. Such policies should be kept under review.

Activity Reviewing your equal opportunities policies and procedures

Below is a list of policies and procedures which colleges should have in place to ensure that equal opportunities are adhered to. It is likely that some of these are more worked out than others. How would you rate your own college's policies and procedures in this area?

- 1 Which of the items below do you consider thorough and practical, and which would benefit from more work? Score each on a scale from 1–5 where 1 equals 'very useful' and 5 equals 'not much use'. Be honest!
- 2 How often are they reviewed?
- 3 How adequate is the review procedure?

Score

1–5

- ☐ equal opportunities policy for staff and for students
- ☐ procedures for dealing with harassment complaints (sex, race, disability) by staff and students
- ☐ disability statement
- ☐ staff recruitment and appointment procedures to address these issues
- ☐ student admissions policies to address these issues.

Viewpoint

If this activity has highlighted any areas that you consider to be weaknesses in your college's approach to equal opportunities, decide whether you need to discuss them with the chair or principal and note down what action you will take in the *Action planner*.

As public bodies entrusted with the education of young people and adults, colleges should strive for best practice on these issues, which means going beyond the minimum required by statute. Although we are more enlightened today in our attitudes towards social diversity, there is still some way to go. The Macpherson Report into the murder of Stephen Lawrence served as a stark reminder that institutions are likely to discriminate unless they actively seek not to, and it can take years for changes to become embedded. For example, there has been an increase since 1993 in the number of female principals but there are still only a handful of black principals among over 400 further education colleges. Women and black people are under-represented at senior levels in further education.

As well as making sure the college does not unlawfully discriminate, governors could consider measures to redress existing inequalities or past discrimination. They may want to aspire to a situation where staffing reflects the student body or the community it serves. The student body is likely to be diverse. Promoting diversity in the workforce can help ensure that staff reach all students effectively and that students' needs are met. One strategy might be to advertise posts in the ethnic minority press. The college may also want to think of ways to target students from minority backgrounds – for example by distributing some publicity in languages other than English, or targeting publicity at ethnic minority organisations who work with young people.

The governing body could start with itself in its aim to make the college an inclusive organisation. Ideally the governing body should reflect its community but frequently this is not the case. It may be appropriate to establish an equal opportunities committee with external membership that reflects the diversity of the local population. Governors, particularly those on the search committee, may wish to undertake training in equal opportunities. Whatever the issue under

consideration, the governing body and clerk should aim to lead by example and ask, 'How will this affect equality of opportunity within the college?'

Section 5 Human rights

This section looks at colleges' legal responsibilities for ensuring the individual freedoms set out in the Human Rights Act and at their specific responsibilities for academic freedom and freedom of speech.

The Human Rights Act

The Human Rights Act 1998 (HRA) incorporates the European Convention on Human Rights ('the Convention') into UK domestic law. Convention rights are now directly enforceable in the UK courts. The HRA has important implications for colleges but the extent of those implications will only emerge as the law is tested.

The Human Rights Act:

- makes it unlawful for a public authority to act in a way which is incompatible with Convention rights (see box below); it creates a new cause of legal action against public authorities in the UK courts
- requires all legislation to be interpreted so as to be compatible with the HRA wherever possible. Where it is not possible to do this, the courts generally have the power to quash subordinate legislation such as statutory instruments. The courts cannot set aside primary legislation but they can make a 'declaration of incompatibility' in order to prompt government action to amend the legislation
- requires UK courts and tribunals to take into account the case law of the European Court in Strasbourg.

The Convention Rights

The Convention guarantees a number of rights and freedoms. These include the right to:

- not suffer degrading or inhuman treatment – **Article 3**
- a fair trial – **Article 6** (see below)
- respect for private and family life, home and correspondence – **Article 8**
- freedom of thought, conscience and religion – **Article 9**
- freedom of expression – **Article 10**
- freedom of assembly and association – **Article 11**
- prohibition of discrimination in the enjoyment of Convention rights – **Article 14**
- peaceful enjoyment of possessions and protection of property – **Article 1 of First Protocol**
- access to education – **Article 2 of First Protocol**.

With the exception of Article 6, the rights set out above are 'qualified rights': interference with them is permissible only so long as what is done:

- has its basis in law
- is necessary in a democratic society, ie it must fulfil a pressing social need, pursue a legitimate aim and be proportionate to the aims being pursued (an important concept known as ' the principle of proportionality') and
- is related to one of the permissible aims set out in the relevant article (eg for the protection of public health and order or for the protection of the rights and freedoms of others).

This means that at times a balance has to be struck between competing interests such as the rights of a particular student or member of staff against the rights of others at the college and the public interest.

Are colleges public authorities?

The HRA does not define what a public authority is. Some bodies are clearly public authorities, such as local authorities, courts, DfES, OFSTED, Adult Learning Inspectorate (ALI), the funding councils and maintained schools. Such public authorities must comply with the HRA in all their activities.

The HRA also covers private organisations which carry out functions of a public nature but only in respect of their public functions, not their private functions.

There has been some debate as to whether colleges are pure public authorities or whether they fall into the hybrid category. There is a strong argument that further education corporations (FECs) as statutory corporations are pure public authorities, but some commentators regard them as hybrids. Colleges with different legal structures (eg designated institutions) are likely to be regarded as hybrid public authorities. The significance is that if the college is regarded as a hybrid, the HRA will cover the college's relationship with students (ie the provision of education) which will be regarded as a public function but not the college's activities as an employer which will be seen as private. However, until the matter is decided by the courts it is safest to err on the side of caution and ensure that your college complies with the HRA in all its activities.

Article 6 The right to a fair trial

This states that everyone in the determination of their 'civil rights or obligations' is entitled to a **fair** and **public hearing** within a **reasonable time** by an **independent and impartial tribunal**.

How does this affect colleges? The requirements of Article 6 may be satisfied if there is a right of appeal to a judicial body which in itself complies with the requirements of Article 6. This is the case where a member of staff who is dismissed has the right to bring a claim before an industrial tribunal. In the case of an excluded student, however, sometimes the only legal action they can bring is one of judicial review. This is only a limited review and does not itself satisfy the requirements of Article 6. Therefore if a student is excluded following a disciplinary procedure which does not comply with the requirements of Article 6 the college may have infringed this right.

Nobody can say with certainty how the HRA will impact on the relationship between the governing body and college staff and students until we have a body of case law which tells us how the courts interpret the Act. Some articles, however, are likely to be more relevant than others. The following activity gives you a chance to think about aspects of college functions that might be affected.

Activity Human rights

Which rights or freedoms could potentially be infringed in the following situations? Look back at the table of Convention rights and decide which articles, if any, you think might apply to the following activities.

- monitoring staff email communications
- asking staff to undergo medical checks
- disciplining a whistleblower for disclosing information to a local councillor
- declining to allow Muslim and Jewish staff time off for major religious holidays
- refusing a place to a student applicant
- excluding a student after exam failure
- holding exams on a religious holiday observed by ethnic minority students.

Viewpoint

You, as the clerk, do not need to be an expert on the HRA. Governors will, however, want to know that someone in the college's management team is keeping their eye on the ball. This activity is intended to alert you to the possible implications of some college activities. We suggest you compare your own thoughts with the discussion and further explanation below, bearing in mind that no-one yet knows what case law will decide in the future.

Rights of staff

If colleges are hybrid public authorities their employment activities may not be covered by the HRA. The dividing line between public and private activities, however, may not always be clear and colleges should bring a respect for human rights to the forefront of all they do.

- **Article 3** – the right not to suffer degrading or inhuman treatment could be breached in instances of serious sex and race discrimination which cause humiliation and mental distress.
- **Article 8** – the right to respect for private and family life could be infringed by a number of common activities including:
 - CCTV surveillance
 - monitoring email communications
 - recording staff phone calls
 - medical checks or compulsory or random drug testing.

These are, however, qualified rights and can be overridden where there is lawful justification. For example monitoring of emails may be justified if its purpose is to ensure that offensive or abusive emails are not sent, thereby protecting the rights and freedom of others. (It is also worth noting that the Telecommunications (Lawful Business Practice) (Interception of Telecommunications) Regulations 2000 give employers quite wide powers to intercept communications.)

- **Article 9** – freedom of religion could be breached where an employee is not able to practise their religion, for instance people of minority faiths not being allowed time off for religious holidays.
- **Article 10** – freedom of expression. The PIDA (see *Section 3*) may be subject to a challenge of compatibility because only a limited number of disclosures are protected and these must be to certain ‘designated’ persons. The restrictions might compromise the right to freedom of speech. (See the information below on academic freedom and freedom of speech).

Rights of students

Students will be able to rely on the rights of privacy and family life, religion and freedom of expression just as staff will be able to do.

- **Article 9** – where the institution has significant numbers of students with religious faiths whose major festivals occur during term-time, reasonable attempts should be made to avoid holding exams on those days.
- Students may wish to rely on the right to education set out in **Article 1 of the First Protocol** to the Convention, for example in trying to dispute a refusal of a place or to challenge exclusion after exam failure. However, it is unclear whether the right to education extends beyond compulsory school age. The Court of Human Rights has held that universities are entitled to insist that an applicant has the ability to pass the course and this is likely to apply to many courses offered by further education colleges.
- However, once a student is on a course they will have contractual rights against the institution which are likely to be civil rights. When an institution makes a decision affecting these rights they will have to respect the right to a fair trial set out in **Article 6**. Before a student is excluded they will need to have had a fair hearing by an impartial person not previously involved, held in public in most situations, if the student wishes. Reasons for the decision should be given.

We hope this exploratory discussion of the HRA has shown how important it is that the college reviews its internal procedures, and keeps them under review to make sure that they are HRA compliant. If the college wishes to do something which may infringe the rights of students or staff it is important that such action is the subject of a clear policy statement so that students and staff are aware of what the college is doing, that it can justify the action under the provisions of the HRA and that the interference with rights and freedoms is kept to an absolute minimum.

Academic freedom and freedom of speech

Article 10 reinforces the importance of the principles of academic freedom and freedom of speech, which are closely related. These principles have long been regarded as of vital significance by the education sector and were already enshrined in our legislation.

The principle of academic freedom is embedded in the articles of government of further education corporations and often repeated in the contracts of employment of academic staff and in staff disciplinary procedures. This right is linked to intellectual property rights and the use of the internet to disseminate materials. It reflects the importance which society attaches to the right of individuals to pursue lines of teaching or research which may be unpopular or controversial. One of the effects of Article 10 may be to extend the right of academic freedom to all staff, not just academics.

Under the provisions of the Education Act (No. 2) 1986 the governing body of a college is required to take such steps as are reasonably practicable to ensure freedom of speech within the law for students, members of staff and for visiting speakers. Governing bodies are also required to ensure that no one is denied the use of college premises on the grounds of his or her beliefs, views, policies or objectives. A code of practice setting out the procedures for meetings held on the premises and the conduct expected of those attending should be maintained.

Activity Reviewing the values which underpin the work of the clerk

You may find it useful to review the topics covered in this module and to identify any areas in which you would feel you would benefit from additional training or development, or further legal advice. Use the checklist below to help you identify the areas in which you consider you are fairly knowledgeable and those in which you feel less confident. Note down any areas to follow up in the *Action planner*.

Score 1–5 where 1 equals not at all confident, and 5 equals fairly knowledgeable.

- | | |
|--|--|
| <input type="checkbox"/> Nolan principles | <input type="checkbox"/> Disability discrimination law |
| <input type="checkbox"/> Code of conduct | <input type="checkbox"/> Equal opportunities policies and procedures |
| <input type="checkbox"/> Register of interests | <input type="checkbox"/> Harassment procedures |
| <input type="checkbox"/> Public Information Disclosure Act | <input type="checkbox"/> Disability statement |
| <input type="checkbox"/> Whistleblowing procedure | <input type="checkbox"/> Human Rights Act |
| <input type="checkbox"/> Sex discrimination law | <input type="checkbox"/> Freedom of speech |
| <input type="checkbox"/> Race discrimination law | <input type="checkbox"/> Academic freedom |

Viewpoint

The social and ethical values which underpin the work of further education colleges are codified in a complex legal framework. You cannot be an expert in all areas, but you need to be aware of this framework and clear about when to seek further legal advice. You also need to be aware of best practice within the sector so that you can encourage your governing body to achieve high standards, not simply the minimum required by law.

You will find it very valuable to compare your college's approach to these issues with that of other colleges. Regular contact with other clerks will enable you to exchange information and ideas about developing best practice. You will find contact details for the Association of College Registrars and Administrators (ACRA) – the clerk's professional association – and other useful organisations in the ***User's guide***.

Module review

This module has looked at the ethical and moral values which govern and influence your work as a clerk and the guidance you provide to your governing body. If you have worked through this module you should be able to:

- explain how the Nolan Committee's seven principles of public life impact on the activities of the governing body and your role as clerk
- describe your role in relation to the governing body's code of conduct and conflicts of interest
- set out the reasons for having a whistleblowing policy
- explain the governing body's role in ensuring that the college promotes equal opportunities
- explain the clerk's responsibilities in relation to whistleblowing, equal opportunities and human rights and identify when specialist advice needs to be sought.

Summary of key learning points

The recommendations of the Nolan Committee and its seven principles of public life have had an important impact on governance of further education colleges and on your role as clerk.

Governing bodies need to consider ways of becoming more responsive to their key stakeholder groups.

Every governing body should have an agreed code of conduct as well as a register of governors' financial and other interests.

A whistleblowing procedure is important to provide guidelines for staff wishing to raise concerns about wrongdoings within the college (eg fraud, financial mismanagement or health and safety issues) and guidance to the college on how to deal with such disclosures.

Whistleblowers are protected by the Public Interest Disclosure Act from dismissal or victimisation provided the disclosure meets the criteria set out in the Act.

It is unlawful to discriminate against students and staff on the grounds of sex, marital status, sexual orientation, colour, race, nationality or ethnic or national origins.

It is unlawful to discriminate against staff for reasons relating to their disability or to fail to make reasonable adjustments to accommodate the requirements of staff or job applicants. This includes modifying equipment, altering working practices and making physical alterations to premises.

The provision of educational services is not covered by the Disability Discrimination Act, but will be covered by the Special Educational Needs and Disability Act when it comes into force. Every college is required to publish a disability statement annually. This should be approved by the governing body.

The governing body should start with itself in the promotion of equal opportunities within the college and thus lead by example.

The implications of the Human Rights Act 1998 for colleges are as yet uncertain but it will have an impact upon a number of the college's activities.

Academic freedom and freedom of speech are fundamental to the activities in a college: they reflect the importance which society attaches to the right to express views or pursue lines of teaching or research which may be unpopular or controversial.

The law on whistleblowing, equal opportunities and human rights is complex. You need not be an expert on these legal areas but you need sufficient awareness of the law to provide guidance to the governing body and to know when legal advice should be sought.

The values discussed in this module cannot be looked at in isolation. They impact on all the issues looked at in the other modules. They should underpin all the activities of the governing body.

Where next?

You have now completed work on *Module 2 Values and ethical framework*. If there are areas in which you need more guidance or information, they may be covered in other modules in the pack. Turn to *Check your current knowledge and skills* in the ***User's guide***. This self-assessment questionnaire will help you to decide which modules or sections of modules may help to fill these gaps. Tick the useful sections for further study.

If you cannot find the information you need within this pack, turn to the *Action planner* in the ***User's guide***. Note down what further information, support or guidance you would like. The *Action planner* gives advice on who may be able to help, and how.

Putting it into action

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

Further reading

The Committee on Standards in Public Life has its own website at www.public-standards.gov.uk. You may find it useful to look at:

The Second Report Of the Committee on Standards in Public Life May 1996 Volume 1: Report (Cm 3270-I) published by The Stationery Office, or you can access the full text, abstract or summary online.

The Fourth Report of the Committee on Standards in Public Life: Review of Standards of conduct in executive NDPBs, NHS Trusts and local public spending bodies November 1997 is available online as an abstract or summary.

To order free copies of summaries of the Committee's reports and other free documents, telephone Freefone: 0800 692 1516

The Home Office website has some useful information on the Human Rights Act. This can be found at www.homeoffice.gov.uk/hract/guidelist.htm

Acknowledgements

The *Clerks training materials* were produced by a partnership of national organisations involved in further education:

ACRA The Association of College Registrars and Administrators is a national organisation which provides professional support to business managers and clerks. The services for clerks include seminars, conferences and network meetings to share good practice and become familiar with new initiatives.

LSDA The Learning and Skills Development Agency is one of the leading research and development organisations operating in the field of post-16 education. Its mission is to be a strategic national resource for the development of policy and practice in post-16 education and training.

AoCSW The Association of Colleges, South West is the regional arm of the national Association of Colleges (AoC) which represents further education colleges and provides a range of services to members.

Eversheds is one of the leading firms of legal advisers to the education sector in the UK, working with over 300 further education colleges.

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values and
ethical framework



clerks training materials

module

3

the main statutory framework

a professional development programme
for corporation clerks in FE colleges

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Note

The Learning and Skills Development Agency
was formerly known as FEDA.

*For suggestions on how to get the most out of these self-study materials, see the **User's guide**.*

Introduction

This module looks at the main statutory framework within which the college's governing body conducts its business. To work effectively as a clerk you need to understand this framework. In particular you need to:

- understand the legal structure of the college, its legal powers and duties, so that you can act as constitutional adviser to the governing body
- know the college's governing instruments, and the procedures and division of responsibilities set out in them, to ensure that the governing body properly manages and conducts its business.

This module does not stand on its own. It is meant to be read together with *Module 2 Values and ethical framework* and *Module 4 The wider legal framework*.

In this module there is a substantial amount of technical information that is essential for the job of clerk. About half the module is devoted to the clerk's responsibilities in relation to the powers of the governing body and the instrument and articles of government. For convenience we have broken these larger topics up into short sections. Powers are covered in *Sections 4–6* and instrument and articles in *Sections 7–10*. This division is an artificial one to provide the reader with manageable chunks of learning. All the sections on each topic should be studied as a whole.

Please bear in mind that some of the legal issues covered in this module are extremely complex. The aim is to give you an overview and awareness of these issues. It is not an exhaustive guide nor is it a substitute for appropriate legal advice.

Aims

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

- explain the legal structure of your college and how it affects the governing body's activities
- state the implications of a college's charitable status
- list your college's powers and the consequences of acting outside them
- explain the need for caution when setting up subsidiary companies or entering into a joint venture

- state your responsibilities under the instrument and articles
- identify the occasions when the corporation seal should be used
- specify the lines of accountability regulating your college.

Contents

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

To do Done

<input type="checkbox"/>	<input type="checkbox"/>	Section 1 An overview of the statutory and legal framework
<input type="checkbox"/>	<input type="checkbox"/>	Section 2 Legal structure and legal personality
<input type="checkbox"/>	<input type="checkbox"/>	Section 3 Charitable status
<input type="checkbox"/>	<input type="checkbox"/>	Section 4 The powers of further education governing bodies: the clerk's responsibilities
<input type="checkbox"/>	<input type="checkbox"/>	Section 5 Powers: subsidiary companies, joint ventures, and dissolution
<input type="checkbox"/>	<input type="checkbox"/>	Section 6 Powers: mergers and acquisitions
<input type="checkbox"/>	<input type="checkbox"/>	Section 7 Instrument and articles of government: the clerk's responsibilities
<input type="checkbox"/>	<input type="checkbox"/>	Section 8 Instrument and articles: membership of governing bodies
<input type="checkbox"/>	<input type="checkbox"/>	Section 9 Instrument and articles: delegation and the committee structure
<input type="checkbox"/>	<input type="checkbox"/>	Section 10 Instrument and articles: authorisations and the corporate seal
<input type="checkbox"/>	<input type="checkbox"/>	Section 11 Accountability

Note that Sections 4–6 Powers and 7–10 Instrument and articles look at the law only as it applies to further education corporations (FECs), unless stated otherwise. Note also that the material in this module takes into account the statutory changes to the instrument and articles of FECs introduced on 1 April 2001.

Working on the self-study activities

These materials have been designed for flexible use, so that you can work through sections and activities in your own time and at your own pace if you would find it difficult to attend external training sessions. Some clerks point out the value of working on at least some of the suggested activities together with another clerk or group of clerks, as there is much potential to learn from each other's experience. You might find it useful to become involved in a local or regional clerks' network in which training materials might be used.

For suggestions on how to organise this kind of support for yourself, see the *User's guide*.

What you will need

To complete activities in this module you will need the following:

- a copy of your college's instrument and articles of government – you will find it useful to read these over carefully before starting work on the module
- for *Section 9 Activity Reviewing terms of reference* you will need a copy of the terms of reference for your governing body's key committees.

Where you need to make notes in response to activity questions, we suggest you do this in a notebook or on separate sheets of loose-leaf paper, and store the information you compile along with the module for future reference.

Section 1 An overview of the statutory and legal framework

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

The FHEA has been amended by subsequent legislation: notably the Disability Discrimination Act 1995, the Education Act 1996, the Employment Rights Act 1996, the School Standards and Framework Act 1998, the Teaching and Higher Education Act 1998 and the Learning and Skills Act 2000 (LSA). These are referred to as primary legislation.

Many of the provisions of these acts are brought into effect by Orders of the Secretary of State, which are known as statutory instruments. These are referred to as secondary legislation, and include the instrument and articles of FECs.

The Department of Education and Skills (DfES) also issues, as appropriate, advice and guidance on the legislation in the form of circulars and administrative memoranda.

You need to be familiar with these acts, their associated secondary legislation, the relevant guidance and the funding council circulars to be able to provide competent constitutional advice to the governing body and to manage its business. In addition, the activities of the governing body are also subject to a raft of legislation dealing with things such as equal opportunities and human rights (*Module 2 Sections 4 and 5*) and employment, data protection and health and safety issues (*Module 4 Section 8*). You also need to be aware of these.

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

- contractual obligations such as those arising from contracts with the college's staff, students and suppliers
- duties imposed by the courts which are not based on either legislation or contract. These are common law duties, and the law relating to them is established through case law. They include the duties of loyalty and good faith, and of care, diligence and skill which governors owe the governing body because they are in a fiduciary position (a position of trust).

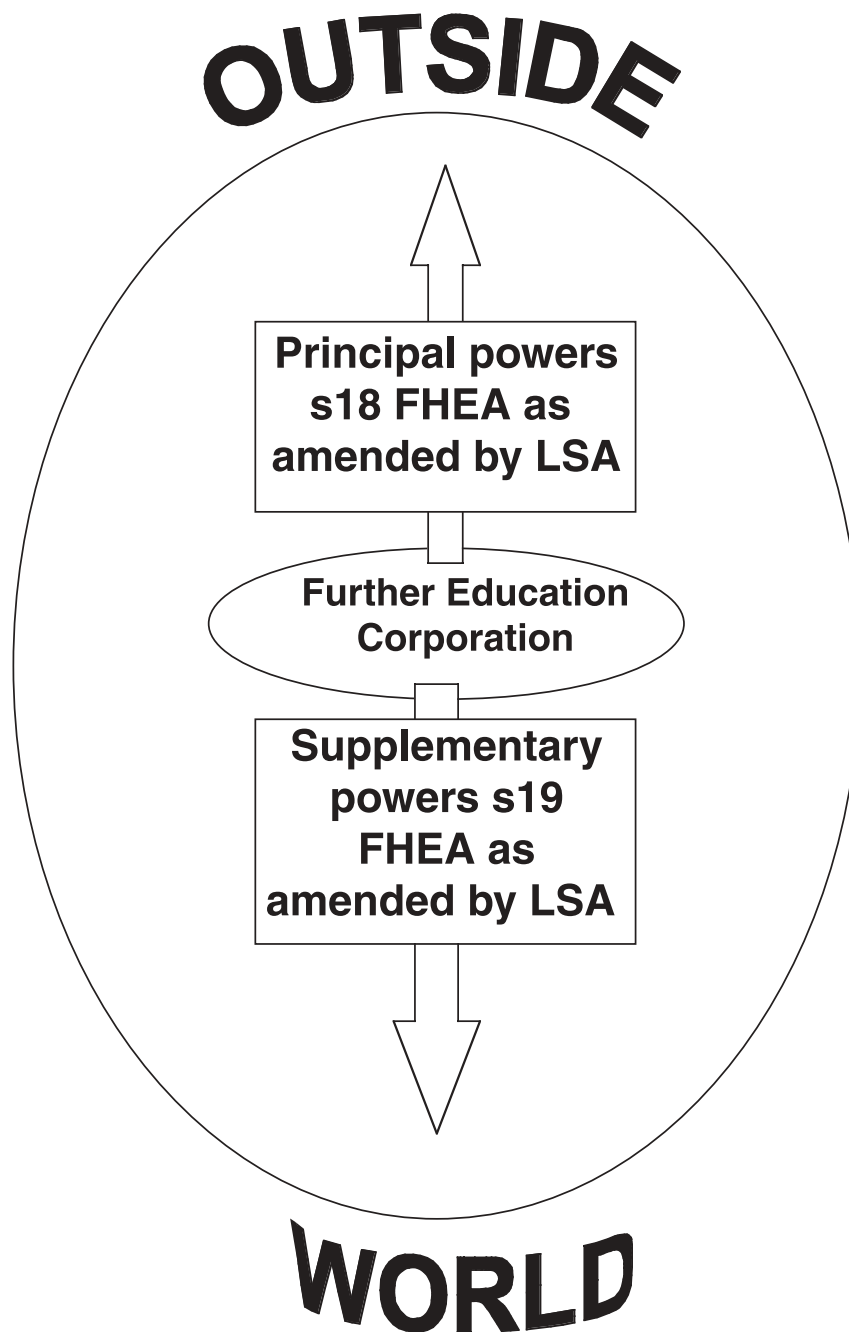
The governing body therefore has statutory, contractual and common law duties. All three types of duties may govern its relationships and activities. We will see this when we look at the relationships with staff and students in *Module 4*.

Section 2 Legal structure and legal personality

Statutory governing bodies

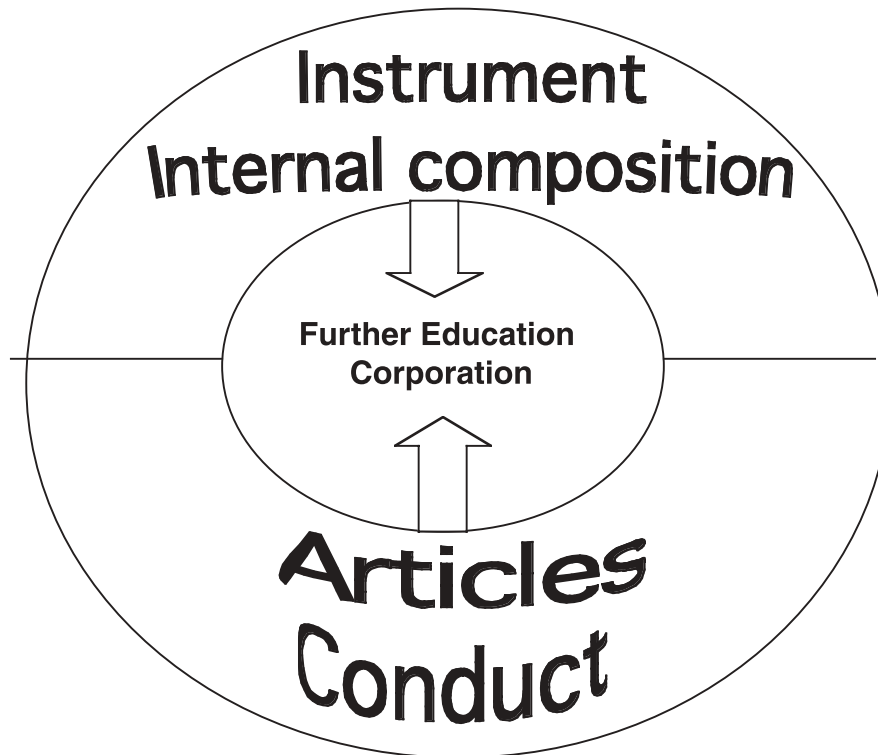
Most FE colleges are statutory corporations set up by order of the Secretary of State under the FHEA. A statutory corporation exists only for the particular purposes which Parliament intended. These purposes (or what we will refer to as powers) are set out in sections 18 and 19 of the FHEA, as amended by the LSA. These statutory powers govern the relationship between the FEC and the outside world.

Figure 1 Legal relation of FEC to the outside world



See *Sections 4–6* for more details on the powers of the FEC. In addition, the FEC is governed by its instrument and articles of government. These are prescribed in regulations made by the Secretary of State under powers established by the FHEA. The instrument and articles set out the college's composition and procedures and its internal powers, responsibilities and duties. These govern the internal management of FECs.

Figure 2 The legal framework controlling the internal relations of the governing body



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

Designated institutions

A few colleges are collectively known as designated institutions. Generally, these are colleges which were not previously maintained by an LEA or were former voluntary aided sixth-form colleges. These colleges have a variety of legal structures:

- companies limited by guarantee, registered under the Companies Acts 1985 to 1989. The governors will usually be directors and members of the company. The company is governed by its memorandum (which sets out the main objects of the company) and the articles of association which set out its internal procedures, rights and responsibilities
- colleges governed by trust deeds
- unincorporated associations which are created with very little formality

- designated sixth-form colleges: these have now been incorporated by the Secretary of State pursuant to powers under the LSA. This makes these colleges statutory corporations, but they differ from FECs in that their powers are set out in their trust deeds and articles 5 and 6 of the Education (Designated Sixth Form Colleges) (Incorporation) (England) Order 2001 and they will have their own instrument and articles.

The other types of designated institution will also generally have their own instrument and articles (or memorandum and articles of association) which have been approved by the Secretary of State.

Legal personality

Those colleges with a corporate status (statutory governing bodies and companies limited by guarantee) have a legal identity which is distinct from the identities of the governors. With this separate legal identity the college can assume rights, duties and liabilities in its own name.

Colleges which do not have a corporate structure (those created by trust deed which do not also have a corporate status and unincorporated associations) do not have this separate legal identity and cannot be held responsible for their actions. It is, as a general rule, the individuals (ie the governors who are trustees) who must take personal responsibility at law for the college's activities. An important consequence of this is that, on the insolvency of a college, creditors may be able to claim against the assets of the individual governors whereas they cannot do so in the case of a college with a corporate structure.

Activity What is your college's legal structure?

Make a note of the legal status of your college. Note down what, if any, implications this has for governors.

Viewpoint

It is important that governors know what the legal status of their college is, and understand the implications of this, especially if it is unincorporated. You should check that all the governors are aware of its status and the implications of this for their personal liability.

Section 3 Charitable status

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

- **Registered charities:** most designated institutions are registered as a charity with the Charities Commission and are subject to the provisions of the Charities Act 1993. The Charity Commissioners exercise supervision over registered charities and have the power to act for the protection of the charity (for example by suspending the trustees or governors).
- **Exempt charities:** FECs are exempt charities for the purposes of the Charities Act 1993. They do not fall under the direct supervision of the Charities Commission. The rationale is that they are adequately supervised by other bodies such as the funding council, the Inland Revenue and the National Audit Office. FECs are therefore not registered with the Charities Commission, cannot describe themselves as a registered charity and do not have a registered number. There is an expectation, however, that governors of FECs will follow the standards set out by the Charities Commission.

Because colleges are charities, governors are required to:

- act in accordance with the charity's powers and its charitable objects (ie to act as an educational charity), promote the interests of the charity and ensure that its assets are applied only for its charitable purpose (ie the provision of education)
- safeguard the assets of the charity.

Special care must be taken when organising trading activities which may not be regarded as charitable or where, for example, the college wants to make a payment or gift which is not related to the provision of education. The same considerations apply to student unions which will usually be unincorporated associations with charitable status. (See *Module 4 Section 3*).

Charitable status has a number of tax implications.

- Colleges are exempt from capital gains, income and corporation taxes on income arising from carrying out the college's primary purpose – the provision of education. Income generated from a college's trading activities will only be exempt if the trade is exercised in the course of carrying out the provision of education and training. The work must be mainly carried out by the students.
- Colleges are exempt from the payment of stamp duty where, for example, a property is transferred from one charitable body to another.

Activity Making ex gratia payments

The governing body has been asked to give its approval to the college sponsoring a national athletics championship which is being held in the locality. This is a major event in the region and everyone is very keen that the college should be seen to support the championship. The sum involved is not large and the expenditure has been approved by the finance committee. Can you see any problems with such a payment?

Viewpoint

You must be cautious when considering the payment of such a sum because it may well not fall within the college's charitable objects – ie the provision of education and training. This payment could therefore be 'ultra vires' (see *Section 4*). It should only be made if the governing body is satisfied – and can show – that making the payment will benefit the long-term interests of the college and further its educational objects; for example, the governing body may have gathered evidence that sponsoring this event would attract more students to the college.

Other examples where care must be exercised include the governing body commissioning some form of memorial to a former member of the college or making an ex gratia payment to a retiring member of staff .

The governing body must also ensure that the provisions in the financial memorandum are complied with, so that it can demonstrate that any ex gratia payments are 'regular, secure value for money and are affordable', and that public funds are being used solely to meet contractual obligations. For example, an ex gratia payment to a retiring senior manager would be regarded by the Learning and Skills Council (LSC) as inappropriate if there was or had been dissatisfaction with the senior manager's conduct.

Section 4 The powers of further education governing bodies: the clerk's responsibilities

Sections 18 and 19 of the FHEA

Although we looked briefly at the college's powers in *Module 1*, they are so crucial to the college's activities that we shall recap them here.

Section 18, as amended by section 142(1) of the LSA, sets out a further education corporation's principal powers. These are to:

- provide further, higher and secondary education and to participate in the provision of secondary education at a school
- supply goods or services in connection with the provision of education.

Section 19, as amended by Schedule 9 (paragraph 22) of the LSA sets out the FEC's supplementary powers. These are basically to do anything necessary or expedient for the exercise of the principal powers. This specifically includes:

- conducting an educational institution
- providing facilities such as accommodation and recreational facilities for staff and students
- acquiring and disposing of property
- entering into contracts such as employing staff
- borrowing money and granting security (subject to the consent of the funding council)
- investing money
- subscribing or otherwise acquiring shares or securities in a company (see below).

What happens if an FEC does something it does not have the power to do? – the principle of ultra vires

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

Such a decision is open to challenge in the courts and may be declared invalid and void. Examples of this would be borrowing without the required consent of the funding council, or carrying on a trading activity which is wholly unrelated to the provision of further education and training. Various consequences flow from a decision being ultra vires: the college could not rely on, or enforce contracts arising from the decision; and any contracting parties who suffer loss as a result of the void agreement may have a claim against the college. Governors may be personally liable for such a loss.

You need a sound understanding of the limitations imposed by your college's powers and charitable status to successfully fulfil your role as constitutional adviser to the college. Whenever your governing body proposes to do something which falls outside the key provision of education and training you need to ask: 'Have we considered whether the college has the power to do

this, and does it fall within our charitable objects?' Whenever there is any doubt, you should recommend that external professional advice be sought.

Activity What is your college empowered to do?

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

- 1 Your college has entered into a joint venture agreement with a local private provider. A company has been formed in which the college and the private provider hold equal shares. The governing body of the college is asked to approve the college's acting as guarantor on a bank loan to be taken out by the company.
- 2 The college has established a subsidiary company to deliver private sector training. The governing body is asked to approve the college's acting as guarantor on a lease being taken out by the subsidiary company. There is no suitable college accommodation from which the company can conduct its training activities and leasing the premises is seen as essential to this purpose.
- 3 Your college has an excellent media studies department which has close links with a local radio and recording studio. Part of the department's courses are taught at the studio. The studio is in some financial difficulties and the college is proposing to take it over. The studio has some ongoing long-term commercial contracts which will need fulfilling. The governors are asked to approve the acquisition of the studio.
- 4 The college's students union (which is an exempt charity) has some surplus assets and the members have voted to make a gift of £2000 to Comic Relief.

Viewpoint

- 1 Acting as guarantor for the joint venture company is likely to be outside the college's charitable objects and therefore ultra vires.
- 2 The situation here is different from 1 above in that the company is a wholly owned subsidiary of the college and is carrying out training activities. Care must always be taken if the college is asked to act as guarantor but this may be a situation where it is permissible.

- 3 Whether this acquisition is something the college has the power to do depends on the extent of the commercial contracts and what the college intends to do with the studio. If the main purpose for which the studio will be used relates to the delivery of media courses, this is not ultra vires. If, however, the college is going to run the studio as a commercial enterprise with the training as an ancillary activity this could well be outside its statutory powers and charitable objects.
- 4 The assets of the student union can only be applied for the purpose of its charitable objects. These will be set out in the union's constitution but will normally relate to the promotion of the educational and social welfare and interests of the students. These objects are different from those of Comic Relief. So although this is a very worthy charitable cause the union cannot make the gift: it would be ultra vires. The position would of course have been different if the union had held a fundraising event to raise money specifically for Comic Relief.

Section 5 Powers: subsidiary companies, joint ventures and dissolution

The FEFC in Circular 99/14 advised that subsidiary companies could only be formed for the purpose of carrying out activities on behalf of the FEC. This means that subsidiary companies cannot do anything outside the scope of the permitted activities of the FEC. This guidance provided clarification by confirming that FECs could establish subsidiary companies even though the FHEA did not expressly give them this power.

The LSA now gives FECs an express power to form subsidiary companies. This would apply to any company which a college has power to form or participate in, including a company limited by guarantee. However, such companies cannot be used for the purpose of conducting an 'education institution', or providing publicly funded education or training, without the approval of the Learning and Skills Council. It is possible that blanket exemptions may be issued. Where there is doubt about a transaction, specific consent of the Learning and Skills Council should be sought.

For the time being, there is no reason to consider that the Learning and Skills Council will stray far from past guidance issued by the FEFC. Before establishing a subsidiary company it remains important to consider whether your college has power to do so.

When a subsidiary company is set up, a memorandum of understanding should be entered into between the FEC and the subsidiary company in accordance with Circular 99/14. Clerks sometimes act as the company

secretary of a subsidiary company. In *Module 4 Section 8* we shall look at the key responsibilities which this entails.

The FEFC and the National Audit Office's *College Companies and Joint Ventures: A Good Practice Guide* provides useful guidance on this area and should be read in conjunction with FEFC Circular 99/14.

VAT considerations: VAT is a real cost to colleges. Put simply, colleges pay VAT but because they do not charge it themselves they cannot recover it. With major projects (eg the redevelopment of a building) it is worth seeking professional advice to see whether a VAT saving scheme can be used. This is sometimes one of the main reasons for setting up a subsidiary company.

Under the Value Added Tax Act 1994 a college is an 'eligible body' which is exempt from charging VAT. Subsidiary companies, on the other hand, do not have VAT eligible body status. They charge VAT and can normally reclaim VAT on their costs. This has advantages for the college and might also be beneficial to customers if they can reclaim VAT. Some organisations have taken this route to provide training services to NHS Trusts for example.

Colleges should be aware that setting up a subsidiary might have certain VAT disadvantages. Registration with HM Customs & Excise (Customs) may be required. If so, VAT records will have to be maintained for Customs to inspect periodically. Supplies made by a subsidiary to its college parent might create an additional cost for the latter. The subsidiary would not usually be able to make VAT exempt supplies to the college because it would not have the same VAT eligible body status as the college.

This is a complex area. The balance of VAT advantages and disadvantages of a subsidiary company means that colleges are well advised to take professional advice before committing themselves.

Joint ventures

FECs can only enter into joint ventures which are in furtherance of their powers. Any monies involved must advance the FEC's charitable purpose, ie the furtherance of education. For example, an FEC cannot enter into a joint venture with a private sector company and act as guarantor for the joint venture company as this would not be acting within its charitable objects. Charities must ensure that they do not give assets away to non-charitable bodies. It may be advisable to discuss investment aspects with the Charity Commissioners, who are able, under section 26 of the Charities Act 1993, to give consent to any investment which is of doubtful charitable status.

Any investment of monies by the FEC must be a prudent and safe investment which, according to the Learning and Skills Council, satisfies the requirements of the Trustee Investment Act 1961, as amended by the Trustee Act 2000: ie the FEC should only put money into a joint venture in return for a tangible benefit.

Any college considering entering into a joint venture should consult FEFC Circular 99/14. This requires colleges to establish a memorandum of understanding between the college and the company to ensure that the college's dealings with the company are open and transparent.

Activity Assessing a joint venture proposal

Learnwell College has participated in a collaborative bid with three other colleges and a private partner to establish an IT skills centre of excellence. The bid was successful. The match funding from each college is £100,000 per partner with the private partner contributing £150,000.

A joint venture company, called Computer Services Limited, is to be established to own the centre and deliver the training. Each partner is to purchase shares in the company. Learnwell's investment is to be £100,000. The business plan for the centre is being prepared.

Members of the governing body are requested to:

- approve the investment of £100,000 in shares in Computer Services Limited
- approve Learnwell College's involvement in a joint venture company.

Make a note of the key issues that should be covered at the meeting and the potential problems that you should draw to the governing body's attention.

Viewpoint

The establishment of an IT skills centre of excellence is on the face of it within the powers of a FEC as it relates to the advancement of education. You should be prepared for the complexity of the joint venture, which will need agreements in place to regulate the relationship between the parties and to deal with issues such as voting rights, deadlock provisions and redemption rights. Legal advice will be required.

The funding of the joint venture company is a potential problem. Commercial companies normally require profits to be distributed according to shares, but charitable companies do not make distributable profits. The preferred structure

for a joint venture company would be a company limited by guarantee. Other methods of funding, such as a loan, must be made on commercial terms and at a commercial rate of interest.

Note that the consent of the funding council for secured or unsecured lending may also be required under the financial memorandum.

Dissolution

FECs are created according to statute and can only be terminated according to statute. The only way a FEC can be dissolved is by an order of the Secretary of State (under section 27 of the FHEA), who will transfer the governing body's liabilities and rights to other similar organisations (subject to duties of consultation). There is no general statutory insolvency regime for FECs as there is for companies under the Insolvency Act 1986.

Section 6 Powers: mergers and acquisitions

This section describes the process of merger of FECs. There are no statutory procedures for merger of FECs with designated institutions or with outside bodies (such as adult education services); however, because such a proposal would have a significant impact on the FEC, it may be useful to follow a similar process.

In principle, there are two approaches to mergers between FECs.

- Dissolution of both bodies (by the Secretary of State under section 27 of the FHEA) and the creation of a new body (under section 16 of the FHEA) to which the assets and liabilities are transferred. This is commonly known as a 'model A' merger.
- Dissolution of one body with the transfer of assets and liabilities to the remaining body which may or may not change its name. This is commonly known as a 'model B' merger.

In both cases the procedure for merger, which is dependent on a decision taken by the Secretary of State, is closely regulated (see FEFC Circular 98/36).

The choice of route depends on the relative strength and size of the parties: generally model A will be regarded as more appropriate where the FECs in question are of comparable strength and size, whereas model B will be chosen where one FEC is demonstrably weaker than the other.

Model A involves the establishment of a new governing body. The Secretary of State may suspend the normal provisions relating to the advertisement of senior posts. For either type of merger to succeed, there must be strong commitment to it from governors, managers, staff, external partners, and the other institutions that have to be consulted under merger procedure.

Model B can often appear as an 'acquisition' of one FEC by another. Such a merger will involve the assimilation of existing staff, and, ideally, the appointment to the continuing governing body of some governors of the dissolving corporation.

The clerk's role in relation to any proposed merger is a rigorous one. In particular, you should ensure that governors discharge their fiduciary duty to act only in the interest of their existing college, for example by sustaining its financial health, improving its asset base and advancing its education mission. A proposal to merge should therefore be evaluated solely in terms of the long-term interest of the college for which governors are now responsible. In evaluating a proposal, governors also have responsibilities to the staff in general and senior postholders in particular, in keeping with their primary duty to safeguard and develop the educational business of the college wisely.

You must also ensure that the merger negotiations proceed in accordance with an action plan and that the action plan satisfies the specific requirements of the funding council. In particular:

- 1 The governing bodies of both institutions will need to approve in principle the proposal for merger, including which model is the preferred route. It is often advisable to record this in a simple heads of agreement entered into by both FECs.
- 2 Your FEC should reach an agreement on feasibilities and an exploration of other options.
- 3 A strategic plan for the new (or enlarged) entity needs to be prepared.
- 4 Fall-back plans should also be prepared in case the merger is not approved.
- 5 The strategic plan must be underpinned by a strong financial plan.
- 6 Due diligence studies should be carried out – financial, legal, commercial and, where appropriate, environmental.
- 7 A shadow governing body should be established, comprising an appropriate mix of members from both existing governing bodies. Careful thought needs to be given to the composition of the shadow governing body.

- 8 The identity of the principal of the new (or enlarged) entity and that of other senior postholders needs to be addressed. This may require, in the event of there being a vacancy to fill, public advertisement and a selection process which complies with the requirements of the articles of government.
- 9 You should ensure that governors are aware of the relevant inspection report, and of the outcome of the funding council's consultation with interested social and economic communities, partners and competitors, and staff and students.
- 10 If the due diligence exercise discloses material weaknesses in the other FEC, the governing body may wish to impose conditions which need to be satisfied before the merger can proceed. These are often described as 'conditions precedent'.
- 11 If the merger submission is approved by the Learning and Skills Council, there will be a submission to the Secretary of State who will decide whether to approve the merger and authorise the relevant orders, including a change of institution or name.

This is a complex procedure requiring you to advise governors on a regular basis. During this process it is standard good practice for clerks to seek professional advice and guidance from 'mentor' colleges that have successfully negotiated a merger.

Note that the process and the concerns will be different where a college is merging with a higher education institution.

Activity Advising on college mergers

You are the clerk of Changewell Community College which has a strong and effective governing body. Following a detailed feasibility study, the college's principal is in discussion with the principal of a neighbouring tertiary college. This college offers a complementary range of courses, but is facing serious financial difficulties as a result of a possible funding 'claw-back' and the early retirement of its principal.

The governors of your college are concerned about the implications of the merger. In particular the steps that should be taken to ensure the college is not harmed and that the governing body is not weakened by it. Look back over the section and make brief notes on the points that you would include in your briefing for the chair of the governing body.

Viewpoint

This is likely to be a model B merger which will mean that the tertiary college will be dissolved and its undertaking transferred to Changewell. This will be carried out by order of the Secretary of State. The corporation of Changewell Community College will continue, but after the merger inclusion of some of the tertiary college's governors on Changewell's governing body will be desirable to ensure continuity.

You will need to suggest mechanisms for including the transferred governors on the Changewell governing body, such as:

- increasing the determined membership of the Changewell corporation
- modifying the variable categories of membership
- leaving open any vacancies on the Changewell governing body arising from governors retiring before the projected merger date.

It would be good practice to establish a steering group consisting of, at least, the principals and chairs of Changewell Community College and of the tertiary college. You should also recommend that appropriate professional advice is taken on the next steps, especially in relation to carrying out due diligence investigations into the tertiary college.

Highlight the responsibility of the Changewell governors, under the college's articles of government, to protect Changewell's educational character and mission, ensure its solvency, and safeguard its assets.

Remind the governors of their fiduciary duty to act prudently and reasonably at all times. This requires the critical examination of all the merger proposals including an assessment of the consequences of merging and not merging, and consideration of other options.

Governors need to understand that mergers between two FECs are made by order of the Secretary of State, and not by contract between the two merger partners. They also need to be advised that it is not possible for Changewell to protect itself from undisclosed liabilities by obtaining warranties and indemnities from the tertiary college. There may, however, be scope for the Changewell corporation to state that it cannot proceed with a merger unless key conditions are satisfied, for example the agreement of the Learning and Skills Council to waive its claim to 'claw-back' in whole or part.

Discuss with your chair the possibility of the steering group drawing up some simple and non-legally binding heads of agreement which both governing bodies can consider and approve. They could cover such matters as: the rationale for the merger; the choice of 'model B' as the preferred route; the proposed name of the enlarged college; the composition of a shadow governing body; the identity of the principal and other senior postholders

after the merger; staffing and property issues; and an initial action agenda. The heads of agreement can be an important framework document which will help inform and direct the merger process.

You will then be ready to prepare a draft plan showing the composition of the shadow governing body with variable options, and a more detailed action agenda. These can be discussed by the steering group.

There are many opportunities for misunderstandings during merger negotiations, and they can easily throw the merger off-track. You should ensure that there are excellent external communications between the two governing bodies, and excellent internal communications between the governors, principal and staff of Changewell College. You should also advise Changewell governing body on which parts of the deliberations and merger papers should be declared confidential.

Section 7 Instrument and articles of government: the clerk's responsibilities

The most important single document for a clerk is the college's instrument and articles of government. This document is key to managing the college's business properly and ensuring that the governing body acts lawfully. The instrument sets out the governing body's constitution and procedures and the articles set out the college's internal powers, duties, and responsibilities. All clerks need to be conversant with the instrument and articles (or memorandum and articles of association) for their college. This section looks at the instrument and articles for FECs. These differ from those of designated institutions although many of the principles will be the same.

Clerks also need to be familiar with standing orders. These are the rules that the governing body has adopted to guide the conduct of meetings. Standing orders deal with things such as:

- the election of chair and vice-chair
- how meetings are convened
- voting
- terms of reference for committees
- publication of agendas and minutes
- declarations of personal interest.

The clerk's responsibilities under the instrument and articles

In *Module 1* and *Module 6* we look at the specific division of responsibilities as set out in the articles between the governing body and the principal. We discuss the importance, and at times difficulties, of maintaining the distinction between governance and management and the clerk's role.

The instrument and articles provide for the appointment of the clerk but do not define the clerk's role. As we discussed in *Module 1*, the only specific legal requirements are for you to:

- receive written notice that a governor has been disqualified
- receive written notice that a governor wants to resign
- maintain a register of governors' interests
- summon meetings and send out agendas.

As well as monitoring whether the college is acting within its powers and advising on constitutional issues, the clerk usually takes on responsibility for various requirements set out in the instrument and articles. These include:

- servicing meetings – ensuring they are quorate and that voting is properly carried out
- maintaining the register of members, monitoring membership and making sure appointments are properly made
- making sure the governing body has a proper system of delegation
- supporting committees and working groups, including the audit and the search committee (see below) and any special committee.

We will now look briefly at servicing meetings, maintaining the quorum, and voting.

Servicing meetings

The governing body is the supreme decision-making body of the college and meetings are the primary way in which the governing body takes its decisions. We will look at your role in servicing meetings in more detail in *Module 6*. In summary, however, the main provisions to be aware of are that:

- there must be at least one governing body meeting a term
- meetings of the governing body must be summoned by the clerk giving at least 7 days written notice, along with agenda and papers
- only an agenda sent by the clerk has authority

- all papers received by the governing body are available for public inspection unless an item covers a named current or prospective employee or student, or is deemed confidential (see *Module 6 Section 10*).

You will also be responsible for preparing the minutes of the meetings of the governing body

Quorum

Decisions taken at meetings of the governing body are only valid and binding if the meeting is quorate. This requires at least forty per cent of the total membership of the governing body (which includes any positions vacant but unoccupied and any governors appointed by the Learning and Skills Council) to be present for a decision to be valid.

A student member under 18 may not vote at a meeting of the governing body or of one of its committees on any question which involves a commitment to expenditure, makes a contract, or incurs a debt or liability.

When working out how many governors are required for a meeting to be quorate, it is better to err on the side of caution and round up rather than down: for example, 40 per cent of a total membership of 18 governors is 7.2, so the appropriate quorum for this governing body is eight governors.

The quorum requirement applies not only to the start but throughout the meeting. In practice, the numbers present at a meeting change constantly as members arrive late, leave early or declare an interest. It is essential for you to keep a note of who is attending, when they arrive and when they leave. If the meeting becomes inquorate you should immediately inform the chair and the meeting should normally be stopped as any decisions made will be invalid. It is, of course, possible to continue informal discussions.

If a meeting cannot be held or continued because it is inquorate, and the agenda item is urgent, the chair can call a special meeting to be summoned as soon as convenient.

The instrument does not apply the 40 per cent rule to committee meetings, although many college committees adopt this practice. The terms of reference for each committee should clearly state its required quorum to avoid any confusion. The requirements in the instrument for governors and the clerk to withdraw in certain circumstances now also apply to committee meetings.

Activity Calculating the quorum

You are clerking a full governing body meeting of Knowmore Sixth-Form College, and have received a number of apologies from governors who can not attend. There are six governors, including a student governor, present at the meeting. The total number of governors is 14. There are currently two vacancies. One of the items on the agenda relates to the appointment of a new department head.

The governing body has standing orders which require the student governor to leave the meeting while any matter concerning a current or prospective member of staff is discussed. A student complaint against a lecturer is on the agenda.

Another agenda item is to approve the refurbishment of the college sports hall at a cost of £30,000. One of the governors present has declared an interest in this matter under the college's code of conduct as his son is a director of the proposed contractor's firm.

Note down any problems you see with proceeding with the meeting.

Viewpoint

For the meeting to be quorate, 40 per cent of the total membership of the governing body should be present. The total membership for this purpose includes any current vacancies. The quorum is 40 per cent of 14, ie six people. The meeting is therefore quorate at its start and can proceed as six governors are present.

The meeting will become inquorate when the student member has to leave during discussion of the student complaint. You will need to inform the chair and stop the meeting when this happens. In these circumstances, it may be appropriate to defer consideration of this item to the next meeting, and announce this at the start of the meeting.

This highlights a problem which a governing body can incur through having blanket policies. The instrument does not require student governors to leave in these circumstances. It only requires the student governor to leave if another governor requires it. Whether this is appropriate depends on what exactly is being discussed. In any event the student governor must not take part in the discussion or vote on the appointment. A governor who is entitled to be and is present at a meeting can, however, count as part of the quorum even though they are not entitled to vote.

A student governor under 18 could not vote on the refurbishment as this commits the college to £30,000 of expenditure. Again, however, the student governor can count as part of the quorum.

In this case, another governor has declared an interest. Under the instrument a governor cannot form part of the quorum if that governor has either a financial interest in the matter under discussion or any other interest of a description specified by the governing body. So, although there is no general legal requirement to disclose the financial interests of family members, because the college's code of conduct requires such a disclosure the governor cannot form part of the quorum.

Voting

The instrument specifies that every question to be decided at a meeting should be determined by a majority of votes of members present (including those attending by video conference) and eligible to vote, with the chair having the second or casting vote in the event of a tie. Proxy and postal votes on behalf of absent governors are not permitted.

In practice, most decisions taken at a meeting are not decided by a formal vote. The chair simply asks the governing body for their agreement, and only calls for a vote if there is a clear expression of dissent, or if there are significant items, such as the approval of the annual budget.

Aspects of the voting procedures not dealt with in the instrument are likely to be covered by standing orders, for example, when a secret ballot should be held.

Section 8 Instrument and articles: membership of the governing body

The clerk usually takes on responsibilities under the instrument for servicing the membership of the governing body. These include:

- maintaining a record of the membership of the governing body, and monitoring its composition to ensure that it complies with the instrument
- ensuring that appointments to the governing body are made in accordance with the instrument
- monitoring membership to ensure that the governing body has sufficient members to form a quorum. The Secretary of State has the power to appoint new governors to the governing body of a college with insufficient members to form a quorum.
- maintaining a register of governors' interests.

For more details on the composition of governing bodies and the register of interests see *Module 1 Section 2*.

Activity The clerk's role in supporting the search committee

Governing bodies are required to establish a search committee to advise on the appointment of members. Listed below are some of the ways in which you can help the search committee and governing body to achieve this.

Work through the list and note any points you are unsure of.

- ☐ Ensuring the process of appointment is open and transparent, and takes into account the seven principles of public life (see *Module 2 Section 1*)
- ☐ Planning for succession by anticipating vacancies
- ☐ Advising on the balance of membership taking into account members' experience and skills, and equal opportunities
- ☐ Advising on selection methods
- ☐ Arranging the elections of staff, student and, where applicable, parent governors
- ☐ Informing new governors of their appointment
- ☐ Checking that appointments are accepted and providing new governors with essential information and adequate training.

Viewpoint

You may find it useful to refer to *Module 6* of these materials or to the *Governor Training Materials Module 8 The search committee* if there are any areas of responsibility that you are not clear about.

Appointment of governors

There has been uncertainty in the past over the appointment of nominated governors and, in particular, whether the governing body has the right to reject a nomination. The changes introduced to the instrument with effect from 1 April 2001 are designed to clarify this area. The governing body can decline to appoint parent, staff and student nominated members who are otherwise eligible only if:

- they have been removed from office as member of a FEC within the last ten years, or
- their appointment would contravene rules made by the governing body on the number of consequential terms which members (whatever the category) can serve.

In relation to local authority and community nominated members, the governing body now has the specific legal right, in addition to the grounds

mentioned above, to reject them if they do not have the specified skills and experience. It is therefore vital that the skills and experience required of a nominated governor are discussed and, ideally, agreed with the nominating body. If no such consultation has taken place and the nominating body is unaware of these requirements, then the governing body will not be able to reject the nomination on this ground. It is also advisable for the governing body to reach an agreement with the prospective nominating bodies on the selection criteria *before* their nominating role is even confirmed. Thus, if an agreement cannot be reached, the governing body is free to approach another nominating body.

In summary, there are four distinct stages in the nomination and appointment of local authority and community members. They are:

- after reaching agreement on selection criteria, the governing body appoints a local authority or community body eligible to nominate
- the nominating body nominates a proposed member
- the search committee considers the nominee's suitability in accordance with the relevant selection criteria, and makes recommendations to the governing body
- the governing body decides, on the basis of the advice of its search committee, whether or not to make the appointment.

Local authority nominations to the governing body

The instrument of government provides for at least one and not more than three governing body members to be local authority nominees. The nominating local authority/ies are appointed by the governing body. Local authorities may nominate anyone to the board. They do not have to nominate a councillor or council officer.

The number of local authority positions can be reviewed at any time within the limitations of the provisions of the instrument. The retirement of an existing local authority nominee provides an opportune time for reviewing whether the most appropriate local authorities have been selected. Realistically it may not be possible to make changes because of the geography of the area and/or the partnerships that are in place. An increase in the number of local authority members may also affect the number of business members given that business members should equal one-third of the total membership (rounded as appropriate).

Appointments can be for any period up to four years. Many governing bodies adopt this as the norm with the exception of the student member, but the term is for the governing body to determine having regard to local circumstances. For local authority nominees, account should be taken of the date of the local

elections and the likelihood of a change in political control. If there were to be a change in political control, it might be helpful to reflect this in the composition of the governing body.

Eligibility

The clerk has the responsibility for checking that anyone under consideration meets the terms of the nomination category that they are entered for, and is not disqualified for any of the reasons specified in the instrument. These state that:

- a person under the age of 18 shall not be appointed (unless nominated as a student governor)
- members of staff, other than the principal, and students are ineligible except those nominated to specific staff or student positions
- the clerk is ineligible
- certain specific circumstances disqualify a serving governor and render a person ineligible for appointment. These include bankruptcy and the incurring of a prison sentence.

You should make sure that all governors and prospective governors are aware of these provisions because it is their responsibility to declare any impediment to their ability to serve or to continue in service.

The governing body should consider the period of each appointment, which must not exceed four years. The instrument says that members retiring at the end of their term of office are eligible for re-appointment, but the Nolan Committee recommended that as a general rule members should not serve more than two terms (a maximum of eight years). A balance needs to be struck between retaining good existing members and introducing new blood. It is highly desirable that appointments do not all come to an end at the same time.

The clerk or chair should send all newly appointed governors a letter confirming their appointment and its terms. These should include, as a minimum, the category of membership, the start date, and the length of the appointment. New governors should be informed of the circumstances disqualifying a person from being a governor. They should also receive a copy of the college's instrument and articles of government; any standing orders; details of the committee structures and memberships; a copy of the *Governor Training Materials*; and a copy of *The College Governor*.

In accordance with company law it is advisable to record, in a register of members kept by the clerk, all appointments, the category of the membership, the term of membership, and its termination date.

Activity Nominating governors

The governing body of Learnwell College includes a member nominated by the local authority. The existing member has resigned, and the search committee has asked you to arrange a new nomination with the chief executive of the local authority.

The local authority nominates Mr Whistle. Both the chief executive of the authority and you realise that this could be difficult. It is widely known in the local community that Mr Whistle resigned from the governing body of the neighbouring sixth-form college following a leak to the press of confidential information about apparent maladministration. However, you are told that the leader of the local authority, supported by the members of the local cabinet, is insistent that Mr Whistle is the nominee, because they value his knowledge of the local community and his willingness to stand up for principles.

You are preparing your briefing note for the search committee. Make a note of the issues that you need to address in the briefing, bearing in mind that governors are likely to ask the following questions.

- 1 Is Mr Whistle eligible to serve on the governing body?
- 2 Can the governing body reject the nomination of the local authority?
- 3 For what term should Mr Whistle be appointed?

Viewpoint

- 1 You know that Mr Whistle is not a member of staff or a student of the institution, and the principal has told you that there is no question of him not being eligible on the grounds of bankruptcy or a sentence by the courts. You might have wondered if Mr Whistle had shown himself to be unfit to serve on the governing body by what he did whilst a member of the governing body of the neighbouring sixth-form college. However, this clause applies only to serving members of the governing body and not to potential members, so it is not relevant.
- 2 We have looked at this point in some detail above. The governing body can only reject the nomination if Mr Whistle does not have the skills or qualifications agreed with the local authority (we are not told whether this is the case or not) or if he was in fact removed from the governing body of the neighbouring sixth-form college. If he resigned voluntarily rather than being removed as unfit to serve (the situation that this provision in the articles is aimed at) then the governing body will not be entitled to reject his nomination.

- 3 In the case of Mr Whistle, the initial appointment could be for, say, one year. Indeed there may be a good case for making all initial appointments for one year as this could be viewed as a probationary period.

The governing body will want to reduce the risk of Mr Whistle making complaints to the media about your college. It is important that Mr Whistle is properly inducted if appointed, and that he knows what is expected – indeed required – of him. The governing body's own code of conduct should address the issue of confidentiality of governing body matters, and his attention could also be drawn to the agreed whistleblowing procedure. This could be made central to the induction programme so that Mr Whistle was clear as to his position.

General points

Difficulties with appointments are bound to arise, and you will need to be able to brief your governing body satisfactorily on procedural and constitutional issues. It is essential for clerks to understand their instrument and articles of government, and to update their knowledge by reading publications such as *The College Governor*. Use your network of colleagues to discuss issues. (Check that confidentiality is respected in exchange for being able to share ideas and pool experience on difficult issues that arise.)

Finally you need an appreciation of when it is necessary to seek legal advice. Given that advice is often urgently needed, an important practical question is whether as clerk you are authorised by your governing body to seek legal advice and incur reasonable costs if the situation arises.

Resignation, disqualification and termination of membership

A governor may resign at any time; the resignation should be given in writing to the clerk.

Governors may be disqualified from continuing in office for specific reasons stated in the instrument. These include bankruptcy and the receipt of a custodial sentence. The governing body may also remove a member by written notice on the grounds of:

- absenteeism
- its satisfaction that the member is unable or unfit to discharge the functions of membership.

The instrument does not specify what renders a person unfit or unable. It is for the governing body to determine, and the test is a subjective one. Nor does the instrument specify what procedure should be followed when deciding whether to terminate membership. The governing body, however, must comply with the requirements of natural justice and procedural fairness. The member in question should be given notice of the reasons why removal is being considered, and given the opportunity to answer the charges either in writing or in person at the meeting.

A resolution to terminate membership is passed by a simple majority of the governors present at the meeting. Although there is no legal duty to give reasons for the decision, there is a strong argument that they should be given in the interests of openness and fairness. Legal advice should be sought if reasons are to be given as the adequacy of those reasons could be open to legal challenge. The chair should give written notice to the member stating that the notice has been passed, and removing the member from office.

Membership of staff governors, including the principal, is terminated if their employment at the college ends. Student members can continue as governing body members until the end of the academic year in which they cease to be enrolled as a student or until such other time as the governing body has determined. Membership of the governing body will automatically be terminated if the student is expelled from the college.

Register of interests

The clerk must keep a register of governors' interests, which must be open to the public.

Under the instrument, a governor with a relevant interest in an item should declare it and, if present at a meeting where the item is discussed, should not take part in the discussion, vote, or form part of the quorum. Such interests include a financial interest in:

- the supply of goods or works to or for the purposes of the college
- any contract or proposed contract concerning the college, or
- any other matter relating to the college.

Any other interest of a kind specified by the governing body must also be disclosed. These will generally be dealt with in the code of conduct and may include interests of a non-financial nature or the interests of family members. See *Module 2* for more information on this area.

The governor is not legally required to leave the room during the discussion. However, depending on the nature of what is being discussed and of the

governor's interest in it, and bearing in mind quorum requirements, it would be good practice to do so. The code of conduct may require this.

If the governor is a company director, for example, of a subsidiary company of the college, the governor is separately required to declare the relevant interests under the company's articles of association.

The principles which underpin this requirement are essential to any system of good governance. Members must act, and be seen to act, in a manner which is rigorously impartial. This is because in law governors are regarded as fiduciaries. They are in a position of trust and confidence in relation to the governing body and are obliged to act solely for the governing body's benefit. This is one of the common law duties we mentioned at the beginning of this module.

For many colleges the register of interests is a standing item on the agenda to remind members of the need to regularly update the register. You may want to invite members to declare any interest they may have in the business to be transacted at a meeting in the notice/agenda sent out, and to provide an opportunity for members to declare an interest at the beginning of the meeting.

Activity Reviewing your responsibilities for membership of the governing body

Look back over the topics covered in this section. For each topic, note down in the *Action planner* section of the **User's guide** any areas where you need to seek clarification, or where you can see areas for improvement in the way you currently fulfil these responsibilities.

Viewpoint

Discuss any points for further action with the chair, the principal, or with your local clerks' network, as appropriate. If work on this section has highlighted aspects of your governing body procedure that could be improved, these may need to be raised with the governing body as a whole.

Section 9 Instrument and articles: delegation and the committee structure

The governing body may delegate some of its responsibilities to one or more of its committees, the chair or the principal. But its powers to delegate are limited by its articles.

The governing body can delegate any 'purpose or function', with two major exceptions. Firstly, some of the governing body's responsibilities are regarded as so important that they may only be discharged by the full governing body. These are:

- the determination of the college's educational character and its mission
- the approval of annual estimates of income and expenditure
- the safeguarding of the college's assets, and ensuring its solvency
- the appointment and dismissal of the principal and clerk (in the latter case this includes any other capacity in which the clerk is employed by the college)
- the modification or revocation of the articles.

Secondly, the governing body cannot delegate powers which have been assigned to the principal or the academic board under the articles.

The governing body is required under its articles to set up:

- a search committee
- an audit committee to advise on the governing body's audit arrangements and systems of internal controls.

Although these are the only mandatory committees, it is good practice to establish a remuneration committee to ensure that pay and conditions of senior postholders are dealt with in a structured and disciplined way. A finance committee can also aid the governing body to carry out its responsibilities more efficiently by delegating certain functions especially those of an advisory or monitoring nature.

The governing body must also set up a special committee as and when required. (For more details on the special committee see *Module 4 Section 1*.)

Terms of reference of committees

All committees established by the governing body should have clear terms of reference and operate within the procedures specifically authorised by the governing body. If a committee, in the name of the governing body, carries out an act for which it does not have delegated powers, the act will be void. This may result in personal liability for the person or persons who were responsible for the act. One of your responsibilities as clerk is to ensure that the governing body has established a proper scheme of delegation and full and proper terms of reference for all its committees.

Activity Reviewing terms of reference

Review the terms of reference of your governing body's key committees. Compare them with the following checklist and note down any departures. Do they:

- ☐ state clearly the precise nature and extent of the committee's responsibilities and the authority for them – ie the date of the governing body's approval
- ☐ make it clear whether the committee exercises a decision-making or an advisory function in relation to each responsibility
- ☐ set out the limits of the financial powers and any other financial limitations on the delegated powers
- ☐ ensure that the committee is properly accountable
- ☐ identify who may be members of the committee (including co-opted members) and the size and composition of the quorum
- ☐ establish arrangements for the appointment of the chair and vice-chair
- ☐ state how meetings are to be called and how often they should be held?

Viewpoint

Where you find departures from the checklist, bring them to the attention of the principal or chair with an eye to taking remedial action. It is essential that committees have comprehensive terms of reference to protect both the college and the individual governors. Make sure any oversights are addressed at the earliest opportunity.

As non-governors can be co-opted as members of all committees except the special committee, this needs to be reflected in the rules on quorum. Decisions should not be taken at meetings where the majority of the governing body members are not present. It would be unacceptable for decisions delegated by the governing body to be taken by members of the committee who are not governors.

Activity The clerk's role in supporting the governing body's committees

The clerk has a fundamental role in advising the governing body on its committee structure, and in supporting the committees and working groups. Consider in what ways you currently support these committees and identify three ways in which you could improve your support.

Viewpoint

Obviously the role of the clerk differs from college to college but some possibilities for improvement might include:

- helping to draw up terms of reference for the governing body's approval
- making sure the committees keep to the terms of reference so that
 - decisions are taken where possible and not unnecessarily referred back to the governing body,
 - committees and working groups do not overstep the powers delegated to them
- making sure that there is an audit trail to so that any decision taken by the committee can be traced back to the proper delegation of that responsibility by the governing body
- ensuring that committee business is reported back effectively, efficiently and regularly to the governing body
- working closely with the principal and other senior managers on the forward planning and co-ordination of the committee work.

Section 10 Instrument and articles: authorisations and the corporate seal

The instrument of government provides that the application of the seal by the governing body must be authenticated by two signatures:

- 1 that of the chair or such other member as has been either generally or specifically authorised to sign for the governing body and
- 2 that of any other member.

There is no requirement under the FHEA for any document to be sealed by the FEC. Under general law, however, any document executed as a deed must be under seal. Generally, all dealings with land (such as transfer of registered, freehold or leasehold property and the granting of leases and mortgages) must be effected by deed. The number of deeds executed by a college is therefore likely to be limited.

Section 20 (4) of the FHEA provides that the execution of a document by the FEC under seal will be treated as conclusive evidence that the document has been properly issued by the governing body. It is your job as clerk to make sure the seal is only used with the prior authorisation of the governing body. This should be done by a resolution and minuted.

Colleges which are unincorporated associations will not have a corporate seal. Generally deeds will have to be signed by all the governors or in accordance with the trust deed.

Activity Who can authorise actions affecting the college's solvency and assets?

The principal of Shortcut-upon-Sea College has ambitious plans to attract more students, improve teaching facilities, and reduce the college's dependence on public funds. At the last meeting of the governing body, a proposal was tabled to buy a site next to the college, build additional classrooms and accommodation, and borrow £5m from the bank to finance the proposals. The governing body approved the proposal in broad principle, subject to consent to the borrowing from the funding council, and the appointment of a contractor. The governing body delegated the authority to approve the purchase contract and loan documentation to the finance and general purposes (F&GP) committee.

After this meeting, new negotiations altered the proposals in various respects: the college now proposes to grant rights of way over part of the site; to increase the number of classrooms and reduce the number of residential bedsits; and to increase the borrowing to £6m.

The funding council consent to the new proposals has been obtained. The final drafts of the purchase contract, the legal charge and deed of priority in favour of the bank and other documents have been approved by the F&GP committee. The bank has asked the college's solicitors for written confirmation that the corporation has the legal power to enter into the transaction and that the legal documents are fully enforceable.

You have just received from the college's solicitors the originals of the purchase contract, deeds and other documents to be executed by the governing body. The solicitors have asked you who is authorised to execute the documentation on behalf of the governing body, and for confirmation that the transaction has been approved in accordance with the college's instrument and articles of government. The governing body will not meet again for another month.

The chair of the governing body telephones you to fix an appointment with the principal so that they can sign the documents. He says that he can execute any documents under 'chair's action'. Make notes on how you would advise the chair.

Viewpoint

Under the college's articles of government, the governing body must not delegate key responsibilities affecting its solvency and the security of its assets to anybody. In this case the proposal put to the governing body at its last meeting has changed in a number of material respects. The F&GP committee does not have the authority to approve these changes on behalf of the governing body – as they have solvency implications and involve long- term decisions affecting the college's assets.

The chair does not have the power to approve the changes and execute the documents under 'chair's action'. This so-called principle has no basis in law. Any such action would need to be ratified by the governing body at its next meeting. This could create serious difficulties for governors who have concerns about the college over-committing itself. Failure to ratify could potentially expose the chair to personal liability.

You have no alternative but to advise the chair to convene a special meeting of the governing body at short notice to:

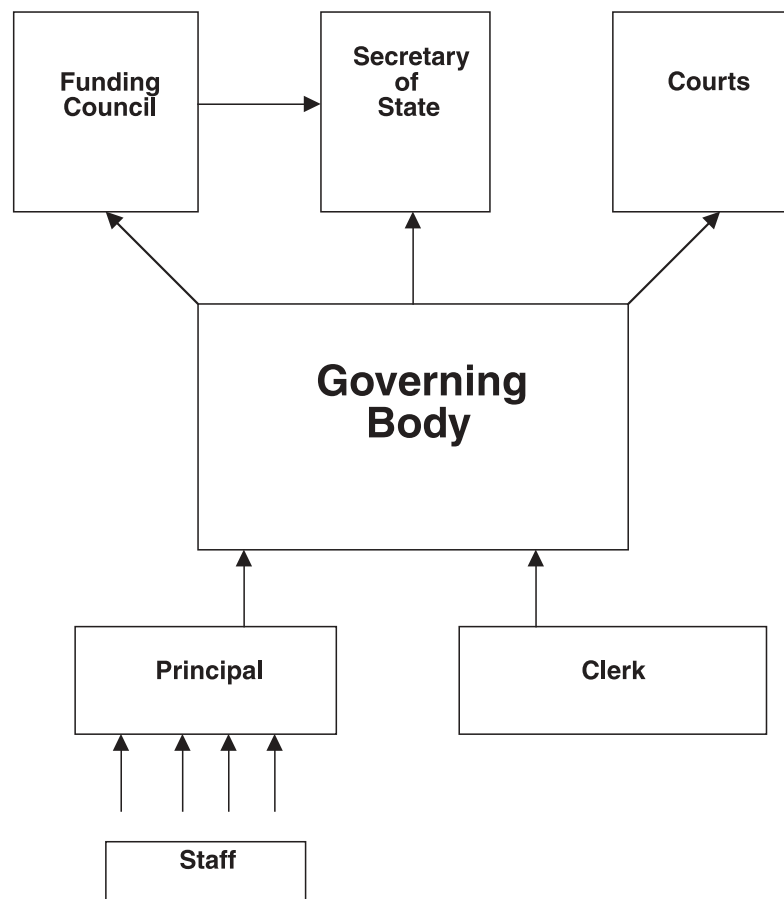
- receive a report from the F&GP committee on the material changes to the proposals since the governing body last met
- approve such changes, including in particular the increase in borrowing, and any conditions attached to the consent from the funding council
- approve the purchase contract and loan documentation
- authorise the signature of the purchase contract, and the execution of the legal charge and other deeds under the college's corporation seal.

Under the articles of government, the seal can only be authenticated by two signatures – that of the chair and another governor. If the chair is unavailable to sign, the corporation must specify who can sign in his place. The clerk is normally responsible for the safe custody of the corporation seal. If the corporation has never used a seal before, one can be purchased quickly and inexpensively from engravers.

Section 11 Accountability

We have looked in detail at the clerk's responsibility for ensuring that the governing body acts within its powers, in accordance with its governing instruments, and complies with the relevant legislation. But what happens if the governing body does not discharge its responsibilities effectively? In the sense of giving a financial account, all FECs are subject to upwards lines of accountability to the government through the funding councils and ultimately to Parliament through the Public Accounts Committee and the Secretary of State. The governing body is also subject to a parallel line of accountability to and through the courts.

Figure 3 Lines of accountability



This form of accountability to Parliament and the courts is distinct from the duty of responsiveness to key stakeholder groups looked at in *Module 2 Section 1*. Accountability can be enforced by legal and financial sanctions, responsiveness generally cannot.

Financial audit

Colleges are required by the funding council and, in the case of FECs, by their articles, to arrange for their accounts to be audited both internally and externally. They may also be audited by a wide variety of other external bodies including the funding council, the National Audit Office, the Public Accounts Committee and providers of specific funding such as the European Commission. These audits form a system to ensure that colleges are publicly accountable for the use of public funds.

The funding council

Colleges are required to enter into a financial memorandum with the funding council, which imposes its own terms and conditions on the payment of grant monies. Breaching such a term will give the funding council the right to impose a sanction, such as withholding of payment.

The Secretary of State

The government, through the Secretary of State, has a variety of powers at its disposal in relation to further education colleges. These are found in section 57 of the FHEA as amended by schedule 9 of the LSA. They include the power to:

- remove all or any member of the governing body
- appoint new members of the governing body if there are vacancies
- give directions as to the exercise of the governing body's powers and performance of their duties.

These powers can only be exercised if the Secretary of State is satisfied that any of the following apply:

- the affairs of the FEC have been or are being mismanaged
- the governing body has failed to discharge any duty imposed by legislation
- the governing body has or is proposing to act unreasonably in the exercise of any power or in the performance of any duty imposed by legislation
- a report by either HM Chief Inspector of Schools in England or the Adult Learning Inspectorate indicates that the college is unlikely to give an acceptable standard of education or has serious weaknesses.

The courts

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

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

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

Judicial review proceedings must generally be brought as soon as possible and in any event within three months of the decision. The usual remedy is for the decision to be quashed and the governing body required to reconsider, although the court could require them to follow a specific course of action. The courts' jurisdiction over the activities of colleges is based on case law, not statute law.

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

Generally if an FEC is being sued (for example for personal injury caused by the negligence of the governing body), it will be the college which is sued. Sometimes, however, individual governors may be named as joint defendants. This is not common practice but should be considered as a possibility, particularly in the context of arranging insurance cover. If a college without corporate status is being sued, the individual governors will be named, not the college because it does not have a legal personality (see *Section 2*).

In both these instances it would be usual for the college to take over the defence of the claim and to meet the costs of, and any liability incurred by, the individual governors.

Personal liability of governors

This is a very complex area of the law on which, if it arises, you will need to take legal advice. Both you and the governors need to be aware that if they have breached the duties imposed on them by the articles of government, by statute, or the courts, they could be held personally liable.

There are, however, three crumbs of comfort for the honest governor who acts reasonably.

- Despite a small number of well-publicised cases highlighting poor governance in the FE sector, no governor has yet been sued personally for this.
- The LSA introduced statutory relief against personal liability of governors or FECs provided they have acted honestly and reasonably. Under section 145, if a governor is found liable in civil proceedings in respect of something he did or did not do as a governor, an application can be made to court and if the court deems the action or omission to be honest and reasonable the court may make an order extinguishing, reducing or varying the liability.
- There is the possibility of taking out insurance.

The articles allow FECs to insure their members against liabilities incurred as a result of membership, and to pay the associated premiums. The governing bodies of other types of college should also be able to take out insurance.

Insurance is very much a safeguard of last resort, and it should be noted that it is not possible to insure against all liabilities. In particular, insurance against criminal liabilities (whether statutory or under the general criminal law) is not possible. Each insurance policy should be carefully checked for exclusions. There will invariably be a cap on the amount of cover provided and an excess provision, which means that for sums below the level of the specified excess there is no cover. The levels of excess in some local government insurance policies have been as high as £100,000 or more.

Governing bodies and their clerks should not allow the existence of an insurance policy to lull them into a false sense of security. An insurance policy will not assist with the inevitable trauma of a legal action, or with the possible damage to the reputation of individual governors and the college.

Activity Practical steps to avoid personal liability

Consider what practical steps you can take as clerk to help your governors avoid suffering any personal liability. Write down three examples.

Viewpoint

Below are the steps which you and the governors should take to limit the exposure to personal liability:

- ensure the governing body acts within its powers and fulfils its duties and responsibilities under the instrument and articles
- provide the appropriate information to governors
- do all you can to ensure that governors disclose all personal interests and record these in a register
- ensure that the governing body takes professional advice wherever appropriate
- if things look as if they are really going wrong, advise individual governors to take their own legal advice
- ensure that meetings are fully and properly minuted.

Module review

This module has looked at the main statutory framework within which the governing body conducts its business, and at the clerk's responsibilities for acting as constitutional adviser and making sure business is conducted properly. If you have worked through the whole module you should now be confident that you can:

- explain the legal structure of your college and how it affects the governing body's activities
- state the implications of a college's charitable status
- list your college's powers and the consequences of acting outside them
- explain the need for caution when setting up subsidiary companies or entering into a joint venture
- state your responsibilities under the instrument and articles
- identify the occasions when the corporation seal should be used
- specify the lines of accountability regulating your college.

Summary of key learning points

Further education colleges have a variety of legal structures. Most are statutory further education corporations (FECs) but some (designated institutions) are unincorporated associations, companies limited by guarantee, or governed by trust deed. Designated sixth-form colleges have been incorporated with effect from 1 April 2001. It is vital that you understand the legal structure, and its implications, for your college.

Colleges are charities and governors must act within the charity's powers and objects, make sure its assets are applied only for its charitable purpose (ie the provision of education) and preserve and maximise its assets. Ex gratia payments cause problems for charities.

The college's powers govern the relationship between the college and the outside world. If the college does something outside its powers, the act in question is invalid and void. Careful consideration needs to be given to the setting up of subsidiary companies and entering into joint ventures.

A further education corporation can only be dissolved by an order of the Secretary of State.

The procedure for merger of two colleges is closely regulated. The clerk's role in relation to any proposed merger is a rigorous one.

A further education college's instrument and articles of government set out the governing body's constitution, procedures and its internal powers and responsibilities. They govern the college's internal relationships.

The clerk usually has extensive responsibility under the instrument and articles for servicing meetings, ensuring meetings are quorate and that voting is properly carried out; for maintaining the register of members, monitoring membership and ensuring appointments are properly made; for maintaining the register of interests; and for ensuring that the governing body has a proper system of delegation in place.

The clerk is usually responsible for ensuring that the corporation seal is only used when appropriate or necessary, and that its use is on every occasion authorised by the governing body. The seal need only be used for documents which are required by law to be executed by deed.

Governing bodies are subject to upwards lines of accountability to the government through the funding councils, and ultimately to Parliament through the Public Accounts Committee and the Secretary of State. The Secretary of State has extensive powers to intervene in failing colleges or colleges where mismanagement has taken place. Governing bodies are also accountable to the courts through the process of judicial review.

Where next?

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

If you cannot find the information you need within this pack, turn to the *Action planner* in the **User's guide**. Note down what further information, support or guidance you would like. The *Action planner* gives advice on who may be able to help, and how.

Putting it into action

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

Further reading

The Eversheds *Annotated Office Copy of the Instrument and Articles of Government of Further Education Colleges* is a useful reference guide available through the Eversheds Governance Subscription Service. For details please contact Fiona Gilmore on 0161 8326666 or email fionagilmore@eversheds.com

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ACRA The Association of College Registrars and Administrators is a national organisation which provides professional support to business managers and clerks. The services for clerks include seminars, conferences and network meetings to share good practice and become familiar with new initiatives.

LSDA The Learning and Skills Development Agency is one of the leading research and development organisations operating in the field of post-16 education. Its mission is to be a strategic national resource for the development of policy and practice in post-16 education and training.

AoCSW The Association of Colleges, South West is the regional arm of the national Association of Colleges (AoC) which represents further education colleges and provides a range of services to members.

Eversheds is one of the leading firms of legal advisers to the education sector in the UK, working with over 300 further education colleges.

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3

the main
statutory framework



clerks training materials

module

4

the wider legal framework

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Note

The Learning and Skills Development Agency
was formerly known as FEDA.

*For suggestions on how to get the most out of these self-study materials, see the **User's guide**.*

Introduction

As we saw in *Modules 2 and 3*, the activities of a governing body are regulated by ethical considerations, the relevant legislation, and its governing instruments. The governing body is also subject to more general legal obligations. The clerk cannot be expected to be an expert in all these areas. But it is advantageous if you are aware of the legal nature of the relationship between the governing body, its staff and its students, and of the scope of some of the more important areas of legislation. This will enable you to alert the chair to the legal implications of items under discussion and when it would be appropriate to take legal advice.

As with *Modules 2 and 3*, bear in mind that some of the legal issues covered in this module are extremely complex. The aim is to give you an overview and awareness of these issues. It is not an exhaustive guide nor is it a substitute for appropriate legal advice.

Aims

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

- summarise the nature of the legal relationship between the college and its staff
- explain the role of the governing body in determining the pay and conditions, disciplinary and grievance procedures, and the dismissal of staff
- outline the legal relationship between the governing body and the students of the college, and its responsibilities towards students
- explain the governing body's responsibilities in relation to the student union
- explain why it is important for colleges to have policies dealing with email and internet use
- outline the college's responsibilities under the Data Protection Act
- understand the effects of the legislation on freedom of information, health and safety and intellectual property law
- state the thresholds for the buying of goods or services which trigger the application of EU procurement regulations
- summarise the main responsibilities of a company secretary.

Contents

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

To do *Done*

- | | | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Section 1 The relationship between the college and its staff |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 2 The relationship between the college and its students |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 3 Student unions |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 4 Cyber liability |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 5 Education law |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 6 Data protection |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 7 Freedom of information |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 8 Other relevant legislation. |

Working on the self-study activities

These materials have been designed for flexible use, so that you can work through sections and activities in your own time and at your own pace if you would find it difficult to attend external training sessions. Several clerks point out the value of working on at least some of the suggested activities together with another clerk or group of clerks, as there is much potential to learn from each other's experience. You might find it useful to become involved in a local or regional clerks' network in which training materials might be used.

For suggestions on how to organise this kind of support for yourself, see the ***User's guide***.

What you will need

To complete activities in this module you will need the following:

- for *Section 1 Activity Reviewing your college's disciplinary procedure* you will need copies of your college's articles of government and disciplinary procedures, and the ACAS Code of Practice
- for *Section 1 Activity Checking your grievance procedures* you will need a copy of your college's grievance procedure
- for *Section 4 Activity Your college's internet and email policies* you will need a copy of your college's internet and email policy

Where you need to make notes in response to activity questions, we suggest you do this in a notebook or on separate sheets of loose-leaf paper, and store the information you compile along with the module for future reference.

Section 1 The relationship between the college and its staff

The legal nature of the relationship between a college and its staff is a complicated one. It is governed by:

- the express terms of the contract between the college and the members of staff
- the duties implied by the courts into a contract of employment. Principally, these are:
 - the duty of fidelity – the member of staff must serve the college faithfully and not act against its interests
 - the duty of trust and co-operation between the parties
 - the duty not to disclose confidential information and trade secrets
- employment and equal opportunities legislation
- in the case of a further education corporation (FEC) by its instrument and articles of government.

In this section we look at aspects of the relationship which are of particular concern to the governing body and the clerk: the determination of pay and conditions; disciplinary procedures; the suspension and dismissal of staff; the role of the special committee; and grievance procedures. When talking of the provisions in the articles of government in this section, we are referring to those of FECs. Many other points in this section, however, apply to all colleges.

Who determines pay and conditions?

Under the articles of government the governing body is responsible for:

- determining the pay and conditions for the principal and the clerk (including those relating to any other capacity in which the clerk is employed by the college) – this is a responsibility which the governing body can delegate to a remuneration committee but note that the powers to appoint and dismiss are not delegable and many remuneration committees exercise an advisory function only
- determining the pay and conditions for other senior postholders – this responsibility can be delegated to a committee or the principal
- setting a framework for the pay and conditions for all other staff – this responsibility is also delegable.

The principal is responsible for the determination of the pay and conditions of service for staff who are not senior postholders within this framework.

This division of responsibilities is reinforced by the FEFC Financial Memorandum (Circular 98/30) which makes adherence to it a condition of funding.

Disciplinary procedures

Under the articles, the governing body is responsible for making rules relating to the conduct of staff. These will be contained in a disciplinary procedure. This responsibility can be delegated to a committee or the principal. The articles and the ACAS Code of Practice provide FECs with a framework for producing effective disciplinary procedures. (The Code of Practice sets out general procedural guidance for all employers, not just colleges).

A disciplinary procedure provides a formal route for dealing with problematic conduct of staff. It can also be used to deal with poor performance, although some colleges have separate procedures to deal with competence issues. This is to be recommended.

The disciplinary procedure should be accepted as reasonable by both the college and its staff. It should be clear and concise so that all staff know and understand it. It is important to consult with staff when proposing a new disciplinary procedure or revising an existing one, particularly where the disciplinary procedure is contractual. This is required by the articles for certain parts of the procedure. The disciplinary procedure must reflect the requirements of the college's articles. But it is important to note that these requirements add to and do not replace employment law.

Activity Reviewing your college's disciplinary procedure

The ACAS Code of Practice sets out the key features of a good disciplinary procedure and is a very useful reference point if your college is revising its own. Look at your college's disciplinary procedure and check that it has the following features. Note down any points that need to be incorporated in your college's code.

Does your disciplinary procedure:

- ☐ provide for matters to be dealt with without undue delay
- ☐ ensure the confidentiality of proceedings, witness statements and records
- ☐ indicate what disciplinary actions may be taken

- ☐ provide for staff to be informed of the complaints against them, and where possible to be given all relevant evidence before any hearing
- ☐ give staff the right to state their case before any decision is taken
- ☐ give staff the right to be accompanied
- ☐ give an indication of the type of conduct which the college may regard as gross misconduct and which may warrant summary dismissal, ie misconduct which is so serious it warrants dismissal without any entitlement to notice
- ☐ ensure that disciplinary action is not taken until the case has been carefully investigated
- ☐ ensure that, except for gross misconduct, a member of staff is not dismissed for a first breach of discipline
- ☐ provide a right of appeal and specify the procedure to be followed
- ☐ specify what disciplinary action may be taken in what circumstances, including: oral warnings, first and final written warnings (and how long warnings will lie on an employee's file), dismissal, and other sanctions provided for in the contract (such as suspension without pay or demotion)
- ☐ comply with the provisions in the articles for the suspension and dismissal of staff and senior postholders (see below)?

Viewpoint

It is essential that you are familiar with the provisions in your disciplinary procedure and that the procedure covers **all** the elements above, so that if an industrial relations difficulty arises, both sides are absolutely clear about the process to follow. Where your current procedure falls short of the checklist above, raise the items with your principal and chair of governors. It is in the interests of everyone, both college and staff, that there are clear, precise guidelines for handling foreseeable disciplinary situations.

Disciplinary procedures and the contract of employment

Should disciplinary (and grievance) procedures form part of the contract of employment? Good practice suggests that they should, because this places clear and binding responsibilities on both employer and employees, and sets out the processes which should be followed when problems arise. That said, whether they form part of the contract or not, the college should always comply with its own procedures so as to be able to successfully defend claims for unfair dismissal. Failure to comply with the provisions in the articles of an FEC will give a member of staff a right of action.

The following sections on suspension and dismissal of staff and senior postholders deal with the provisions under the articles of government of FECs.

Suspension of staff

Only the chair, or in the chair's absence the vice-chair, can suspend a senior postholder. Under the articles, a clerk who is a member of staff will be treated as a senior postholder. Such a suspension must be reported to the governing body and to the Learning and Skills Council within two days or as soon as is practicable. The principal may suspend any other member of staff with or without pay. The procedure for suspending all staff, including senior postholders, should be set out in the college's disciplinary procedure.

Any person who has been under suspension for three weeks has a right of appeal to the governing body against the decision to suspend. This right of appeal does not apply if the staff member has been notified of a proposal of dismissal, or is a senior postholder (including the clerk if he or she is a member of staff) whose conduct has been referred to a special committee. The appeal should be considered as soon as possible, with the suspension continuing until the appeal is heard.

The right to suspend without pay has only recently been conferred on FECs. Caution must be exercised before using it. You can only suspend without pay if this is specifically provided for in the employment contract. Such a suspension may also breach the requirements of natural justice. Suspension without pay should only be used in exceptional circumstances.

Dismissal of staff other than the clerk and senior postholders

The principal has the responsibility for dismissing staff other than the clerk and senior postholders. This can be done without notice and with immediate effect, ie summary dismissal, if the dismissal is for gross misconduct. The principal can delegate this power to another senior postholder.

Under the articles the member of staff has the right, before any decision to dismiss is taken, to:

- make representations (including oral representations) to the principal or to any other person appointed to investigate the matter and make recommendations
- be accompanied, although not represented, by a friend who is a professional adviser for this purpose.

It is also important that the investigation is kept separate from the disciplinary hearing. The person conducting the investigation should take no part in the decision to dismiss or not.

Members of staff have a right of appeal to the governing body against a summary dismissal or notice of dismissal. If the principal has delegated the right to dismiss to another senior postholder, the governing body may wish to delegate to the principal the power to hear appeals from staff. It is essential that whoever hears the appeal has had no involvement in the decision to dismiss.

Activity Preserving the independence of appeal procedures

A member of staff has assaulted a student. The incident was an extremely serious one. The main witness to the incident is the principal who, under the agreed disciplinary procedure, is responsible for hearing any appeal. (The right to dismiss has been delegated by the principal to another senior postholder.) Make notes on how you would advise the principal and the governing body to proceed.

Viewpoint

Clearly, the principal cannot hear the appeal as he is a key witness. If he were to do so, it would be a clear breach of natural justice: he would not be seen as an unbiased decision-maker.

Although the governing body has delegated responsibility to hear any appeals to the principal, in this instance it should deal with the appeal itself. The member of staff should be informed of the proposed arrangements and the reasons for this change when notified of the right to appeal, and asked to agree to them.

Dismissal of the clerk

The changes introduced to the articles in April 2001 are designed to put a clerk who is employed by the college in the same position as a senior postholder; thus, dismissal as a member of staff must be carried out using the special committee procedure. However, if the appointment as clerk is separate from his or her employment in some other capacity, such as director of resources, then the governing body does not have to follow the special committee procedure to remove him or her from the post of clerk. Dismissal will be the responsibility of the governing body and cannot be delegated. This is also the position in relation to someone appointed as clerk who is not employed by the college.

Dismissal of senior postholders

The governing body is responsible for dismissing the principal, other senior postholders and the clerk. It cannot delegate this responsibility. Dismissal of senior postholders and the role of the special committee is dealt with in *Module 6*.

Grievance procedures

'Grievance' is the term used when staff bring to the attention of management problems relating to their working environment, terms and conditions or workplace relations. FEC governing bodies are required by their articles to make rules for dealing with grievances. Grievance procedures should be drafted in consultation with the staff. Although non-FEC colleges are not required by statute to have formal grievance procedures, there is a general statutory requirement for employers to nominate someone whom employees can approach with grievances.

It is clearly beneficial to employee relations to have a comprehensive procedure in place, and all colleges should have one. The procedure should be simple, in writing and available to all staff. The ACAS Code of Practice provides useful guidance on such procedures.

Activity Checking your grievance procedure

Review your college's grievance procedure against the following checklist of good practice. Note down any points where your current procedure falls short.

Checklist: Does your grievance procedure have the following features?

- ☐ A statement of intent that the college is committed to creating a positive working environment which discourages the harbouring of grievances.
- ☐ A short, but non-exclusive, list of areas in which grievances might arise. For example:
 - ☐ terms or conditions of employment
 - ☐ equal opportunities
 - ☐ new working practices
 - ☐ health and safety.
- ☐ A statement that all grievances will be dealt with in confidence, and that staff will not be discriminated against for raising their grievance.
- ☐ An informal process through which most grievances may be resolved, and a second formal procedure to be invoked when the informal process has failed or is not appropriate.

- ☐ Both formal and informal procedures which state who employees should approach with their grievances.
- ☐ A statement that at all stages of the grievance procedure the person bringing the grievance and the person named in the grievance are entitled to be accompanied by a work colleague or trade union representative.
- ☐ Timescales for action clearly set out for every stage of the grievance procedure.

Viewpoint

Where any of the above points are not covered in your procedure, draft proposals to cover them and bring them to the attention of your principal and chair of governors.

General employment legislation

There is a raft of legislation which governs employment rights and equal opportunity issues. We have looked at the latter in *Module 2*. You cannot be expected to know the detailed provisions of each statute but should be aware of the following pieces of legislation and the broad issues that they cover, so that you recognise when legal advice is necessary. You should also be aware that employment law is constantly changing.

The main statute covering individual employment rights is the Employment Rights Act 1996 which includes the need for the employer to provide a written statement of terms to the employee covering the fundamental aspects of his employment such as job title, place of work, pay, hours, and notice. The Employment Rights Act 1996 also contains the provisions relating to unfair dismissal and redundancy payments. Other important employment legislation includes the Health and Safety at Work Act 1974 (which is self-explanatory) and the Trade Union and Labour Relations (Consolidation) Act 1992 which consolidates the legislation relating to trade union and group provisions.

Section 2 The relationship between the college and its students

The relationship between the college and its students is governed by:

- the terms of the student contract – the courts now recognise the relationship as a contractual one
- the duties implied by the courts – such as the duty of care
- in the case of FECs, the articles of government

- specific legislation such as the Education Act 1994, which imposes extensive duties in relation to students unions (see *Section 3* below)
- general legislation, such as anti-discrimination legislation, the Data Protection Act and the Human Rights Act. (see *Module 2* and *Section 6* below).

The relationship is also governed by additional requirements placed on governing bodies by the Department for Education and Skills (DfES) publication, *Charter for Further Education*, and the funding council.

The articles of government of FECs

The articles set out the following key responsibilities towards students:

- The principal is responsible for maintaining student discipline, and, within the rules laid down by the governing body, for suspending or expelling students on disciplinary grounds, and for expelling students on academic grounds.
- The governing body is responsible, after consultation with representatives of the students, for making rules regulating the conduct of students. This includes procedures for suspension and expulsion, including expulsion for academic reasons.
- The academic board is responsible for advising the principal on procedures for expelling students for academic reasons. It should also advise the principal on arrangements for the admission, assessment and examination of students.

The governing body should also ensure that the college has prepared and produced a college charter to complement the charter for further education.

The student contract

Although the clerk is not responsible for student admissions, the contract is so fundamental to the relationship between college and student that it is worth considering in detail here.

The contract does not have to be in writing, nor does it necessarily need to be in one document. The terms of the student contract can be drawn from a wide variety of sources including the prospectus, handbook, and student charter; the offer and acceptance letters; the learning agreement; the disciplinary, complaints and appeals procedures; and departmental literature. Statements made by staff at interviews and elsewhere may also be held to form part of the contract.

A contract is formed when a student unequivocally accepts an offer of a place at college. This may be by post, email, telephone or, if they have not accepted a place **before**, when they enrol or register as a student. The timing of the formation of the contract is critical because in order for terms to be part of the contract they must be brought to the attention of the student before the contract is formed. The more unusual or onerous the term, eg provisions about the payment of fees, the greater the steps which should be taken to draw it to the student's attention.

It is also important that all terms in the student contract are fair, and written in plain and intelligible English. Otherwise they may be found to be unenforceable by the courts. This is because students will generally be regarded by the courts as consumers. There are various pieces of legislation designed to protect the interests of the consumer where there is a recognised imbalance in the bargaining power of the contracting parties. The two most significant pieces of legislation for the student contract are the Unfair Contract Terms Act 1977 (UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations).

UCTA deals with terms which seek to limit or exclude liability. You cannot exclude liability for death or personal injury. Any other exclusion clauses must be reasonable or the court will not enforce them. Many institutions wish to reserve the right unilaterally to vary, merge or cancel courses without any liability to the students. Such clauses are extremely difficult to enforce.

The Regulations go further. Any term which has not been individually negotiated and is unfair will not be binding on the students. A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights to the detriment of the student. The Regulations also require the terms of a contract to be expressed in plain, intelligible language.

The Contracts (Rights of Third Parties) Act 1999 amends the long-standing rule of law that a person cannot enforce a contract unless he/she is a party to that contract. Under the new law, third parties can enforce and rely on terms in a contract if the contract purports to confer a benefit on them. This could possibly open the way to those sponsoring a student through a college to take legal action against the college. The parties could if they wish agree that the benefits conferred by the Act shall not apply to the student contract.

The Consumer Protection (Contracts concluded by Means of Distance Communication) Regulations 2000 (the Consumer Protection Regulations) apply when a college enters into contracts with students by telephone, by post or over the internet. The college must provide the student with specific

information in a clear and comprehensible manner and in good time before the contract is formed. The information concerned is fairly basic:

- the name and address of the college
- the main characteristics of the contract, including student and course requirements
- the price of the course
- the arrangements for payment
- the right to withdraw from the course with no penalty for a limited period after the contract is completed.

If the college fails to comply with the Consumer Protection Regulations it may be reported to the Department of Trade and Industry and subsequently forced to comply.

Disciplinary procedures

The responsibility for maintaining good discipline to ensure the smooth functioning of the college rests with the principal. It is necessary to balance this smooth functioning of the college and its duty to protect its staff, students and reputation against the rights of the individual students being disciplined.

The disciplinary code should satisfy the principles of natural justice, in particular the principles that every student has a right to a hearing before an impartial adjudicator, and to be accompanied. There should also be a right of appeal to a person who has not previously been involved in the disciplinary process.

If the principal is to hear appeals, it is important that the principal has delegated the power to take disciplinary action to another senior postholder. The code should comply with the Human Rights Act 1998, and, particularly in relation to exclusions, with Article 6 (the right to a fair trial). (See *Module 2 Section 5*.)

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

Activity Student discipline

Four students are involved in a fight, involving offensive weapons, in the college halls of residence. The matter is reported to the police. The police search the rooms of the four students involved. The four students are suspended by the deputy principal for seven days pending the outcome of an internal investigation.

Make notes on the following:

- what next steps should the college take
- what issues might arise at a disciplinary panel hearing
- what other issues will the college need to consider
- what is the role of the clerk?

Viewpoint

Before taking any steps the college should consider its code of discipline. Does it provide a power of suspension? Does it specify time limits for the suspension and/or carrying out the investigations? Does it cover incidents which take place off campus in the halls of residence?

The college should conduct an internal investigation which may require obtaining written statements from the students. This investigation should not be carried out by anyone who will hear the disciplinary hearing or give evidence or take part in an appeal. The college should liaise with the police, and find out whether they intend to press charges. If they do, the college may want to consider whether it is appropriate to continue its own enquiry.

The college should set a date for the disciplinary hearing in accordance with the disciplinary code. It should do this as soon as practicably possible. The students must be fully informed of the allegations against them, and of their right to be accompanied at the hearing.

Whoever hears the disciplinary hearing and any appeal must have had no previous involvement in the matter, and must only consider relevant issues. The penalty should be commensurate with the breach of discipline.

What other issues will the college need to consider? If the college wishes to terminate the residence agreement, it must have specific grounds to do so under the terms of that agreement. It must exercise this right in accordance with the relevant property law. The residence agreement is a separate contract from the student contract, and students have the rights of a tenant in a landlord and tenant relationship.

What is the role of the clerk? This depends on your disciplinary procedure and practice at your college. If there is a right of appeal to the governing body you may be required to advise the governors during the appeal. It is therefore important that you are not involved in earlier stages of the process.

At all times the college should fully document its actions, and observe the rules of natural justice.

Activity Reviewing your college's student disciplinary procedures

The governing body is responsible for approving your college's student disciplinary procedure. It is therefore important that you are aware of what is best practice in this area. Consider your college's disciplinary procedure against the following checklist and make notes on areas which need improving.

- ☐ Are its key terms properly incorporated into the student contract?
- ☐ Has it been approved by the governing body?
- ☐ Does it ensure the independence of participants at every stage?
- ☐ Is the power to suspend/exclude clearly set out in the procedures and is it flexible?
- ☐ Does the college have the discretion to vary the procedures?
- ☐ Does it ensure, as far as possible, that students are guaranteed a fair hearing?
- ☐ Does it ensure that students know the details of the case against them in good time prior to any hearing?
- ☐ Does it specify the student's right to be accompanied at any hearing?
- ☐ Does it ensure the duty of confidentiality under the Data Protection Act 1998?
- ☐ Does it make sure that students are informed of their right of appeal?
- ☐ If there is a right of appeal to the governing body, does it specify how the governors will deal with the appeal, ie will the appeal be heard by a panel of governors or will the chair hear it, or will it go to the full governing body? Note that:
 - ☐ a panel of governors is probably the most practical and fair provision
 - ☐ the governors may wish to consider appointing or identifying an external person to act as an independent examiner on appeal, so satisfying the requirement of an independent tribunal under Article 6 of the Human Rights Act.
- ☐ Are all those involved in the disciplinary process, including those investigating the matter and any governors who might sit on an appeal panel, given adequate training in their responsibilities?

Viewpoint

If this checklist has helped you identify gaps or areas for improvement in your student disciplinary procedures, note down what action you will take to follow these up.

Grievance and academic appeals procedures

Although it is not specifically required in the articles, every college should have a complaints procedure. This is required by the DfES *Charter for Further Education*. It is important for the governing body to monitor complaints made under such procedures and to promote accountability and high standards by setting appropriate performance indicators.

In applying its disciplinary code, grievance procedures, or appeals procedures the college must adhere to the requirements set out in its articles, and those of other relevant legislation such as anti-discrimination legislation, data protection, and the Human Rights Act.

Section 3 Student unions

The law does not require colleges to establish a student union. But if one exists, the articles of government require that:

- it conducts and manages its own affairs and funds
- it acts in accordance with a constitution which the governing body has approved
- it is managed on the basis of audited accounts presented annually to the governing body. These accounts should be consolidated into the college accounts.

The AoC has issued a model constitution for a students union (see *Bulletin 8/98* 4 September 1998) with notes for guidance.

The provisions in the articles encapsulate the more important requirements of the Education Act 1994. This imposes extensive duties on governing bodies for student unions. The Education Act's requirements were motivated by the wish of the then government to make membership of a student union voluntary rather than automatic.

The governing body must comply with all these responsibilities, and not just the duties set out in the articles. Under section 22 of the Act, the governing body should take 'such steps as are reasonably practical to secure that any Students

Union ... operates in a fair and democratic manner and is accountable for the finances'. Specifically this includes taking steps to ensure that:

- the union has a written constitution
- the governing body approves and regularly reviews the constitution
- secret ballots are held for elections to major union offices
- union elections are fairly and properly conducted
- no student holds a union office for more than one year, or more than one office while a student
- regular financial reports are published and made available to all students and the governing body
- the procedure for allocating resources to groups or clubs is fair, set down in writing and freely accessible to all students
- affiliation to external organisations is decided upon annually by secret ballot
- there is a complaints procedure, with effective remedies available to students dissatisfied in their dealings with the union
- complaints are dealt with promptly and fairly.

The governing body is required to produce a code of practice governing the student union, which must be made available to all students, including applicants.

If the governing body fails to discharge its statutory responsibilities, especially where a union is in financial difficulties, it may be possible to sue the governing body. The governing body's role is therefore more far-reaching than its articles would suggest. It is essential that the statutory responsibilities are complied with to minimise the governing body's liabilities.

The legal status of the student union and its constitution

The exact legal status of student unions is unclear. As case law develops, it is likely that the student unions of FECs will be treated as unincorporated associations with a separate legal identity from that of the college, and that they will be regarded as exempt charities under the Charities Act 1993. (See *Module 3 Section 3* for more information on exempt charities).

As a consequence, officers of a student union will be treated as quasi-trustees of any property held for the purposes of the union. As trustees, the officers will have a fiduciary duty to the student union and its members. In practical terms, this means that if there is any misappropriation of funds, the officers will be jointly and severally liable for those funds, and potentially liable as individuals for breach of their fiduciary duty as trustees. The governing body is also

potentially liable under the Education Act 1994 for breach of its statutory duty in respect of section 22, and for breach of its fiduciary duty.

In view of their potential personal liability as trustees, the role and responsibilities of the officers of the students union should be set out in detail in the constitution of the student union.

As an unincorporated association the student union does not have a separate legal personality, and cannot enter into contracts (See *Module 3 Section 2*). Contracts on behalf of the student union are entered into in the names of individual officers of the union. It is these individuals, as representatives of the membership of the student union, who have the power to enter into contracts, and sue and be sued as a consequence.

The governing body should ensure that the student union constitution includes procedures to ensure the health and safety of its staff and members and that the relevant legislation is complied with. If it does not there is a risk that the governing body could be liable for such a breach.

The constitution of the students union should set out the terms of engagement of its officers. These should make it clear that as officers act in the capacity of trustees they are not entitled to be paid. In some unions, certain positions are sabbatical posts – ie students are given a year off from their studies to devote themselves fully to the role (eg president of the union). Note that such an officer is an employee of the college.

Activity Dealing with embezzlement in the student union

Learnwell College has a student union established with a constitution determined by the governing body. Jimmy Andrews, president of the student union is suspected of embezzling significant funds from the union. Make notes on what action you should take, what action the students union can take and what action the college can take. Is there any liability on the governing body for the funds embezzled by Jimmy?

Viewpoint

Below are some suggested action points for dealing with this situation.

- You should notify the governing body, the audit committee, and any committee dealing with student issues.
- There will need to be an investigation. In the circumstances it is likely that the audit committee would wish to appoint external auditors to investigate the matter.

- If the members of the student union can demonstrate that the governing body has failed to safeguard the assets of the union, they could sue the governing body under section 22 of the Education Act, and for breach of fiduciary duty. In addition they may wish to sue the officers of the student union. In that event, Jimmy's fellow officers may be jointly and severally liable for breach of fiduciary duty.
- The governing body should take legal advice from its solicitors on its potential liability and on what steps in mitigation it should take. It should also take advice on the college's duty of disclosure in these circumstances.
- It is also important to ensure that the college's duty of confidentiality under the Data Protection Act 1989 is complied with in dealing with this matter.

Section 4 Cyber liability

Most colleges now have both an external internet site and an internal intranet site. Email is a standard means of communication. Many colleges are delivering course materials online and providing distance learning via the internet. In *Module 6* we look at setting up an intranet site for your college governors. The potential legal consequences of internet and email abuse are wide-ranging. Your college needs to have an effective policy in place to address the potential problems.

Vicarious liability

A range of offences can be committed by the inappropriate use of internet and email. A college may be vicariously liable for the consequences of the misuse of such systems by members of staff who are acting in the course of their employment, even if the acts are not authorised by the college. The only available defence in such circumstances is for the college to show that it has attempted to implement appropriate preventative measures.

In particular, the college may be liable if it or a member of staff:

- are guilty of defamation or harassment
- publishes obscene articles
- infringes the intellectual property rights of a third party.

We shall look at these in more detail below.

Defamation: The internet is a form of publication and therefore within the scope of the legislation relating to libel. Both words and pictures produced on

the internet are capable of being libellous if they are untrue or ridicule a person, and as a result damage that person's reputation. Emails can be forwarded in a moment to a much wider audience than the original sender intended.

The Defamation Act 1996, however, specifically provides a defence for electronic disseminators of defamatory material who can show that they:

- were not the author, editor or commercial publisher of the material and
- took reasonable care and
- did not know (and had no reason to believe) that what they did caused or contributed to publication of a defamatory statement.

Colleges can therefore defend themselves against possible action by putting in place policies and procedures sufficiently vigorous to satisfy the 'reasonable care' and 'knowing contribution' requirement.

Email harassment: Communication by email tends to be more informal than other forms of written communication, and such informality can easily be misconstrued. Remarks sent by email are capable of amounting to harassment and forming the foundations of complaints of sexual or racial discrimination (See *Module 2 Section 4*). As with any form of harassment the intention of the parties is irrelevant. It is no defence for the defender to say the remarks were intended as a joke. The college has a legal duty to protect its employees and students from harassment.

Obscenity: A college may be prosecuted under the Obscene Publications Act 1959 if it publishes an obscene article. There is no requirement for the college to have had any intention to deprave or corrupt. It will, however, be a defence to show that the college had not examined the material and that it had no reasonable cause to suspect that the material was of such a nature that its publication would be an offence under the Act.

Intellectual property rights: A college may also be liable if its staff use the internet and email to send or receive any materials that infringe the intellectual property rights of a third party. The use of bulletin boards and email facilities allow users to store and transmit copyright material to other users and some of this material may infringe copyright. This problem is particularly significant in relation to the downloading of software from the internet. If colleges do not have adequate safeguards in place there is a real risk of unlicensed software being installed on the college's system.

Under the copyright laws the person who posted the infringing material on a bulletin board etc is liable but so too is the online provider, ie the college, even if it has no knowledge of the infringement.

Other risks: Further internet risks include the spreading of viruses, the inadvertent formation of contracts, and breach of confidentiality and of the Data Protection Act (see *Section 6* below).

Monitoring: The ability of colleges to monitor staff emails and the use of the internet enables colleges to detect misuse, and deal with it through the disciplinary process. In certain circumstances, colleges now have the right to monitor emails without staff consent under the Telecommunications Lawful Business Practice (Interception of Communications) Regulations 2000. This is a controversial area, and if the college wishes to monitor the emails of staff it is good practice to openly and expressly reserve the right to do so, and obtain the consent of staff. Monitoring emails without warning may amount to breach of the duty of trust and confidence implied in all employment relationships. It is also potential breach of the Human Rights Act (See *Module 2 Section 5*).

The golden rule is that colleges must tell their staff in advance that their email and use of the internet is not private, and may be subject to monitoring, reading and printing. (This links with the Human Rights Act).

Internet policies and disciplinary procedures: It is important for colleges to have internet and email policies in place. These should be linked to disciplinary procedures. Without clear policies, setting out parameters for using the internet and email, colleges may experience difficulty in disciplining staff for improper use. Other policies, such as your college's equal opportunities policies' will need amending to take account of internet and email misuse.

Activity Your college's internet and email policies

Does your college have an electronic communications policy covering the internet and email in place? Obtain a copy of your college's policy and make notes on which of the following aspects it does not cover.

- ☐ A statement that the policy applies to all persons employed by the college who use email and the internet through computers based at the college's premises or through computers at other sites via the college's network.
- ☐ A statement that the policy is to be followed by everyone and that failure to comply with the policy may constitute a serious disciplinary offence.
- ☐ Names of staff members who can be approached if anyone has any doubt as to the regulations and procedures set out in the policy.
- ☐ A statement that the college may monitor internet usage as it considers necessary to ensure compliance with the policy.

- ☐ A statement that email and the internet must only be used in the reasonable conduct of the college's business along with clear statements as to what types of use will not be tolerated by the college.
- ☐ A statement that care should be taken and/or a senior member of staff's authority given before entering into contractual commitments by email.

Viewpoint

This is not only an issue for staff. With students having access to the internet and the college intranet, it is important to have similar policies in place for students. If your college does not have an e-communications policy, or it does not cover all the points above, use your notes as the basis of an email to your principal and governors on the matter.

Section 5 Education law

Under the articles of government, governors are responsible for conducting the college in accordance with:

- the Education Acts 1944 to 1992
- the Learning and Skills Act 2000
- any subsequent legislation, relevant regulations, orders or directions made by the Secretary of State
- the instrument and articles of the college
- any rules or bylaws made under the articles.

We have already looked at some of these in *Module 3*.

The most important piece of recent legislation is the Learning Skills Act 2000 (LSA) which introduces a number of important changes in the sector. There is now a non-departmental public body for England which is responsible for the planning, funding, quality assurance and delivery functions for post-16 education that were previously exercised by the local education authorities, the Further Education Funding Council (FEFC) and the Training and Enterprise Councils (TECs). With the formation of the Learning and Skills Council (LSC), further education colleges are facing further period of rapid change.

The LSA establishes a comprehensive inspection regime:

- OFSTED is responsible for the inspection of provision for 16 to 19 year olds in schools and colleges
- the Adult Learning Inspectorate (ALI) is responsible for post-19 provision in colleges, work-based provision for all age groups, and community education

- where the remits of OFSTED and ALI overlap there are to be joint inspections
- the LSA also provides for area inspection of all 16 to 19 provisions.

In future, inspection is likely to focus on the learners' experience as well as the college's self-assessment report.

The Connexions Service is established to provide integrated support services for 13 to 19 year olds. Individual learning accounts have been created offering discounts on learning coupled with incentives for employers who contribute towards their employees' learning. City academies are to replace seriously failing secondary schools in urban areas.

Below is a summary of some of the other major changes introduced by the LSC which we have already looked at in *Module 3*:

- the Secretary of State has power, which he has already exercised, to incorporate the governing body of former voluntary aided sixth-form colleges (*Module 3 Section 1*)
- the personal liability of governors of FECs is now protected to an extent (*Module 3 Section 11*)
- the Secretary of State now has far reaching powers to intervene in the affairs of further education colleges to address issues of mismanagement or inadequate quality (*Module 3 Section 11*)
- further education colleges now have an express power to form subsidiary companies (*Module 3 Section 5*).

Activity Impact of the Learning and Skills Act 2000

Do you need to gather more information on any of the following aspects of the implementation of the LSA?

- ☐ Learning and Skills Council
- ☐ OFSTED inspection arrangements
- ☐ Adult Learning Inspectorate inspection arrangements
- ☐ Joint inspection arrangements
- ☐ Inspection of learners' experience
- ☐ Individual learning accounts
- ☐ City academies.

Viewpoint

Some useful sources of further information appear in the *Useful resources* section of the **User's guide**. Your principal or colleagues in your local clerk's network may be able to suggest other sources of help.

Section 1 Data protection

The law of data protection as set out in the Data Protection Act 1998 (DPA) aims to balance the right of individuals to privacy and the need for institutions to process personal information for their legitimate business purposes. The DPA applies only to personal data (ie information which relates to a living individual who can be identified from that information) which is automated or intended for automated processing or is part of a structured 'relevant filing system' or any 'accessible record'.

There is a wide variety of personal data kept by colleges, including: references, personnel records; emails containing personal details; appraisals and reports; and addresses of staff and student members. Both factual information and expressions of opinion about the individual are covered. Information collected via security cards (for example, entry and exit times to a college's premises, and software and internet use by students and staff) also counts as personal data.

The DPA applies to the 'processing' of personal data. Processing includes obtaining, recording or holding data or carrying out any set of operations including organisation, adaptation, alteration, disclosure, retrieval, conservation, use and destruction of data. It applies to any activity relating to personal data.

Colleges must maintain a data protection registration (now called a notification) and must ensure that it processes personal data in accordance with that registration/notification. In addition colleges must keep to the data protection principles which govern the manner in which data is collected, held and processed. These are that:

- personal data shall be processed fairly and lawfully
- personal data shall be obtained only for specified and lawful purposes
- personal data should be adequate, relevant and not excessive in relation to the purpose or purposes for which it is processed
- personal data should be accurate, and when necessary kept up to date
- personal data should not be kept for longer than is necessary for the purpose for which it was collected
- personal data should only be processed in accordance with the rights of individuals under the DPA – the main one being the individuals' right of access to data held about him/her
- appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data, and against accidental loss, destruction, or damage to personal data
- personal data shall not be transferred to a country outside the European economic area unless that country adequately protects personal data.

Breach of the provisions of the DPA can lead to criminal and civil liability for a college. It is therefore important that a college's internal documents are reviewed to ensure they comply with data protection principles. These include the terms and conditions contained in the student enrolment forms, the student handbook, the staff handbook, staff employment contracts, all recruitment forms, documents relating to closed circuit television, information regarding the use of security codes, and the notices to students when they collect their identity and student union cards.

A data protection policy should be in place and all staff made aware of it. This is the responsibility of the college management, but the governing body will want to ensure that a policy is in place, and will probably want to approve it.

The person with responsibility for the college policy should be aware of the changes introduced to this area by the Freedom of Information Act 2000 (FOIA) (See *Section 7*) and the overlap between it and the DPA.

Activity Request for information from parents

The parents of a student have phoned to ask whether she has been attending College. The pupil is 19 and has not had contact with her parents for a few months. Her parents say that they just want to check that she is safe and that she is still performing well at College. The receptionist puts the call through to you.

Make notes on how you would respond to the parents' request.

Viewpoint

Compare your ideas with the notes below.

- The legal position is quite clear. At 19, the student is legally an adult and her parents are no longer legally responsible for her. The college's duty is to the student not her parents.
- Data should not be disclosed to third parties, including the student's parents, without her consent.
- The only circumstances in which the college may disclose personal information without the individual's consent is where the disclosure is:
 - required by law
 - necessary for the purpose of obtaining legal advice or in connection with any legal proceedings
 - for the prevention or detection of crime
 - for the apprehension or prosecution of offenders

- for the assessment or collection of any tax or duty
- where the College's failure to disclose would substantially prejudice one of these purposes.

In this case, none of the above apply, so you should not discuss the student, details of her attendance or performance with her parents.

- This is a difficult situation to deal with. Your sympathies may be with the parents, particularly if, for example, they are concerned about their daughter's health. You should explain sympathetically and clearly why legally you cannot give them information about their daughter. You may want to give some practical help such as:
 - saying you will accept a sealed envelope which can then be forwarded to the student's last recorded address or offering to forward an email message
 - you could have a word with the student without telling the parents, and ask her to call her parents to let them know that she is safe and well.

You can see from this activity how, even when acting in good faith, it is easy for staff to breach the law on data protection.

How can you raise awareness of data protection in your college? As well as its data protection policy, it might be useful for the college to also have a short policy statement on 'Disclosing information to third parties' which all staff are made aware of. You might also make it policy to channel all calls of this nature through specific staff who are fully trained in this area.

Section 7 Freedom of information

The provisions of the Freedom of Information Act 2000 come into force over the next five years. They give any person or company the right to be informed in writing by a public authority, including further education colleges, whether it holds information of the description requested, and if it does, to receive that information within 20 days **unless**:

- the cost of complying with the request would exceed the appropriate limit set by the Secretary of State
- the request is vexatious or repeated
- or the information falls within one of the grounds for exemption under the Act.

The grounds for exemption are extensive. They include information which is:

- personal data
- reasonably accessible to the public by other means
- intended for future publication
- or where disclosure would be likely to prejudice:
 - law enforcement
 - the effective conduct of public affairs by public authorities
 - health and safety
 - commercial interests.

In the majority of cases the college will still have a duty to release the information if the public interest in disclosing it outweighs the public interest in maintaining the exemption.

The Act does not confer any right on an individual to bring proceedings against the college if it does not comply with the Act. The task of enforcement is given largely to the Information Commissioner – the new name for the Data Protection Registrar, who will oversee the enforcement of both Acts.

The overlap between the Freedom of Information Act and the Data Protection Act is a complex one. If a request is made for personal information then it should be treated not as a request under the Freedom of Information Act but as a request under the Data Protection Act. Moreover the Act extends the scope of two of the rights under the Data Protection Act (the rights of subject access and data accuracy) to **any** personal information held by the public authority whether or not this is automated or part of a relevant filing system or accessible record. For example post-it notes on tutors' files will be covered, whereas the files themselves might not have been covered under the Data Protection Act.

The Act is likely to affect colleges in the following ways.

- Colleges will need to revise their procedures on requests by students and staff for information on personal data held about them by the college.
- Colleges will come under increasing pressure to disclose non-personal management information. Good governance and the articles of government already require the public disclosure of governing body papers, except where they concern staffing, or sensitive personal or commercial matters. There are several exemptions under the Act covering management reports and policy development papers. An example would be where, in the reasonable opinion of a qualified person (such as the clerk), disclosure would be likely to inhibit the provision of advice, exchange of views or prejudice the effective conduct of the affairs of the college.

Although at the time of writing the Act is not yet fully in force, colleges need to consider how to organise their information so that they will be able to comply with requests received under the Act. The information managers in your college will need to understand the complexities of the Act's balance of public and private interests, and its interaction with the Data Protection and Human Rights Acts.

Activity The implications of the Freedom of Information Act

The governing body wants your advice on how the Freedom of Information Act will affect their response to the following requests for information.

- 1 A member of staff asks in writing to see her personal file, and in particular a copy of the reference recently provided by the college to a prospective employer. The job offer has been withdrawn and the member of staff believes the reference may be relevant.
- 2 Bob Building Contractors Ltd, who have recently unsuccessfully tendered for some development work on the college campus, write to ask: why they did not get the bid; who the successful tenderer was; and the price of the successful bid.
- 3 A former member of staff asks for information about a research project which the college is undertaking in conjunction with a pharmaceutical company. The ex-member of staff would have been aware of the project before she left. The relevant department, the governors and the company in question are adamant that the information must not be disclosed.

Viewpoint

- 1 This is a request for personal information and is therefore exempt from the Freedom of Information Act. It should be treated as a request under the Data Protection Act. The member of staff is entitled to request a copy of all personal information about her held by the college. The college can charge a fee for providing this. The file should be checked to make sure it does not contain personal information about third parties which cannot be disclosed without their consent, or information that is not personal to her. You are not obliged to disclose the reference if it was provided in confidence, although you should bear in mind the Data Protection Commissioner's view that employers should be as open as possible.
- 2 As part of the policy of openness, the college should be willing to inform Bob Building Contractors why they were not successful although there is

no general legal duty to do so. Under the Act, the company has a right to be given this information if it has been recorded somewhere, unless one of the grounds for exemption apply. The identity of the successful tenderer should also be disclosed and may in any case be in the public domain. The college will have to disclose the price of the successful bid under the FOI unless it believes that one of the exceptions applies (eg the information is commercially sensitive). The college can charge a fee for dealing with the request.

- 3 Again, the information will have to be disclosed under the FOI unless you are satisfied that one of the grounds for exemption apply (eg the information is commercially sensitive or intended for future publication).

Section 8 Other relevant legislation

Health and safety legislation

There are significant duties placed on employers and those in control of premises by health and safety legislation. These must be complied with and the health and safety of students and staff ensured. Buildings must be in good repair, services must be in efficient working order, all work processes and premises must be assessed for hazards, and effective action taken to eliminate risk.

An effective maintenance system is required to ensure a safe environment. Particular care should be taken when temporary buildings are brought into use to ensure that they meet all health and safety requirements. The movement of students around the building should be properly organised. Colleges also have a duty to ensure as far as possible the safety of their students on work placements.

Colleges are legally required to have a health and safety policy statement. It should clearly state who in the college's senior management team is responsible for health and safety. There should also be a management plan which ensures regular and effective training in health and safety procedures.

Property law

Land and buildings are often a college's most valuable assets. It is important that governing bodies protect these assets when dealing with them. This includes taking advice on the commercial worth of land and buildings when buying, leasing or selling them, and ensuring that any associated legal documentation contains the statements required by the Charities Commissioner under the Charities Act 1993.

The Financial Memorandum requires the consent of the funding council for any land and building transactions where the total costs exceed £100,000 or 5 per cent of the college's annual income, whichever is the lower.

As charities, colleges are exempt from payment of stamp duty when buying or leasing property and are entitled to rate relief.

Finally, there is a raft of legislation affecting property issues, such as the Disability Discrimination Act 1995 and the Special Educational Needs and Disability Act 2001. The 1995 Act requires institutions to make 'reasonable' adjustments to their working practices and premises to ensure that they are accessible to people with disabilities. (See *Module 2 Section 4*.)

Company law

Designated institutions that are companies limited by guarantee are subject to company law. The governors are directors of the company. In practice, many of the requirements imposed on directors by the Companies Acts 1985 to 1989 are also imposed on governors by the Education Acts and the college's governing instruments. But you cannot assume that compliance with these will mean that governors are fully compliant with the Companies Act 1985. Care needs to be taken that the governing body procedures, such as accounting and auditing procedures, comply with specific requirements of the Companies Act.

Any trading subsidiary of a college has to comply with the Companies Act. In many cases the clerk is the company secretary of subsidiary companies, and as such has specific responsibilities.

The company secretary is basically the administrator of a company and is responsible for complying with the day-to-day statutory requirements. These include:

- authenticating the sealing of deeds by the company, together with a director of the company, unless the company's articles of association specify otherwise
- recording minutes of directors' and shareholders' meetings and preparing any necessary paperwork
- making entries in the company's statutory books, and keeping these up-to-date. This includes entering details of transfers and allotment of shares, appointments and resignations of directors, and the details of new members. Registers must be kept up-to-date, including the register of charges, register of debentures and register of directors' interests
- issuing new share certificates. This must be done within two months of the allotment and/or transfer

- dealing with all correspondence to shareholders under the direction of the board of directors, and forwarding any required copy documentation to the auditors
- making all necessary returns to the Registrar of Companies. This entails:
 - completing the annual return each year, and ensuring it is up-to-date and accurately reflects the directors' and shareholders' details together with shares issued
 - filing the required statutory forms with the Registrar of Companies, for example, appointments or resignations of directors, changes in accounting reference date, registered office, authorised share capital, allotment of shares etc.
 - filing any special or extraordinary resolutions and certain ordinary resolutions with the Registrar of Companies
- dealing with any stamp duty implications arising from the transfer of shares and applying to the Inland Revenue for the stock transfer form to be stamped. All details in relation to the transfer must be entered in the register of transfers and the register of members. It is important to note that if a stock transfer form requires stamping then the date upon which a person becomes a member and/or ceases to be a member must be the date of stamping. It is a criminal offence to state a date before stamping.

EU procurement regulations

Colleges, as publicly funded bodies, have to comply with European procurement regulations. These apply if the college buys goods or services with a value greater than Euro 214,326 (£144,456) or in the case of construction contracts Euro 5,358,153 (£3,611,395). (These are the limits set until the end of 2001.) There are also complex aggregation rules which mean that for some purposes a number of different contracts are counted as part of a single procurement exercise (eg the regular purchase of books or IT equipment). The length of the contract should also be considered. For example, if a college enters into a contract for computer services worth £50,000 per year for three years, it would be covered by the regulations.

Intellectual property

Colleges have intellectual property rights, such as rights in new technology developed at the college. These rights should be protected because they can be exploited to provide a source of finance for the college. As intellectual property rights can be valuable, colleges should have an intellectual property policy in place for staff and students, which sets out the ownership rights to intellectual property at the college.

Colleges must be careful not to infringe the rights of third parties. This may occur for instance when a lecturer copies the work of another academic and claims it as his own. In such a case the copyright in the work will vest in the creator and the lecturer's copying may amount to an infringement of copyright. Similarly, there may be circumstances when the college will need to consider entering into confidentiality agreements with third parties to safeguard the college's ideas and to register trade marks and patents to prevent others benefiting from its brand or invention. (See also *Section 4*.)

Activity Reviewing governing body responsibilities in these areas

Read through the scenarios below and if necessary look back over this section to decide what if any, the governing body's legal responsibilities would be in each situation.

- 1 A new member of staff scalds herself badly on a hot tap in a staff toilet. The notice warning about scalding water had fallen on the floor. Purchase of a new thermostat system has just been approved. Has the college met its health and safety responsibilities?
- 2 The college is considering acquiring new property next to an existing teaching block to expand its classroom capacity. The new property is on two floors with no lift. The governing body asks you whether it would need to be made fully accessible to wheelchair users if purchased.
- 3 You have recently been appointed as company secretary to your college's subsidiary company. One of the directors is leaving the college and therefore resigns her directorship. On looking through the companies statutory books you realise that these have not been kept up-to-date and you can find no record of the director in question having been appointed. A search at Companies House reveals that her appointment has not been registered there. What should you do?
- 4 The college wishes to enter into the following transactions. Do the EU procurement regulations apply to either transaction?
 - a) a contract for the supply of photocopiers at a cost of £45,000 per annum. The contract does not specify how long it will last for.
 - b) a two-year cleaning contract worth £55,000 a year. At the end of that period the contract will be renewed for a further two-year period unless the parties agree otherwise.

Viewpoint

- 1 Under section 3 of the Health and Safety at Work Act the college owes a duty to its employees. It must do all that is reasonably practicable not to expose its employees to risks to their health and safety. Has it done so in this case? Factors which will be considered include:

- how long had the warning notice been on the floor?
- was the college aware of this and done nothing about it?
- have there been any previous instances of scalding?
- how long has the hot water problem existed?
- how long has it taken the college to arrange for the purchase of the new thermostat?

Obviously we do not have all the answers to these questions but it appears on the face of it that the college may not have done all it could to prevent the accident.

- 2 The property may need to be made accessible to wheelchair users. As from 2004 the college may be required under the Disability Discrimination Act 1995 to make physical adjustments to its premises to ensure that its staff are not discriminated against. Students are not covered by this Act but they will be protected by the Special Educational Needs and Disability Act 2001. When the Act comes into force a student will be discriminated against if he or she is placed at a 'substantial disadvantage in comparison to persons who are not disabled'. The steps required to avoid discrimination will depend on the circumstances but might require the installation of a lift. (See *Module 2 Section 4*). Ensuring that there is adequate disabled access is therefore an important consideration when acquiring new premises.
- 3 You will need to look through past governing body minutes to find the relevant details of when this director – and the others – were appointed and use this information to bring the statutory books up-to-date. You should check to make sure the register of members is also accurate. You will then need to file all the necessary statutory forms at Companies House. This example shows why it is important to keep the statutory books up-to-date. If this is not done it can cause real practical difficulties, extra work and confusion. The company can also be fined.
- 4 The EU procurement regulations will apply to both transactions:
 - a) A contract which has no specified duration will be deemed to last for four years. Therefore the contract for the supply of photocopiers will be treated as having a value of £180,000.
 - b) Although the cleaning contract appears at first glance to be a two-year contract worth £110,000, it will be treated as a four-year contract worth £220,000 for the purposes of the regulations.

Module review

This module has looked at the general legal obligations which govern the relationship between further education governing bodies, their staff and students. If you have worked through the whole the module you should now be confident that you can:

- summarise the nature of the legal relationship between the college and its staff
- explain the role of the governing body in determining the pay and conditions, disciplinary and grievance procedures, and the dismissal of staff
- outline the legal relationship between the governing body and the students of the college, and its responsibilities towards students
- explain the governing body's responsibilities in relation to the student union
- explain why it is important for colleges to have policies dealing with email and internet use
- outline the college's responsibilities under the Data Protection Act
- summarise the effects of the legislation on freedom of information, health and safety and intellectual property law
- state the thresholds for the buying of goods or services which trigger the application of EU procurement regulations
- summarise the main responsibilities of a company secretary.

Summary of key learning points

The governing body is the employer of college staff, it has particular responsibility for senior postholders (including their suspension or dismissal), for setting the framework for the payment of other staff, and for ensuring that the college has disciplinary and grievance procedures. The principal is responsible for the day-to-day management of the staff.

The nature of the relationship between the college/governing body and its students is a contractual one. The governing body is responsible for ensuring that there is a disciplinary procedure for students, and procedures for the exclusion of students for academic reasons. It should also ensure that there is a complaints procedure. The principal is responsible for the maintenance of student discipline, and for the suspension or exclusion of students within the framework laid down by the governing body.

There is no legal requirement to establish a student union but if there is one the governing body has extensive responsibilities for that union under the articles and the terms of the Education Act 1994.

A college can be vicariously liable for the misuse of the internet or email by its staff acting in the course of their employment. It is therefore important to have policies in place explaining what is the permitted use of these facilities and what action could be taken if the policies are contravened.

It is important that the college has a data protection policy, and a member of staff in charge of overseeing its operation and ensuring that the Data Protection Act is complied with. Colleges should also begin planning for their new responsibilities under the Freedom of Information Act.

A clerk who is also company secretary of any college subsidiary company is responsible for complying with the day-to-day statutory requirements under the Companies Act including maintaining the company books and making all necessary returns to the Registrar of Companies.

There is a raft of legislation which affects the activities of the governing body. The clerk cannot be an expert on these areas but needs an awareness of the issues to make sure that governors are alerted to the need for specialist advice.

Where next?

You have now completed work on *Module 4 The wider legal framework*. If there are areas in which you need more guidance or information, they may be covered in other modules in the pack. Turn to *Check your current knowledge and skills* in the **User's guide**. This self-assessment questionnaire will help you to decide which modules or sections of modules may help to fill these gaps. Tick the useful sections for further study.

If you cannot find the information you need within this pack, turn to the *Action planner* in the **User's guide**. Note down what further information, support or guidance you would like. The *Action planner* gives advice on who may be able to help, and how.

Putting it into action

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

Further reading

There are a number of useful websites etc on legal issues:

The Charity Commission website – www.charity-commission.gov.uk – provides information on student unions

The Information Commissioner website – www.dataprotection.gov.uk – provides guidance on data protection issues

The Home Office website – www.homeoffice.gov.uk – has a section on Constitutional and Community issues providing useful guidance on a number of issues including freedom of information.

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The *Clerks training materials* were produced by a partnership of national organisations involved in further education:

ACRA The Association of College Registrars and Administrators is a national organisation which provides professional support to business managers and clerks. The services for clerks include seminars, conferences and network meetings to share good practice and become familiar with new initiatives.

LSDA The Learning and Skills Development Agency is one of the leading research and development organisations operating in the field of post-16 education. Its mission is to be a strategic national resource for the development of policy and practice in post-16 education and training.

AoCSW The Association of Colleges, South West is the regional arm of the national Association of Colleges (AoC) which represents further education colleges and provides a range of services to members.

Eversheds is one of the leading firms of legal advisers to the education sector in the UK, working with over 300 further education colleges.

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4

the wider
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5

working relationships

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for corporation clerks in FE colleges

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Note

The Learning and Skills Development Agency
was formerly known as FEDA.

*For suggestions on how to get the most out of these self-study materials, see the **User's guide**.*

Introduction

This module explores a range of theories and practical techniques for managing relationships with other people in organisations. When we did a survey of clerks to ask what these training materials should include, over half said that building up successful working relationships was a key factor in being an effective clerk.

The clerk's job is to make sure the governing body conducts its business efficiently, operates within its powers and follows procedures. The clerk is both servant to the governing body and responsible for how it carries out its business. To do this effectively the clerk has to maintain good working relationships with the chair, principal, chairs of subcommittees and individual governors, while remaining completely impartial and independent. It is a role which requires you to be:

- formal and friendly
- facilitating and regulating
- a kindly sage and conscientious umpire.

Achieving this balance is not always easy. There are a range of ideas and techniques that you can use to help you analyse your own and other people's approaches to these relationships, and to decide on practical steps to improve your effectiveness in working with other people.

Aims

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

- apply assertiveness skills to help manage difficult situations
- discuss common barriers to communication and strategies to help
- consider the diversity of perspectives and interests represented on the governing body and strategies to help a sense of common purpose
- explain key processes and skills for working with groups
- analyse skills for self-management and apply these to your own interactions
- identify sources of stress in your work and select strategies to help.

Contents

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

To do *Done*

- | | | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Section 1 Dealing with difficult situations |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 2 Communication |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 3 Power, influence and politics |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 4 Working with groups |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 5 Managing self |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 6 Managing stress |

Working on the self-study activities

These materials have been designed for flexible use, so that you can work through sections and activities in your own time and at your own pace if you would find it difficult to attend external training sessions. Clerks who have tested these materials point out the value of working on at least some of the suggested activities together with another clerk or group of clerks, as there is much potential to learn from each other's experience. You might find it useful to become involved in a local or regional clerks' network in which training materials might be used.

For suggestions on how to organise this kind of support for yourself, see the *User's guide*.

What you will need

To complete some of the activities in this module you will need to carry out additional tasks outside the module workbook.

- For *Section 2 Activity: Analysing how your governing body communicates* you will need to observe a meeting of the governing body.
- For *Section 4 Activity: Observing group interactions* you will also need to observe a meeting of the governing body.
- For *Section 4 Activity: Reviewing your group skills* you may want to work through the checklist with someone you trust.

Where you need to make notes in response to activity questions, we suggest you do this in a notebook or on separate sheets of loose-leaf paper, and store the information you compile along with the module for future reference.

Section 1 Dealing with difficult situations

The clerk's job is satisfying and rewarding when the work of the governing body runs smoothly, but the clerk sometimes has to walk a political tightrope, dealing calmly and impartially with difficult situations. It is inevitable that, on occasions, the chair seems inaccessible, or the principal obstructive, or the governors unsympathetic, even though the clerk may generally be the first to recognise their knowledge and expertise. While negotiating what can sometimes seem like a minefield, the clerk must keep in mind a clear idea of what the governing body is doing and what they are trying to achieve. Managing these relationships and behaviours with professional detachment requires a degree of self-awareness, skill and sensitivity in dealing with other people.

This kind of working environment throws up a whole range of pressures on the day-to-day relationships that the clerk needs to maintain, for example:

- avoiding being drawn into disputes and debates that might jeopardise detachment and independence
- staying neutral in responding to groups trying to lobby support
- dealing with attempts to undermine your advice or credibility.

To do this effectively, and to reduce the stress that these kinds of pressure can create, the clerk needs to manage successfully a range of interactions with other people. A key aspect of managing relationships is being honest, open and direct. This is the core of assertive behaviour, which we look at more closely in this section.

Different types of behaviour

Assertiveness – clear, honest and open communication – can help to reduce stress in interactions with other people. To understand what assertiveness is we must, first of all, be clear about what it is not. The checklist below gives examples of three different styles of behaviour which are not assertive: aggressive, indirect and submissive. Most of us tend to vary our style of communication depending on the circumstances and who we are talking to. Sometimes, however, an individual consistently uses a style which gets in the way of genuine dialogue.

Behaviour checklist

Aggressive behaviour is directed at satisfying the individual's needs without taking into account the needs and feelings of others. Examples include:

- ☐ Making other people's decisions for them
- ☐ Making decisions without taking account of the views of people affected by them
- ☐ Putting down other people who don't agree with your point of view
- ☐ Interrupting a lot
- ☐ Blaming someone else when things go wrong
- ☐ Arguing for the sake of it.

Non-assertive behaviour is directed at satisfying the needs and feelings of others while concealing or denying your own. **Indirect or manipulative behaviour** is one form of hiding your own needs and feelings – examples include:

- Making other people's decisions for them while trying to make them feel they've made their own
- Appearing to consult but making your own decision in the end
- Using flattery to get what you want
- Making other people feel guilty
- Dropping hints rather than saying directly what you mean
- Sidetracking the other person away from something you don't want to deal with
- Criticising someone or sabotaging their efforts behind their back.

Submissive or passive behaviour is a form of **non-assertive behaviour** in which the individual denies their own needs. Examples include:

- Allowing others to make decisions for you
- Keeping quiet about what you really want so the other person doesn't realise how important it is to you
- Being persuaded into something against your will
- Complaining behind the scenes about not getting what you want, without saying it directly to the person concerned
- Avoiding confrontation by trying to smooth things over that really need to be dealt with.

Activity Reviewing different styles of behaviour

- 1 Use the checklist above to analyse your own style of behaviour. You may also find it useful to analyse the styles of people you work with, especially those individuals with whom you sometimes have difficulty communicating.
- 2 How do you tend to react to each of these styles of behaviour in other people? How do colleagues react?

Viewpoint

Doing this activity may give you fresh insight into your own or someone else's behaviour. An individual who tends towards one particular style may do this deliberately to block honest communication, or may be completely unaware of their behaviour and its effect on other people.

We each tend to respond differently to unhelpful styles of behaviour in other people. One person may respond to aggressive behaviour, for example, by becoming more submissive to avoid conflict while another person may react by getting more confrontational themselves. This can set up a vicious circle in meetings. Individuals in a group may establish a pattern of behaving and responding to each other's behaviour that gets in the way of productive discussion.

Assertive behaviour enables an exchange to take place with another person based on openness, directness, and mutual respect. It involves negotiation on how the different needs and feelings of both people might be met. There are specific strategies which can help us to feel more assertive:

- Respect the other person's rights to express opinions, make mistakes, make decisions, change their minds AND
- Expect the same respect for your own rights
- Be specific, say what you would like to happen
 - keep to the point
 - keep it short
 - persist if this is appropriate
- Let the other person know how you feel in a neutral way:
 - use 'I' to talk about needs and feelings 'I feel frustrated because....'
 - give confident explanations rather than being apologetic or self-deprecating
 - repeat an important point calmly rather than getting frustrated or sarcastic

- Listen to and acknowledge the other person :
 - show you are listening by nodding, making eye contact, taking notes
 - ask questions rather than responding with statements
 - summarise what the other person has said, when appropriate.

We will now look at how you can use an understanding of behaviour styles to develop your own skills in this area.

Activity Analysing your own behaviour styles

Think of a situation, preferably in your role as clerk, in which you have used each of these four styles of behaviour. Make a few notes about each incident and the circumstances and personalities which caused you to behave in the way that you did.

For the examples of aggressive and non-assertive behaviour, think about what stopped you from being more assertive. What do you think you might have done differently, in the light of the suggestions above? You might find it useful to draw up a sheet along the lines of the example below to work through this activity.

Style of behaviour	Example	What stopped me from being assertive?	What could I have done differently?
Passive	I just let the chair defer the item on self-assessment AGAIN when I knew it was important and I should have insisted.	Chair's intense irritation with this topic – turns it on me!	Maybe acknowledge his anxiety, and my own – I think he feels threatened by the SA process

Viewpoint

This kind of analysis may help you see more clearly what was happening in a difficult situation or relationship that you or a colleague had to face. A mismatch in styles of behaviour is not always the problem, and often not the only problem. However, being aware of your own style and other people's means that you are better able to analyse what is going wrong in communication between individuals, and to make choices about how to respond.

Our behaviour towards each other is affected by factors such as personality, position in the organisation, power, perception, mood and history. We cannot expect to behave in the same way all the time because the chemistry in interacting with other people is unique to each event and incident. However, developing awareness of our selves and how we respond to others is a key dimension of our development as managers. By developing assertive behaviour, we are more likely to have our own needs met and to be meeting the other person's needs at the same time. This in turn increases our self-confidence and improves our working relationships with others.

Managing yourself is a key component of effective management: after all if you can't manage yourself, how can you hope to manage others?

Section 2 Communication

This section looks at key aspects of communication: how individuals differently interpret the same experience, 'noise' or factors that get in the way of clear communication, and the value of giving and getting feedback so as to develop a shared understanding and common purpose in working relationships.

Communication strategies

We often hear of difficulties in organisations defined as 'communication problems'. It seems to be a catch-all for all the ills, mistakes and misunderstandings that characterise organisational life. The essence of survival in any organisation is to be able to communicate effectively. For a clerk providing support to their governing body it is doubly essential.

An important part of a manager's interactions with other people is persuading them or motivating them to do things they wouldn't otherwise do. This is often a key dimension of problem-solving and decision-making. For the clerk, motivating and persuading are made more difficult because, although there is authority vested in the role, the clerk is the servant and not the line manager of the governing body. Consequently the clerk's communication strategies have to be subtle and sophisticated. You can support, facilitate and advise but you cannot tell the governing body what to do.

Critical to the process is the need to establish ownership for addressing a problem or reaching a decision. This often requires a consultative approach to ensure that a wide spectrum of views is heard. Consultation helps to build up trust and confidence in the relationship between the clerk and the governing body.

How we interpret the world

The process through which communication is structured is often fraught. How many times have you witnessed an event, say a film or TV programme, or a conversation in the pub, and then heard someone else's account of it conflict with your own? We tend to expect everyone to see things the way we do, so it is a bit of a shock when they have a totally different view. If people disagree in their understanding and interpretation of shared experiences, how much more difficult is it to get across ideas and opinions about something that is outside the other person's experience altogether?

We will now look at a situation that a clerk might come across, involving a simple straightforward interaction between three people. Even in this uncomplicated scenario, there is room for participants to interpret what happens very differently.

Imagine you are a clerk who has not had a proper appraisal for three years. In a telephone conversation with a clerk at a nearby college, your colleague enthuses about her recent appraisal and how useful she has found it. You decide to raise this with the principal and the chair when the three of you meet to consider the agenda for the next meeting of the governing body. The meeting takes longer than anticipated partly because you have had to draw their attention several times to standing orders that are not being adhered to. The other two are now keen to get away but you feel this is so important it should not wait.

Clerk: Before we go there is a matter I would like to raise...

(Principal looks anxiously at her watch)

Chair: (brusque) Well, what is it?

Clerk: It's about my appraisal, I –

Principal: (interrupting to close down the conversation) Yes, we really must do something about that I know. We'll diary something next time, but if you'll excuse me I have to get to –

Clerk: I'd like to make that appointment now. We've been putting this off for months and I'm getting concerned. I'm responsible for organising the training for governors but I haven't had an opportunity to discuss my own training and development needs.

Chair: (seizing an opportunity) I'm sorry I don't have my diary with me, perhaps we'll do this after governors ...?

Clerk: But that's not for another three weeks!

Principal: (exasperated) Look if we've delayed for three years I'm sure another three weeks is not going to make any difference! Now I really must go ...

The principal and chair leave you alone in the room to consider how you might have approached the problem differently. The following week you are waiting in the principal's outer office. Her door is ajar. She is with the chair and you realise they are talking about you...

Chair: ... almost to the point of rudeness!

Principal: Perhaps he's been on an assertiveness course.

Chair: It's probably those training materials for clerks putting ideas into his head! He's never complained about the appraisal before, has he?

Principal: No. I wonder if there are problems at home making him so irritable? He was very pushy in the meeting too, wasn't he?

Chair: Yes, such a stickler for protocol. Do we really need to be so obsessive I wonder?

Principal: Of course not. I think he's trying to protect his position. Make us feel that he is essential. With all this outsourcing going on maybe he's getting insecure himself. I'm fed up with everybody posturing like this – trying to convince me that they are indispensable.

Chair: Perhaps we ought to give him an appraisal just to show who's in charge.

Activity Interpreting behaviour

- 1 What do you think about the clerk's request?
What do you think about the chair's and principal's reaction to the request?
- 2 How far do you agree with their subsequent interpretation of the clerk's behaviour?
How would you describe the clerk's behaviour?
Why do you think they have decided to interpret the clerk's behaviour in this way?

Viewpoint

Compare your own ideas with the notes below. Your interpretation may well be quite different – and that is the point. We each give our own meanings to situations and signals from other people.

- 1 Obviously there is an issue here about the timing of requests and the reading of other people's emotional states. At the end of a long and frustrating meeting for both the principal and the chair, neither is ready to be reminded of their own omission. With hindsight, this was not the time and the clerk should perhaps have been more sensitive to the signals. But we don't always see these things, particularly if we are absorbed by our own concerns. The clerk went into the meeting determined to raise the issue and so did not read the emotional state of his colleagues as the meeting drew to a close. When we 'psych ourselves up' to do something our energy is focused inwards and not on other people. The principal and chair, now frustrated and short of time, were not in the mood to discuss something they had failed to do, and their exasperation and perhaps guilt contributed to the way they rationalised the clerk's behaviour.
- 2 Here we can see how the clerk's request about a reasonable entitlement becomes re-defined by the principal and the chair as 'rudeness', 'complaining', 'irritable', 'pushy', 'stickler', 'obsessive' and 'insecure'. The clerk has become the problem. In their speculation, they are keen to define the exchange as one in which the clerk is at fault: something has put ideas into the clerk's head; there are problems at home; he is trying to legitimise his position. The principal and chair are trying to 'explain' away the behaviour and transfer blame rather than take any responsibility for it themselves.

Let's now look at some of the factors that can hinder or help this kind of communication.

'Noise'

The situation above illustrates how there is significant scope for distortion in any encounter between people. Our emotional states – guilt, remorse, anger, exasperation – can interfere with the process in that they will affect how we transmit or receive messages. Surrounding emotions and other factors that interfere with the intended message are known as 'noise'.

'Noise' may mean that the sender of a message is not able accurately to convey their meaning or that the receiver interprets the message in a way that was not intended. Meaning lies in people rather than words and, as a consequence, there is a danger of misreading what we say to each other. The clerk's determination to persist and the principal's and chair's awkward

feelings about having neglected the appraisal all contributed to the 'noise' in this interaction.

Giving and getting feedback

Because of these difficulties, seeking feedback from the receiver is crucial to make sure the sender has succeeded in conveying what they wanted to convey. This checking helps to ensure mutual understanding:

'Does that make sense?'

'What do you think about that?'

'Tell me what you think I said, I'm not sure if I was being very clear...'

It is useful to get in the habit of giving feedback as well as asking for it, by paraphrasing or reflecting back what the sender has said or asking for clarification if the meaning is not clear.

'Let me just check, you want to...'

'What do you mean when you say...'

'Can I just clarify...?'

Another important form of feedback is non-verbal communication. Non-verbal signals often convey our feelings. We sometimes say one thing while feeling quite the opposite. Facial expressions, posture, vocal intonation and inflection often 'leak' what we are really feeling.

The clerk's attention to detail earlier in the meeting had exasperated the principal and chair. This might have been evident through 'leaks' such as sighs (frustration); staring out of the window (switching off); fidgeting (impatience); or folded arms (disagreement). The clerk might perhaps have read this useful non-verbal feedback, and then checked for further clarification.

'You both seem a bit fed up this morning. I wonder if it's something I'm doing that's making you feel like that. Is that the case?'

Activity Giving and getting feedback

Work through the questions below to identify areas where more feedback would help you in your work.

- 1 How often do you ask for feedback from your colleagues on the governing body?

☐ Often ☐ Sometimes ☐ Rarely ☐ Never
- 2 How often do you consciously give feedback to your colleagues?

☐ Often ☐ Sometimes ☐ Rarely ☐ Never
- 3 Identify one person whom you would particularly like to ask for feedback, and note down when and how you will do it.
- 4 Note down one person to whom you think it would be useful to give feedback, and work out when and how you will do it.

Viewpoint

This activity may have reassured you that you do give and get satisfactory feedback from most colleagues, but it might have made you aware of certain working relationships that could significantly benefit from better feedback. If you think this may be difficult, start by giving and asking for feedback on small issues or in 'safe' situations. See what the results are, and build from there.

Defensive routines

Defensiveness is one of the major obstacles to effective communication because when we are being defensive we are too preoccupied to hear what the sender is trying to convey to us.

The principal and chair were embarrassed about neglecting the clerk's appraisal and wanted to avoid looking foolish. Their behaviour was designed to avoid that embarrassment and they continued to act defensively by finding fault with the clerk.

If he hadn't been so absorbed by his own agenda could the clerk have seen this coming?

Management theorist Chris Argyris argues that all exchanges in organisations are designed to avoid threat and embarrassment. We want to act in ways in which we are in control and so we build up what he calls 'defensive routines' which ensure the preservation of our control. Sometimes seeking feedback in the way suggested can activate one of those routines, such as denial. Even so, seeking feedback does shift the balance in the interaction. In this case,

a denial would make it much more difficult for the chair and principal to later define the clerk as the problem.

Carl Rogers suggests that most responses to attempts at communication fall into one of five categories:

- 1 **Evaluative** in which the listener, in effect, tells the sender what to do
- 2 **Interpretive** where the listener implies what the sender should think
- 3 **Supportive** in which the listener seeks to reassure the sender
- 4 **Probing** where the listener wants the sender to elaborate further
- 5 **Understanding** seeks to confirm that the listener has heard accurately.

Activity Analysing how your governing body communicates

During the next meeting of your governing body, observe the effectiveness of the communication:

How much giving or seeking feedback is there?

To what extent do people talk across each other?

Which of the five categories do most responses fall into?

Who tends to make evaluative or interpretive responses?

Is there congruence between the content of what people are saying and the non-verbal signals they are giving?

When there is mutual understanding what do you notice about the quality of the exchanges?

Viewpoint

Being aware of the aspects of communication that we have discussed in this section can help us to understand some of the hidden meanings behind what is actually being said. Mentally standing back to observe our own and other people's interactions can be very illuminating. Sometimes this awareness can help us to work out why communication with someone else is difficult, or why it seems to be going wrong, and find ways of putting it right.

If you have found it useful to work through this section and observe the interactions of your governing body, you could consider further training or development in this area. Communicating is an essential skill for the clerk and the best way to develop good communication is by practising with other people.

Finally, it is worth stressing that many exchanges between people are in reality not aiming to progress towards mutual understanding. Instead they often represent struggles for power and control of one person over another. Reading the politics of the governing body and its meetings is a crucial dimension of effective clerking. It is one we shall turn to next.

Section 3 Power, influence and politics

According to various theories on management and organisations we are 'sense-makers.' That is to say, we are engaged in reading and ascribing motives to the behaviour of others. Being able to process this information and predict the actions and reactions of others can make us more effective in managing the complexities that confront us in organisations.

People actively pursue their personal goals and governors are no exception to this. Individuals perceive and interpret their environment, and subsequently adapt and make choices in line with what they believe is realistic in that context or environment. In these ways people formulate strategies that are designed to fulfil their goals.

However, the way in which we interpret our environment is shaped by our own experience and values – each individual has their own 'world view' through which they interpret their perceptions of the environment.

The clerk had perhaps formulated a strategy that was derived from a misreading of the situation, influenced by his concern to ensure that the governing body conducted its business according to the rules. A coalition had emerged between the chair and the principal, perhaps influenced by the clerk's behaviour but also by their shared view that they, and not the clerk, controlled the governing body. This coalition succeeded in defining the clerk in a particular way, preventing a discussion about appraisal, and ensuring that the personal goals of the principal and chair (ie to avoid an issue that they saw as challenging their authority) were met at the expense of those of the clerk.

To support the governing body effectively, the clerk needs some awareness of the different interests and world views of its members. Getting progress and understanding on a particular issue will happen more quickly if you are able to start where other people are, and move them towards a shared sense of purpose.

Activity Translating between different views of the world

Read the following thumbnail descriptions of four governors, and then answer the questions below.

Nelson Smith works for a local voluntary organisation that works with young black people. He knows a lot of people in the local African-Caribbean community and works with a range of other voluntary organisations. He wants to make sure the college is meeting the needs of young black people. He is used to informal meetings where ideas are discussed and decisions worked out by consensus, and finds the governing body very bureaucratic. He is not perturbed by confrontation or conflict, and thinks it is useful to air differences and grievances.

Pauline Michaels is a retired GP who believes passionately in education. She has spent her professional life diagnosing and treating patients – this involves gathering, and analysing information within a short consultation, making rapid decisions and getting things done promptly. She is always willing to undertake practical tasks but she is not a strategic thinker. She finds governing body meetings tedious and says very little. She believes the chair and principal should generally be left to get on with things.

Richard Bryce is a partner in a local firm of solicitors. One of his children attends the college. His professional life involves carefully timed meetings with clients and issuing precise instructions and/or delegating tasks to other colleagues. He is a clear thinker and good speaker, quickly cutting to the core of an issue or problem. He feels the governing body should be more businesslike, and dislikes long rambling meetings where other people say a lot that is not relevant to the issue.

Michaela Jessop is a staff governor. She is a strategic thinker, and quick to analyse the political implications of the issues and decisions that the governing body deal with. She is a good advocate for the staff viewpoint, sometimes outspoken on questions of principle, and has a healthy suspicion of management.

Choose three or four individuals on your own governing body whose viewpoints you sometimes find hard to understand.

- 1 Can you pinpoint things in the selected individuals' background or experience that would help to explain their world view, and their likely response to particular issues? You may find it useful to write thumbnail descriptions (confidentially and anonymised) like the ones above.

- 2 Consider how you might 'translate' a particular issue or problem into terms that would make it easier for each of the individuals selected to make sense of it.

Viewpoint

When any group of people come together to make decisions it is inevitable that there will sometimes be disagreement and conflict. Groups are little more than organisations in miniature. Managing the politics of such groups is a key dimension to influencing outcomes and achieving a common goal. The starting point is being aware of the different world views and personal interests within the governing body, and finding ways of engaging these.

The critical consideration for the clerk is how you can make it easier for the governing body to make sound decisions. Assertiveness skills can help to achieve this. Encouraging a collaborative or participative approach which engenders trust and commitment can also help.

Activity Reviewing your strategies to involve governors

Think about a time when you had difficulty persuading members of the governing body to consider an issue or take a particular course of action (eg seeking a decision on when and how the writing of the self assessment report should take place).

- 1 Use the first column of tick boxes in the checklist below to analyse what strategies you used (mark with a ✓) and what alternative strategies you might have used (note with a ?).
- 2 Use the second column of tick boxes to identify the strategies that you use most frequently. Score 1 to 3 where 1 = I use this a lot and 3 = I use this very little.

Score

- | | | | |
|---|--------------------------|--------------------------|---|
| 1 | <input type="checkbox"/> | <input type="checkbox"/> | Threaten: If you don't do this, then... We must do this or... |
| 2 | <input type="checkbox"/> | <input type="checkbox"/> | Direct: You must/should/have got to... |
| 3 | <input type="checkbox"/> | <input type="checkbox"/> | Moralise: I think the best thing to do is... |
| 4 | <input type="checkbox"/> | <input type="checkbox"/> | Advise: If I were you I should... |
| 5 | <input type="checkbox"/> | <input type="checkbox"/> | Cajole: You must do this, so that... |
| 6 | <input type="checkbox"/> | <input type="checkbox"/> | Sell: You have always said that this has been an area of difficulty for you. I believe that this initiative will overcome those problems. |
| 7 | <input type="checkbox"/> | <input type="checkbox"/> | Motivate: If we get this done, it will be great because we are then able to... |

- 8 ☐ ☐ Summarise accurately: The key points to bear in mind for this decision are...
- 9 ☐ ☐ Use logic: The correct thing to do is... The rules say...
- 10 ☐ ☐ Question to collect information: What do you want to try and achieve...
- 11 ☐ ☐ Suggest options: The options are either...or...
- 12 ☐ ☐ Involve: What do you think about...?
- 13 ☐ ☐ Include: I think you are absolutely right. We need to take that into account.
- 14 ☐ ☐ Support: Clearly if you see it that way then we must respect your judgement and consider the implications.
- 15 ☐ ☐ Seek common ground: Are there some things here that we can agree on right away?
- 16 ☐ ☐ Encourage: That was a good point you made a few minutes ago, can you say more?

Viewpoint

- 1 There is obviously no blueprint here. Your 'reading' of the situation is important. You need to consider how crucial it is to get ownership of the decision and what time is available to make that decision. Obviously getting real consensus on a decision from a group of people will take longer than simply getting formal agreement. However if governors are just instructed to agree something, their actual commitment to the decision may be severely limited. There is a tension in any decision-making between allowing enough time for information, discussion and persuasion to get a high degree of commitment and getting through the business efficiently. This tension will influence your approach and the strategies you use.
- 2 Broadly, strategies 1 to 7 represent more or less subtle 'controlling' strategies, ie directing other people to do what you want. Strategies 8 to 11 are 'rational' strategies, ie applying reason or using information to assist decisions. Strategies 12 to 16 are participative – encouraging other people to contribute and feel involved in decisions. Each of the strategies listed is useful at the appropriate time and place. However, if you tend to use one type of strategy more than any other, and if you find you use participative strategies less than others or only very rarely, you may want to think about expanding your negotiating style by trying out some of the strategies that you only occasionally use now.

Effective clerking can often require a significant amount of tact, diplomacy and patience. These are key characteristics of the role. However, they should be based upon an overriding sense of purpose, direction and focus. Being able to 'read' the intentions, preferences and orientations of others can have a profound impact on your effectiveness.

Section 4 Working with groups

Another key aspect of sense-making (see *Section 3*) is reading group dynamics. Despite the fact that we are all group participants in one form or another it is rare for us to stop and think why people behave in a particular way. It is only when a problem arises that we are alerted to the fact that something might be wrong.

Content and process

Governing bodies are a group of people who meet to make decisions. In order to do that they consider information and ideas that are set before them. This is their reason for existence: to solve problems. We can refer to the information, ideas and problems they consider as *content* issues. However, what many of us miss when considering the performance of a group is the *process* issues: in other words *how* the group is addressing the content issues. Process is the oiling of the content wheels. Process ensures that content does not become stalled or seized on the way. We ignore process at our peril. Process is about:

- how communication is handled
- who is talking to whom
- the methods by which the governing body reaches a decision, eg consensus-seeking, polling, or unanimity.

Activity Making use of process behaviours

Some behaviours can help process and others can help content. Examples are given in the table below. At the next meeting of the governing body, assess how many process behaviours you see.

Behaviour that contributes to content	Behaviour that contributes to process
summarising	humour
clarifying	compromise
giving information	encouragement
asking for information	asking questions
	asking for feedback

Viewpoint

If process behaviours are few and far between it is likely that the governing body may not be performing very effectively as a group. If governors are aware of their preferred behaviours and there is a good balance between process and content people, this can be a strength. An imbalance or lack of awareness of these different behaviours amongst key players can end up pulling meetings in opposite directions. Group process skills is one area of training that can make a real difference to the governing body as a whole, and you might want to discuss this with the chair or principal.

Disturbances

Other factors that can impede the progress of a group include:

- emotional issues – eg personal relationships between governors
- identity – eg a student governor feels apprehensive or intimidated by other members
- power – eg a chair whose autocratic behaviour discourages debate
- alienation – eg a new governor has not had a satisfactory induction and is not sure whether others accept her as legitimate contributor.

Group norms

All groups establish norms of behaviour, ie codes of acceptable conduct through which the group works. The key issue here is whether the norms help the group to be effective or work against it.

There are a number of stages any group must go through in order to establish effective working relationships: these stages are 'storming' 'norming' and 'performing'. During this process individuals test out each other's commitment, goals, priorities, etc. Only after that can norms be established and the group move towards performing effectively in a cohesive way. Regular changes in group membership tend to inhibit this process.

Activity Observing group interactions

Can you identify the group norms of your governing body? Is the current group of governors at the storming, norming or performing stage? Are you able to spot emotional behaviours that are restricting its performance? Are you able to glean any information outside meetings to confirm or refute your analysis?

At the next meeting of the governing body, draw up a diagram to show how each member of the group interacts with others. Draw out the group members as they sit around the table. Each time one of them speaks draw a line from them to the person they are speaking to; if they make a general comment draw the line into the centre of the table.

Viewpoint

How a governing body functions will affect the quality of the decisions it makes and the sense of commitment that individuals bring to its deliberations. Compiling a diagram or 'sociogram' quickly gives you a graphic impression of the way interactions take place within the group. If you are able to share this with colleagues it can provide useful insight and ideas for improving a group's performance.

If there are problems in this area it is likely that you will find it difficult to retain new governors for very long. Conducting exit interviews with governors who leave might well provide some useful feedback on group dynamics in the governing body that could be brought to the attention of the chair and perhaps the full board.

Whilst it is not be wholly appropriate to consider a governing body as a 'team', research studies on teamwork have some value here. Evidence suggests that effective teams:

- are open with each other and do not shy away from confrontation
- encourage both co-operation and conflict
- regularly review their performance, eg through self-assessment or a governance healthcheck.

Groupthink

One of the dangers that can ensnare groups is 'groupthink.' This is where a group of people avoid conflict by seeking to find a way of agreeing above all else. This consensus-seeking becomes an end in itself. No-one wants to disrupt the cosy atmosphere by expressing a view that might destabilise it. There is an illusion of unanimity because views are not contested or disputed despite the fact that, deep down, individuals may have reservations about them.

This danger has afflicted certain further education governing bodies in the past, leading to some high profile cases where weaknesses, including a tendency to groupthink, have been publicly exposed.

Making presentations

There may be occasions where you need to make a presentation to the governing body. Here we are not concerned with how to organise the content of the presentation, but with the group processes that are involved in designing and delivering the content in an effective way. We will look at this with the help of a case study.

Members of Learnwell College governing body find the self-assessment process an onerous task and are keen to delegate it to one or two people. The clerk knows that this is where the problems start because this tends to result in lack of ownership, and lack of understanding of the process. This was exposed as a weakness in the last inspection. The clerk agrees to make a presentation to help develop more general commitment to the self-assessment process.

Authors Andrew Leigh and Michael Maynard argue that the key processes to think about in designing a presentation are: preparation, purpose, presence, passion and personality.

Preparation

- Research your audience: conduct a mental audit of the governing body and try to identify where your support will come from and where the opposition is likely to be.
- Pre-empt likely resistance or reservations: acknowledge that some governors dislike self-assessment before taking those arguments forward in a positive way.
- Set out the costs and benefits: explain the consequences for the governing body and college of failing to conduct a rigorous self-assessment, and the gains from doing it well.

Purpose

Every presentation has purposes which go beyond the formal aims that appear on screen. Identify all the purposes of the presentation. These could include any combination of the following:

- to persuade
- to provide new information
- to give feedback
- to establish your credibility as a reliable source
- to demonstrate your competence

- to confront
- to reduce tension or dispel anxiety.

In this particular scenario there is a mixed audience and your purpose is at least two-fold: to reinforce commitment and alleviate concerns.

Presence

Presence is about developing awareness of yourself and your environment. This involves taking mental note of:

- the atmosphere
- the mood of the audience
- their level of concentration
- the level and tone of your voice
- your hand movements
- your eye contact with people in the audience
- the timing of your pauses
- non-verbal signals which tell you what people think about what you are saying.

Your presence helps to hold the attention of your audience.

Passion

If you don't demonstrate commitment to your subject then why should others be committed? You need to reach the resisters in the audience at an emotional level; you need them to care about self-assessment. Use expressive words that convey your feelings and capture governors' imaginations.

'If we are downgraded because of a poor self-assessment it will be tragic.'

'If we don't commit to this as a governing body we will be in deep trouble.'

'I know this governing body has more than enough expertise to do this well. Let's make it happen.'

Personality

Audiences can sense falseness and insincerity. Most audiences want to like the presenter. They may enjoy superb showmanship but they also respect straightforwardness and quiet competence. Be as natural as possible.

Nerves can make people freeze or become very wooden when making presentations. The best way to avoid this is to plan carefully. If you know that the content of your presentation is well-organised, you can relax and concentrate on being yourself.

The next time you encounter an effective speaker try and analyse what makes them effective. Adapt and practise some of those techniques for yourself. We tend to believe that the pure logic and reasonableness of our argument will win through. Remember both hearts and minds have to be won over. The force of the argument alone won't win the day but, combined with an effective presentation, it stands a much better chance.

Activity Reviewing your group skills

Now you have completed this section you might like to use the checklist below to do an audit of your group work skills.

- 1 Work through each item and give yourself a score of 1 to 5.
- 2 If you can, give a second copy of the checklist to someone you trust and ask them to fill in how they think you score on each item.
- 3 Compare the scores and, where there are big differences, discuss why your friend or colleague sees you differently.
- 4 Decide on three or four priority areas for improvement, and how you will tackle them.

Checklist: Skills for working in groups

Observational skills	1 = Need to improve			5 = Good at this	
Noting tension in the group	1	2	3	4	5
Noting who talks to whom	1	2	3	4	5
Noting interest level in the group	1	2	3	4	5
Sensing the feelings of individuals	1	2	3	4	5
Noting who is being 'left out'	1	2	3	4	5
Noting reaction to my comments	1	2	3	4	5

Communication skills

Being brief and concise	1	2	3	4	5
Being forceful	1	2	3	4	5
Drawing others out	1	2	3	4	5
Listening alertly	1	2	3	4	5
Thinking before I talk	1	2	3	4	5
Keeping my remarks to the topic	1	2	3	4	5

Problem-solving skills

Stating problems or goals	1	2	3	4	5
Asking for ideas, opinions	1	2	3	4	5
Giving ideas	1	2	3	4	5
Evaluating ideas critically	1	2	3	4	5
Summarising discussion	1	2	3	4	5
Clarifying issues	1	2	3	4	5

Morale-building skills

Showing interest	1	2	3	4	5
Working to keep people from being ignored	1	2	3	4	5
Harmonising and helping people reach agreement	1	2	3	4	5
Reducing tension	1	2	3	4	5
Upholding rights of individuals in face of group pressure	1	2	3	4	5
Expressing praise or appreciation	1	2	3	4	5

General

Understanding why I do what I do	1	2	3	4	5
Encouraging comments on my own behaviour	1	2	3	4	5
Accepting help willingly	1	2	3	4	5
Making up my mind firmly	1	2	3	4	5
Criticising myself	1	2	3	4	5
Waiting patiently	1	2	3	4	5
Going off by myself to read/think	1	2	3	4	5

Viewpoint

This is a practical tool which other members of the governing body might also like to use, either privately or as a group. It could provide the basis for useful discussion and insight, and help to identify further training or development needs for particular individuals or the governing body as a whole.

Section 5 Managing self

In an earlier section we suggested that managing ourselves is the first step in successfully managing others. Over the last thirty years the leadership styles and personalities of senior managers have come to be seen as crucial to the success of organisations. Many models and theories of management and leadership have developed, and with these has emerged an awareness that emotional behaviour is a crucial aspect of effective management.

Emotional intelligence

Emotional intelligence describes a group of personal and social capabilities that are said to be found in outstanding performers. Management theorist Daniel Golman looked at data from large high-performing companies and found that although technical skills and cognitive ability have some importance at senior levels, emotional intelligence characterised the most competent and successful managers.

As clerk to the corporation, you are acting with senior colleagues inside and outside the organisation to ensure the effective working of the governing body. The relationships between members of the governing body and the senior staff at the college are often complex and can be much enhanced by the emotional intelligence of the clerk.

It is suggested that there are four capabilities within emotional intelligence:

- **self-awareness:** the ability to read and understand your emotions and their impact on others; self-confidence and realistic evaluation of your strengths and weaknesses
- **self-management:** self-control, trustworthiness, conscientiousness, adaptability, initiative and a drive to meet an internally set standard of excellence
- **social awareness:** empathy – the skill of sensing other people's emotions/perspective; organisational awareness; recognising other people's needs
- **social skill:** the ability to inspire, influence and develop others; communication skills; conflict management, building bonds and promoting co-operation.

It is not within the scope of these materials to offer personal diagnosis of your competence in each of these areas. However you can begin to consider situations where you might practise and enhance your skills through active reflection on and learning from events at governing body meetings, interactions between members and the principal, interactions between the principal and chair, and so on. Get in the habit of noting and analysing critical

incidents (situations where something didn't work well and which present useful opportunities to learn from mistakes). For example, if we take the case outlined in *Section 2* we could analyse the clerk's behaviour in terms of the four emotional intelligence capabilities.

How well had the clerk read the general tone of the meeting? He may have been concentrating so much on content – in this case procedural issues – that he failed to read the impact his behaviour was having on the other two people, which suggests a lack of **self-awareness**.

Had he **empathised** with the principal and the chair? Did he see their anxiety to finish the meeting? He knew that they wanted to get away but chose to persist because he felt the issue was important. Sometimes it is a finely balanced judgement. If the chair and principal always found reasons for putting off discussion about his appraisal, his persistence might be a necessary strategy for **self-management**. But it might also show a lack of **social awareness**.

Should he have recognised that he wasn't in a very powerful position at that time? His desire to get action on the appraisal shows **conscientious self-management**, but perhaps also shows a lack of **adaptability**.

Social skill comes into play in making this kind of judgement. The clerk would probably have found it easier to **influence** the other two individuals and obtain their co-operation if he had chosen a time when he was in a strong position and the chair and principal in a more open mood. Perhaps the beginning of the meeting would have been a better time. On reading their mood at the end of the meeting, he might have chosen to wait and perhaps float the request with the principal in a private discussion or telephone call the next day.

Activity Analysing a critical incident

Think back over your interactions with a particular governor or group of governors in the last month or two and choose a critical incident to reflect on. Using the questions below as a guide, describe the incident in terms of emotional intelligence – your own or that of other participants.

What emotions drove your actions?

What could you have done differently?

What worked well?

How do your peers interpret what went on?

What would they have done differently?

Viewpoint

We cannot comment specifically on the incident you chose to analyse, but it is worth stressing that this kind of active reflection almost always repays the time spent on it. It can give valuable new insight into how others see us and how we might handle the situation and the interactions that took place more effectively in future.

Consider keeping a notebook where you regularly analyse critical incidents. If you have set up a learning set or peer network, you could periodically spend some time describing an incident and jointly reflecting on self-awareness, self-management, social awareness and social skill.

Managing yourself, and hence others, is a key component of your self-development. To see these materials as a launch pad for further work might be the start you are looking for. To view every situation as one that is rich in learning potential might be another.

Analysts of successful management are increasingly interested in the idea of 'learning organisations' – that is, organisations which actively use mistakes as vehicles for learning about and improving organisational effectiveness (as opposed to laying blame for things that go wrong or seeking to hide them). Whatever opportunities you take you should remember that continuous improvement applies to individuals in just the same way as it can be applied to organisations. We have a responsibility to ourselves to ensure that it happens. Emotional intelligence offers a way to examine dimensions of our behaviour that have not had a great deal of attention in the past yet are crucial for progression as well as survival.

Section 6 Managing stress

Work-related stress is a more common cause of health problems than personal problems. Working in organisations is a complex business and the clerk has a substantial share of complexity, uncertainty and ambiguity to deal with. All this is stressful.

To do something positive about sources of stress we need to identify them, and this section provides a checklist to help you do that. Typical stressors for clerks may include the complex demands of the clerking/management role, relationships with the chair and the principal, and heavy demands on time which can affect family and social relationships.

The physical symptoms of stress can include: upset stomach, disrupted sleep, high blood pressure, tense muscles causing headaches and backache.

palpitations and chest pains, loss of memory and concentration and an inability to make decisions.

Stress occurs when either physical or mental demands exceed our capacity to respond. Stress is a normal part of everyday life and can be a healthy stimulus if it is managed properly. To do this we need to take care of ourselves. One form of taking care is to adopt a set of relaxation techniques. These may involve breathing exercises, imagining yourself in a relaxing environment, or visualising yourself taking control of a stressful situation. Another is to pay attention to your diet, drinking and smoking.

Stress chart

The stress chart below is based on research in the late 70s by American psychologist Richard Rahe. Rahe looked at the varying levels of stress produced by different life events in a population of 2,500 US navy personnel.

This well-known stress scale is a useful general guide to assessing possible sources and levels of stress in your life. It should be emphasised, however, that everyone has an individual pattern of physiological and psychological responses and therefore reacts differently to different stressors. Note that happy events which cause major life changes can be a source of stress as well as unhappy ones.

Activity Assessing your stress levels

Circle the score of any of the events that have occurred to you in the last 12 months and then add up your total score.

Events	Stress Points
Death of a spouse	100
Divorce	73
Marital separation	65
Prison sentence	63
Death of a close family member	63
Personal injury or illness	53
Marriage	50
Loss of job	47
Marital reconciliation	45
Retirement	45
Change in health of a family member	44

Pregnancy	39
Sex difficulties	39
Gain of new family member	39
Business readjustment	39
Change of financial state	38
Death of a close friend	37
Change to a different job	36
Change in number of arguments with spouse	35
Large mortgage	31
Foreclosure of mortgage or loan	30
Change in responsibilities at work	29
Son or daughter leaving home	29
Trouble with in-laws	28
Outstanding personal achievement	28
Partner begins or stops work	26
Begin or end of school	26
Change in living conditions	25
Revision of personal habits	24
Trouble with boss	23
Change in work hours or conditions	20
Change in residence	20
Change in schools	20
Change in recreation	19
Change in social activities	19
Low mortgage or loan	18
Change in sleeping habits	17
Change in number of family gatherings	16
Change in eating habits	15
Holiday	13
Christmas	12
Minor violations of the law	11
Total Score	----

Viewpoint

You may find you disagreed with the score given to some stressors in the chart. For example, Christmas or family gatherings are a major source of stress for some people, much less so for others. This scale was developed over 20 years ago, so you may have felt it does not fully reflect some current workplace stressors – for example ‘computer rage’ (or despair) induced by dealing with computer hardware or software problems.

Your overall score will however be a general guide to the levels of stress you are dealing with.

If you scored:

Below 60	You are unusually free of stress.
60-80	You are experiencing a normal amount of stress.
80-100	Your stress level is rather high.
100+	You are under serious stress at home, at work or both. The higher the mark above 100, the more serious the stress.

Stress affects our health. Here are the health implications of scores on the Rahe scale:

Below 150	There is an average chance of developing a stress-related illness.
150-299	There is a moderate risk of developing a stress-related illness.
300+	There is a high chance of developing a stress-related illness in the coming months.

In a recent survey undertaken by MIND, 63% of those that took part said that problems at work now cause equal or more stress than personal problems. One in five companies surveyed reported that between a quarter and half of all sickness absences are stress-related.

Activity Would you or the governing body benefit from training in stress management?

The following are identified as work-related stressors:

- ☐ Threat of redundancy
- ☐ Poor relationships with colleagues
- ☐ Financial difficulties
- ☐ Working in a noisy area
- ☐ Change of job
- ☐ Too much responsibility
- ☐ Not enough responsibility
- ☐ Lack of stimulation, boredom
- ☐ Not enough time
- ☐ Expectations too high or too low.

How many of the stressors in the checklist affect you or colleagues on the governing body? Are there other stressors that you would add to the list? What active steps do you take to manage these work-related sources of stress?

Viewpoint

Various coping skills can help to manage stress. If we can develop these skills and use them appropriately we can strengthen our ability to cope in general and so raise our self-confidence.

- **Plan your time** – leaving everything to the last minute can be exceedingly stressful.
- **Set goals and prioritise** by determining what is long-term and what is short-term and then make sure the goals are realistic.
- **Assertiveness** eliminates a common source of stress (see *Sections 1 and 4*).
- **Talk things over** to get things out of your system. The support of others can be invaluable.
- **Hobbies** can be a distraction from the day-to-day pressures.
- **Stability zones** are areas of your life that are constant and positive and so need to be nurtured.
- **Confront the problem** by dealing with the source rather than the symptoms.

If you and/or other colleagues on the governing body are under serious and prolonged stress at work, it may be worth considering a formal assessment of the stressors, and training to help you reduce or manage them more effectively. For more information see *Useful resources* in the **User's guide**. In particular take a look at anything written by Cary Cooper. He has been at the forefront of research into stress at work over the last ten years.

The critical factors to keep in mind in managing stress are:

- Awareness – identify the causes and effects of stress in your life
- Balance – learn to know your limits, recognise the danger signs and find the right balance for you
- Control – even in a situation where there are serious constrictions on you, it is still possible to make active choices. You must believe that you have some control over the things that affect you, otherwise you will be unable to change them.

And that is the key message: that YOU are in charge!

Module review

This module has looked at working relationships and the skills and strategies that are useful for managing interactions with colleagues on the governing body. If you have worked through the whole module you should now be confident that you can:

- apply assertiveness skills to help manage difficult situations
- discuss common barriers to communication and strategies to help
- consider the diversity of perspectives and interests represented on the governing body and strategies to help a sense of common purpose
- explain key processes and skills for working with groups
- analyse skills for self-management and apply these to your own interactions
- identify sources of stress in your work and select strategies to help.

Summary of key learning points

Individuals use a range of behaviour styles (aggressive, manipulative, passive, assertive) in communicating with other people. Assertiveness is clear, honest and open communication. Assertiveness skills are useful in dealing with difficult situations and in communicating effectively with people who deliberately or unconsciously use unhelpful types of behaviour.

Individuals draw on their own background, experience and 'world view' to interpret what they perceive in their environment. The same situation may be interpreted very differently by each of the individuals involved.

Our emotional state can create 'noise' which may distort the communication signals that we send and receive. Our desire to avoid threat or embarrassment can lead to defensive behaviour which also prevents us communicating effectively.

Giving and asking for feedback helps communication. So does developing an awareness of communication styles, and analysing the way in which individuals on the governing body interact with each other.

Individuals on the governing body are concerned with their own interests and personal goals. You need to understand the interests and motives of colleagues, and be able to translate an issue into terms that make sense to the different individuals concerned. Using a range of strategies (directing, persuading, reasoning, involving) will help you to support the governing body in making sound decisions with a high level of commitment.

Effective clerking requires an awareness of group dynamics such as group norms, 'groupthink' and disturbances to group behaviour. It is valuable to develop process skills for working with groups and making presentations: this involves observation, feedback and practice.

Emotional intelligence is a characteristic of competent, successful managers. It comprises: self-awareness, self-management, social awareness and social skill. Reflecting on critical incidents can help to develop some of these capabilities. Using opportunities to learn from things that go wrong is a sign of strength, not weakness.

Clerking is a stressful job. To do something positive about stress we need to identify the major stressors that affect us and take action to avoid, reduce or manage them appropriately.

Where next?

You have now completed work on *Module 5 Working relationships*. If there are areas in which you need more guidance or information, they may be covered in other modules in the pack. Turn to *Check your current knowledge and skills* in the ***User's guide***. This self-assessment questionnaire will help you to decide which modules or sections of modules may help to fill these gaps. Tick the useful sections for further study.

If you cannot find the information you need within this pack, turn to the *Action planner* in the ***User's guide***. Note down what further information, support or guidance you would like. The *Action planner* gives advice on who may be able to help, and how.

Putting it into action

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

Further reading

Here are some suggestions if you would like to read more about Cooper's work on understanding and preventing stress at work:

Cooper, CL (1998) *Theories of Organisational Stress* OUP

Cooper, CL et al (1996) *Stress Prevention in the Workplace* Office of Official Publications of the European Communities

Worrel, L & Cooper, CL (1999) *The Quality Of Working Life* Institute of Management

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The *Clerks training materials* were produced by a partnership of national organisations involved in further education:

ACRA The Association of College Registrars and Administrators is a national organisation which provides professional support to business managers and clerks. The services for clerks include seminars, conferences and network meetings to share good practice and become familiar with new initiatives.

LSDA The Learning and Skills Development Agency is one of the leading research and development organisations operating in the field of post-16 education. Its mission is to be a strategic national resource for the development of policy and practice in post-16 education and training.

AoCSW The Association of Colleges, South West is the regional arm of the national Association of Colleges (AoC) which represents further education colleges and provides a range of services to members.

Eversheds is one of the leading firms of legal advisers to the education sector in the UK, working with over 300 further education colleges.

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6

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Note

The Learning and Skills Development Agency
was formerly known as FEDA.

*For suggestions on how to get the most out of these self-study materials, see the **User's guide**.*

Introduction

This module looks at managing the process of governance. It is aimed at new and experienced clerks and provides information to help you review and improve on existing arrangements. The eleven sections expand on topics in earlier modules so that you can see, for example, how the statutory framework impacts on the role of the clerk.

Aims

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

- outline the differing roles of the chair, the principal and the clerk
- explain to the governing body and others the arrangements for:
 - the appraisal of the clerk
 - appointing a new principal
 - establishing a special committee
 - appointing the chair and vice-chair of the governing body
- ensure the governing body maintains the register of interests in line with statutory requirements and good practice
- assist governors in assessing the performance of the governing body and producing the annual report to the audit committee
- set up and maintain an intranet site for the governing body
- manage meetings
- draft standing orders and terms of reference.

Contents

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

To do *Done*

- | | | |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | Section 1 'The Trinity' – your relationship with the chair and principal |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 2 Appraisal of the clerk |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 3 Appointing the principal or chief executive |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 4 The special committee |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 5 Appointing the chair and vice-chair of the governing body |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 6 The register of interests |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 7 Self-assessment and external inspection of the governing body |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 8 Annual report of the audit committee |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 9 A governing body intranet site |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 10 Managing meetings |
| <input type="checkbox"/> | <input type="checkbox"/> | Section 11 Drafting standing orders and terms of reference |

Working on the self-study activities

These materials have been designed for flexible use, so that you can work through sections and activities in your own time and at your own pace if you would find it difficult to attend external training sessions. Several clerks point out the value of working on at least some of the suggested activities together with another clerk or group of clerks, as there is much potential to learn from each other's experience. You might find it useful to become involved in a local or regional clerks' network in which training materials might be used.

For suggestions on how to organise this kind of support for yourself, see the ***User's guide***.

What you will need

To complete several of the activities in this module you will need copies of the instrument and articles of government. There are some additional documents which it would be useful for you to have.

- For *Section 7 Activity Formulating an action plan* it would be useful to have some previous self-assessment or inspection reports for your governing body, together with any action plans resulting from them.
- For *Section 8 Activity What goes into your audit committee's annual report?* you might need to refer to your last audit committee report.
- For *Section 11 Activity Do the standing orders approved by your governing body meet current local needs?* you will need a copy of your governing body's standing orders.
- For *Section 11 Activity Reviewing the terms of reference of your governing body's committees* you will need the terms of reference of your governing body's committees.

Where you need to make notes in response to activity questions, we suggest you do this in a notebook or on separate sheets of loose-leaf paper, and store the information you compile along with the module for future reference.

Section 1 'The Trinity' – your relationship with the chair and principal

One of the challenges for the clerk is to establish effective and efficient working relationships with the chair of the governing body and the principal. Where there is regular and open communication, with all three individuals fulfilling their agreed roles in the best interests of the governing body, there is likely to be a good or even excellent standard of governance.

The line management arrangements for the posts of clerk and principal are usually similar: typically the clerk and the principal are required to report to the governing body through the chair.

This section provides guidance on the working relationship between the clerk, the chair and the principal and on some of the issues that may need attention. (See also *Module 5 Working relationships*)

Activity Developing agendas

Consider what you would do if you found yourself in the situation outlined below.

At Bluewater College the chair and the principal meet to determine the agendas for meetings of the governing body. The final version of the agenda is then handed to the clerk to circulate with the appropriate reports written by the principal and other members of the senior management team.

The newly appointed clerk to the governing body is surprised to find such a working relationship for the development of agendas. From previous experience in the private sector and in a health service trust, the clerk expects to be involved in the meeting and to take an active role in drawing up the agenda. The clerk wishes to establish the best possible standards of governance for Bluewater College, and wonders how to deal with this dilemma.

Do you agree with the clerk's view? What are the advantages, if any, of all three people being involved? Note down your thoughts and proposed course of action.

Viewpoint

The majority of clerks are actively involved in preparing the agendas for governing body and committee meetings and, in fact, most take the leading role. You may have noted down some of the benefits that your own governing body derives from the clerk, the chair and principal working together to develop agendas. A newly appointed clerk, principal or chair may have different expectations from the other partners in this 'Trinity' and may not fully appreciate the role of the clerk of a further education governing body.

The clerk, the chair and the principal need to collaborate on issues such as developing agendas to ensure that all three parties are aware of the actions taken or planned by the others. You may have noted other advantages to this three-way collaboration along the lines below.

- The clerk normally maintains a calendar of the issues to be dealt with at the relevant points in the annual cycle of governing body meetings (see *Governor Training Materials Module 2 Section 6* for an example of the annual cycle of meetings).
- The clerk also identifies items raised at earlier meetings of the governing body and its committees that require the further attention of the governing body.

- The principal may highlight development, policy or strategic issues (eg new developments impacting on the College Strategic Plan) which it is appropriate to bring to the attention of the governing body.
- The chair may be alert to those issues that are of interest to members but that might not normally be put forward by college management.
- All three (the clerk, the principal and the chair) act as a set of checks and balances which means that none of them is able to put items to one side without the agreement of the others. This helps to ensure that the interests of the governing body are paramount.

The clerk could use these arguments to support the case for the clerk attending agenda planning meetings in future.

Regular meetings between the clerk, the chair and the principal can also provide a focus for forward planning on medium- and long-term issues needing attention in the months and years ahead. Meetings also provide an excellent opportunity to discuss whether or not reports should be labelled as confidential (see *Section 10* for further information on confidentiality).

Being the clerk to a further education governing body can be a lonely role. Most clerks get great benefit from attending network meetings and conferences, as well as keeping in daily contact using email to share good practice and discuss issues.

Section 2 Appraisal of the clerk

Appraisal is a process which allows individuals and those with whom they work, usually their line manager, to review their performance, and strengths and weaknesses, and identify areas for improvement, training and development needs, and targets to aim for in the future. It is recognised good practice to appraise employees. Even where the clerk is a contractor rather than an employee, appraisal is appropriate. Because of the pace of change in further education and the need to continually improve the governance process, an **annual** appraisal of the clerk's performance is a good idea.

The newly appointed clerk to the governing body of Learnwell College quickly realises that the annual appraisal of the previous clerk had been nothing more than a cosy chat with the chair with no records kept.

The clerk to the governing body of Bluewater College is also the college secretary (a post equivalent to that of vice-principal). The college secretary is appraised by the principal, who is the line manager, and governance issues associated with the role of clerk are usually addressed at the same time.

There is no single model of good practice for the appraisal of the clerk. Colleges have various arrangements according to different needs and circumstances. However, to make the process effective, and avoid the rather unsatisfactory arrangements in place at Learnwell and Bluewater Colleges, some general principles should apply.

Principles for appraisal of the clerk

The governing body has overall responsibility for the appraisal of the clerk. The clerk may need to advise the governing body on how often appraisal should take place and the best time of year.

Appraisal of the clerking function should not be mixed up with the appraisal of any other management role. If the clerk holds another post within the college, this should be appraised quite separately (unlike the Bluewater College scenario outlined above).

The governing body should agree the appraisal arrangements, including the appointment of members to serve on the appraisal panel.

Appraisal is normally carried out by the individual's line manager, which in this case would be the chair of the governing body. This has advantages as the chair works closely with the clerk during the year and will be familiar with the clerk's overall performance, strengths and weaknesses. To ensure objectivity if this working relationship is a close one, a small panel of governors (including the chair but normally not more than three people) could carry out the appraisal.

The clerk should be appraised at least once a year. The governing body should decide the best time of year. Late in the summer term or early in the autumn term is a good time to reflect on the previous year and to prepare the work programme for the following twelve months.

It is good practice to make a formal record of the appraisal interview. This should be signed by all parties as a correct record and used to help monitor progress. There should be a personal copy for the clerk and one which is stored in the clerk's appraisal file.

The governing body should be told when the appraisal has taken place. Governors should then decide whether the personal targets agreed between the clerk and the appraisal panel are made public or kept confidential.

The annual appraisal interview should identify the general training and development needs of the clerk. The governing body should ensure that a budget is allocated each year to enable the clerk to participate in training, development and updating opportunities. Even the most experienced clerk

needs opportunities for regular updating and developing new skills in line with changes in the regulatory framework.

Inspection comments on the clerk's performance

Inspection reports on governance usually comment on the clerkship arrangements. The chief inspector's annual report for 1999–2000 found weaknesses in clerkship in around one-quarter of governing bodies. Below is a list of some of the strengths identified in inspection reports on the governance of individual colleges.

- ☐ Appropriate agendas
- ☐ Supporting papers are well written
- ☐ Papers are made widely available
- ☐ Papers are sent out in time
- ☐ Clerk has a clear job description approved by the governing body
- ☐ The scope of debate is always adhered to
- ☐ There are clear minutes with actions
- ☐ Clerk is independent from the management of the college
- ☐ Clerk has produced standing orders
- ☐ Clerk has a legal qualification
- ☐ Clerk provides regular briefing notes on local and national issues for the governors
- ☐ Clerk has been on training programmes
- ☐ Clerk maintains an up-to-date register of interests which is regularly reviewed
- ☐ Proper procedures are in place for reviewing the performance of the clerk.

An analysis of selected inspection reports shows that some or all of the competences listed below are likely to be needed for effective clerking.

- ☐ A good relationship with principal and chair
- ☐ An ability to stand one's ground
- ☐ A readiness to acquire new skills in line with changes in the clerking role
- ☐ A team approach
- ☐ A proactive not reactive philosophy
- ☐ An ability to develop an auditor role as clerk
- ☐ An ability to develop a researcher role as clerk.

Activity Assessing your strengths and weaknesses

Work through the checklists above and identify the areas which you consider to be personal strengths, and those which may be weaknesses.

Viewpoint

The purpose of this activity is simply to set you thinking about what knowledge, skills and understanding contribute to high quality clerkship. Experienced clerks may view this list as simply scratching the surface. However, if the appraisal arrangements at your college have until now been rather informal or casual, this activity may provide a starting point for a more focussed appraisal of your performance. The next activity provides an example of an appraisal process to compare with that of your own college.

Activity Reviewing your appraisal process

Below is a sample list of questions that an appraisal interview might cover. How do they compare with your own appraisal process? Note down which aspects you consider most useful in each approach.

- ☐ Outline the key areas of your job that have been most successful
- ☐ Outline the key areas of your job that have been least successful
- ☐ Summarise your achievements in reaching the agreed targets over the last year
- ☐ List the factors that helped or hindered performance of your job last year
- ☐ In order to make future job performance better what additional things might be done by:
 - ☐ us (appraisal panel)
 - ☐ you (appraisee)
 - ☐ anyone else.
- ☐ List your personal hopes for a future career
- ☐ Detail any aspects of your job that would be improved by more experience or training and make specific suggestions as to how you could achieve these improvements
- ☐ List agreed objectives for the next year and a timetable of events
- ☐ Appraisers' overall comments
- ☐ Appraisee's overall comments.

Viewpoint

There are various ways to carry out the appraisal. What is important is that it is a constructive process which you find useful, and one from which both the appraisers and the appraisee receive valuable feedback. (See *Module 5 Section 2* on giving and getting useful feedback.) If you feel there is scope

to make the process more useful to all those involved, the college's human resources department may be a good source of advice.

Two key goals of appraisal are to agree performance targets for the coming year and to help the appraisee identify what further training, development or other support is needed to achieve these targets.

These professional development materials are a useful tool to assist this process. You could, for example, use the self-assessment checklist, *Check your current skills and knowledge*, in the **User's guide** to help you identify training or development needs to discuss with the appraisal panel. You might also want to use or adapt the *Action planner* to plan a programme or course of action for the training needs that you agree with the panel.

Section 3 Appointing the principal or chief executive

The appointment of a new principal (who is the chief executive and is called by this title in some colleges) is one of the most important tasks undertaken by the governing body. The wrong decision could have serious implications for the college. It may also be expensive to remedy the situation.

The articles of government state that the governing body as a whole has responsibility for appointing the principal. It is one of the few responsibilities that *cannot* be delegated to a committee or to individuals, although normal practice is for a selection panel comprising a few governors to be established to undertake the process and make a recommendation to the full governing body. This section identifies the main issues that will need attention during what can be an uncertain time for the college.

Activity Understanding your role in the appointment of the principal

The principal of your college informs the chair of the governing body that he has accepted a new appointment and wishes to leave his post as soon as possible. The chair contacts you for advice.

Identify what arrangements you will need to make over the resignation of the principal and the appointment of a replacement.

Viewpoint

At this stage the clerk will need to:

- confirm the period of notice that the existing principal has to give the governing body under the terms of the contract of employment (this is likely to be six months although the governing body may have some discretion to agree an earlier release)
- inform the other members of the governing body of the intended resignation before it becomes public knowledge
- confirm who is eligible to serve on the selection panel for appointment of a new principal
- arrange a special meeting (if a governing body meeting is not imminent) to address these issues and appoint the selection panel.

It may be necessary to appoint an acting principal if there is to be a gap between the outgoing principal leaving and the new principal starting. Remember that it will also be necessary to inform the funding council of the appointment of an acting principal, as that person will become the accounting officer, even if only for a matter of weeks. This will ensure that the governing body continues to comply with the requirements of the financial memorandum.

Activity Arrangements for making the appointment

A special meeting of the governing body has been called to make arrangements for the appointment of a new principal. The chair asks you to prepare the relevant reports and present them to the governing body. What issues will you need to cover? (Some of the points identified in the previous activity may also be relevant here).

Viewpoint

Your first task is to establish the composition of the selection panel in line with the articles of government. At least five members of the governing body are required, one of whom must be the chair or vice-chair. It is a good idea to appoint at least six or seven members, so that illness or other unforeseen circumstances do not delay the appointment process.

The membership of the selection panel will need careful thought to ensure as far as possible that the most appropriate candidate is appointed. The panel's composition should reflect that of the governing body as a whole and be inclusive in terms of gender, ethnic origin, disability, etc.

Not all members of the governing body are eligible to serve on the selection panel – staff and student members are specifically excluded although there is no reason why they cannot be involved in some aspects of the process.

For example, there may be a reception for candidates which staff and student members could attend.

The terms of reference of the selection panel, which derive from the articles of government, are to:

- determine the arrangements for selecting applicants for interview
- interview those applicants
- recommend one of the applicants to the full governing body for appointment as the new principal.

If the selection panel is unable to make a recommendation, for whatever reason, the articles of government provide for the process to continue until a recommendation can be put forward.

The responsibilities of the selection panel are likely to include:

- determining the job description and person specification for the post
- agreeing the wording of the advertisement to appear in the national press and the publications to be used
- reviewing the information pack for potential candidates
- determining the timetable of the appointment process.

The remuneration package may be determined by the full governing body or by the remuneration committee acting on behalf of the governing body. They will need to consider any other factors to be made known to potential candidates such as arrangements for payment of removal expenses.

You will need to think about arrangements for supporting the selection panel. Many clerks carry out this role themselves although some governing bodies have found it helpful to call in the services of the Association of Colleges or one of the recruitment agencies. The costs and potential benefits of any such options will need to be taken into account before a decision to make use of them is taken by the selection panel.

If you are given the task of supporting the selection panel, it is always valuable to have an external viewpoint during the recruitment process. The principal of another college may be well placed to carry out this role.

Such an important appointment requires a rigorous selection process. The selection panel will need to determine the type of assessments to be carried out (eg candidates could be asked to make presentations on specific topics). The use of a published person specification may help the selection panel to eliminate candidates at each stage of the selection process, before making a final recommendation to the governing body.

The decision of the full governing body, which may need to be taken at a special meeting, will be subject to such factors as:

- sight of examination certificates
- receipt of at least two satisfactory references
- medical clearance
- satisfactory outcome of the police check.

It is worth repeating that responsibility for making the final appointment **cannot** be delegated by the governing body.

The final task in the appointment process is to determine performance targets for the appointee's probationary period.

The arrangements for monitoring the performance of the new principal should lead to a review of the appraisal process. Remember this is also a responsibility of the governing body although the task is usually delegated to a small panel of members or sometimes to the chair acting on behalf of the governing body.

Activity Reviewing your governing body's arrangements for appointing the principal

Have you been involved in appointing a principal? If so, note down anything you learnt from that experience, or from reading this section, that might lead you to advise your governing body differently next time.

If you have not, review the arrangements your governing body has in place and decide whether there are any aspects of the process that might be improved.

Viewpoint

Whether or not you have had direct experience of the appointment process, this activity should have given you the opportunity to think carefully about your own governing body's procedures for appointing a new principal. Note down any thoughts you might have had in the *Action planner* in the **User's guide**.

Now that we have considered the appointment of the principal, we will move on to look at the role of the special committee in the dismissal of senior postholders.

Section 4 The special committee

Under the instrument and articles of government, the special committee must examine the case for dismissal of a senior postholder (which includes the principal) and make recommendations to the governing body.

The special committee does not have a calendar of meetings like other committees. In fact most governing bodies have no direct experience of activating the special committee although they may have discussed arrangements for setting one up if the need arises.

Activity When does the special committee need to take action?

Read the scenario below. Check your instrument and articles of government and note down what action you should take. What issues would you need to take into account in dealing with this situation?

The vice-principal is accused of inappropriate use of the intranet by downloading soft pornography pictures onto the hard disk of his office PC. The recently appointed principal receives the accusation and, following a brief review of the available evidence, decides to suspend the vice-principal on full pay on the grounds of misconduct pending a formal hearing. The vice-principal is a senior postholder as designated by the governing body on 12 October 1992.

Viewpoint

The clerk is adviser to the governing body on matters relating to the governance of the institution and, because the vice-principal is a senior postholder, would have to take action in such a case. You may have noted a number of sensitive issues in this case, along the lines below:

- the principal's incorrect belief that she has the right to suspend any member of staff of the college
- the reputation of the vice-principal who is entitled to be treated with due respect pending the final decision of the governing body
- the good name of the college which could be seriously compromised if the media were to get hold of the story
- the need for the governing body to conduct business according to the instrument and articles of government and in line with best practice.

Your first step, having checked the instrument and articles of government, should be to arrange an immediate meeting with the principal to explain what the correct course of action should be. You might then decide between you who is to brief the chair or vice-chair of the governing body. The chair or vice-chair should then formally consider the situation and decide whether suspension is the right course of action. The decision of the chair should be confirmed in writing to the suspended staff member.

Having corrected the suspension arrangements to comply with the instrument and articles of government, an action plan would need to be implemented to address some other aspects of the problem.

- The rest of the governing body must be notified of the suspension of the vice-principal on the grounds of alleged misconduct. (It may be wise not to give further information to governors at this stage since to do so might prejudice their possible involvement at a later stage in the proceedings.)
- Other members of staff should be notified of the suspension. This would need a sensitive but proactive approach to avoid or at least minimise harmful speculation. At one college facing a parallel situation, an investigation reported that governors' silence and lack of appropriate action led to 'rumour, innuendo and gossip about sleaze and corruption'.
- This incident may be a criminal offence (depending on the nature of the material) and if so, the governors may want to consider whether the matter should be referred to the police.
- Finally, it would be your task to make arrangements for the special committee to examine the case and then make appropriate recommendations to the full governing body.

The vice-principal's role and responsibilities would need to be covered during the period of suspension. This issue is not the focus of these training materials.

As the special committee could be called at any time, you need to be clear about its membership and terms of reference. We look at this in the next activity.

The timetable of events will need to reflect the provisions of the articles of government introduced on 1 April 2001. These are new arrangements which attempt to ensure that the proceedings are not unnecessarily delayed before a decision is reached.

Activity Determining the membership and terms of reference of the special committee

- 1 Work through this list of possible members of the governing body and identify who may and may not be members of the special committee.
 - ☐ Business members
 - ☐ Co-opted members
 - ☐ Staff members
 - ☐ Student members
 - ☐ Community members
 - ☐ Local authority members
 - ☐ Parent members (if any)
 - ☐ Principal
 - ☐ Chair of the governing body
 - ☐ Vice-chair of the governing body.
- 2 Below are some outline terms of reference for the special committee. Do you consider them adequate to meet both local needs and the provisions of the articles of government? How does this outline compare with the terms of reference adopted by your governing body?

The special committee will:

- ☐ Receive referrals from the chair of the governing body or, if the chair is absent, from the vice-chair or a majority of members of the governing body, about the possible dismissal of a senior postholder
- ☐ Examine the case for the dismissal of a senior postholder
- ☐ Make recommendations to the governing body on the dismissal of a senior postholder.

Viewpoint

You should have noted that staff members, student members, the principal, chair and vice-chair cannot be members of the special committee. This requirement helps to ensure that the governing body acts and is seen to be acting impartially in the dismissal of a senior postholder.

Although brief, the terms of reference set out here are sufficient for statutory requirements. Local needs vary and your governing body's terms of reference document may contain more detail.

If this activity has drawn your attention to amendments that could be made to your own governing body's arrangements for the special committee, note these down in the *Action planner* in the **User's guide**.

Section 5 Appointing the chair and vice-chair of the governing body

Under the provisions of the instrument of government, the governing body must appoint a chair and vice-chair. However, not all governing body members are eligible for appointment; the principal, staff members and student members are all specifically excluded.

The role of chair is a crucial one for the smooth running of the governing body, so whilst the remaining governing body members are all eligible for appointment, it may prove useful for governors to be offered some guidance on the key qualities needed by the chair. This is particularly important if there are several nominations. Such guidance could arise from general discussion between members of the governing body or guidelines could be drafted by the retiring chair in collaboration with the clerk. As adviser to the governing body, you probably have your own ideas about the qualities required of an effective chair. This is outside the scope of this section but you will find the role of the chair discussed in more detail in *Section 1* of this module.

Appointment of the chair and vice-chair is one of the issues that you could address in your governing body's standing orders, building on the provisions of the instrument of government (see *Section 11*).

How are the chair and vice-chair appointed?

All members of the governing body are eligible to participate in appointing the chair and vice-chair. Although the principal, staff members and student members cannot be appointed to these offices, they can take part in the nomination and voting.

Many governing bodies vote by a simple show of hands but it is permissible to conduct a secret ballot. This may be appropriate where more than one person is nominated and seconded.

You need to be prepared to deal with those occasions when more than one nomination is made, particularly if there is a tied vote. Above all, try to stay calm. If necessary ask for a few minutes to refer to the standing orders if they cover this issue.

When are the chair and vice-chair appointed?

The instrument of government which came into effect on 1 April 2001 provides for a new chair and vice-chair to be appointed at the last meeting before the expiry of the term of office of the existing chair and vice-chair.

If the chair and/or vice-chair resign from office during their period of appointment, or if they are removed from office by the governing body, the new appointments should be made immediately, without delay.

What is the period of office for the chair and vice-chair?

Under the instrument of government, it is up to the governing body to determine the period of office of the chair and vice-chair but remember that this will be limited by the individual's remaining period of office as a governor (four years at most).

It is not a good idea to appoint a new chair or vice-chair for too long a period. Their performance in these roles may not be to the satisfaction of the governing body and, although they could be invited to resign by the other members, this would not enhance team-building. An annual appointment process is usually more appropriate.

What happens when the chair is unable to attend a meeting of the governing body?

The vice-chair will carry out the role of chair in the absence of the appointed chair.

If both the chair and vice-chair are absent from a quorate meeting of the governing body the members present are entitled to choose one of their number to act as chair for that meeting; the principal, staff members and student members are excluded from appointment as 'one-off' chair.

Activity Reviewing your procedures for appointing the chair and vice-chair

Compare the procedures which your governing body has in place for appointing the chair and vice-chair with the principles outlined above by answering the following questions. For each answer you give, note down whether your governing body's practice is the best possible and, if not, what changes you would like to make.

- 1 When your governing body last had to appoint a chair or vice-chair, were the governing body members given any guidance as to what personal qualities they should look for in potential nominees? If so, what form did that guidance take?
- 2 Has your governing body adopted standing orders on the appointment of the chair and vice-chair?
- 3 Does your governing body appoint by show of hands or secret ballot?
- 4 What period of office has your governing body adopted for the chair and vice-chair?
- 5 Have both the chair and the vice-chair ever been absent from a quorate meeting and, if so, what happened?

Viewpoint

This activity should have helped you to think through your own procedures for appointing a chair and vice-chair. Note down any areas of concern that you would like to put before your governing body in the *Action planner* in the **User's guide**. You should try to address any areas for improvement as soon as possible. It is best to have solid procedures in place *before* you actually need to use them. In particular, if your standing orders do not cover this issue, perhaps this could be considered at the next standing orders review. You will find your job as clerk much easier in the face of a problem such as a tied vote if clear guidelines are in place.

Section 6 The register of interests

Module 2 Values and ethical framework addressed the role of the clerk in seeking to ensure that the governing body maintains the highest standards of conduct. The declaration and recording of members' interests helps to achieve this objective.

The instrument of government requires the clerk to maintain a register of the financial interests of the governing body. These are disclosed to the governing body and the register must be open to public inspection.

Non-financial interests

Most governing bodies have incorporated the Nolan committee's seven principles of public life into their local codes of conduct (see *Module 2 Section 1*). The seven principles provide a yardstick against which public services can be

measured and the declaration of non-financial interests can be as important and relevant as the declaration of financial interests. The fact that the current instrument of government does not require the recording of non-financial interests in the register maintained by the clerk does not mean that you should overlook them altogether.

Activity What sort of non-financial interests should be registered?

Read through the following information relating to six members of the governing body of Bluewater College and consider what aspects, if any, of their personal circumstances count as potential interests which should be made known to the governing body as a whole and recorded in the register maintained by the clerk.

Put a tick or a cross in the box depending on whether you think there is a potential interest to be declared. For those items you have ticked, note down the precise nature of that interest.

Bluewater College is the only general further education college in a small town.

- ☐ Mrs Siara Khan works as a part-time receptionist for a local firm of solicitors which acts on behalf of the college in legal matters.
- ☐ Mr Harry Dibner is the retired managing director of a local construction firm which is often invited to tender for college work. The firm is now run by his son and daughter but Mr Dibner still serves on the board of a number of local organisations.
- ☐ Mrs Sally Gummidge is a dentist. Her partner in the dental practice is married to a qualified accountant whose firm is about to submit a tender to act as the college's external auditor.
- ☐ Mr Steve Portway is the manager of the local swimming pool which is hired by the college for five hours each week during term-time for the sports science students. He serves on the governing body of Bluewater College as a community member.
- ☐ Mrs Olivia Catley is the local authority member on the governing body. She is the chair of the planning committee and is a lecturer at the local sixth-form centre which was established last year after an Ofsted area inspection.
- ☐ Mr Victor Sivagunam is one of the two staff members on the governing body. He is secretary of the college branch of the union and is deeply committed to a number of causes which he supports by fundraising.

Viewpoint

You may have noted that people are likely to know each other in a small town and there is not an endless supply of potential governors. Each of these governors has outside interests which could impact on their decision-making. Some are more obvious than others and not all are of a financial nature. This suggests that non financial interests need to be recorded in the register maintained by the clerk and made known at meetings when relevant.

The nature of these governors' interests highlights the distinction between governance and management. Governors would have an interest in the final decision on the appointment of the auditors. To remove any possible conflict of interest, Ms Gummidge should not be involved in the appointment process. The situation is different for Mr Portway, as it is unlikely that the governing body would be directly involved with the hire of the local swimming pool. The fact that Mr Portway recorded the nature of his employment in the register should be sufficient.

In these circumstances the governing body could decide that the register of interests should cover both financial and non-financial interests. This could be addressed in the governing body's code of conduct. Questions to complete for the register of interests might typically include:

Name of employer, nature of employment or business
 Directorships
 Significant shareholdings
 Elected offices
 Trusteeship or participation in management of charities
 Public appointments (paid or unpaid)
 Membership of professional bodies, trade unions, etc
 Membership of closed organisations
 Other relevant information, financial or non-financial.

Questions on the interests of close relatives of governors (eg partners and children) would be voluntary and may be a sensitive issue. The onus is on individual members to decide for themselves which interests could impact on their own decision making.

As well as completing the register of interests, the individual member has a responsibility actively to declare an interest in an agenda item. Many governing bodies have agreed that all meetings (including committees) start with an invitation to governors to make known any agenda items in which they have an interest. The minutes of the meeting then note whether and what interests are declared. This does not remove the need for the clerk to maintain the register of interests.

Section 7 Self-assessment and external inspection of the governing body

This section looks at how governing bodies assess their own performance and considers the relationship between self-assessment and external inspection. Note that the new inspection framework published in March 2001 places less emphasis on governance and more emphasis on learner's experience than the arrangements that have been in place since 1993. The implications of the new framework for the clerk and governing body will be dealt with in a future update to these materials.

Governing bodies are used to carrying out an annual assessment of their performance so as to identify strengths and weaknesses and prepare an action plan to address the weaknesses. Various approaches to the self-assessment process have developed since the ingoverning body of colleges. The governance health check launched in February 2001 as a result of a Standards Fund initiative will be a valuable tool for governing bodies, providing the opportunity to obtain comparative (benchmark) data to assess their performance against that of other governing bodies. (Your governing body should have several copies.)

External validation of the self-assessment report was undertaken by the funding council during the four-year period 1997 to 2001. Under the new inspection framework, governance (ie the contribution of governors and the governing body) will be reviewed as one element of the college's overall leadership, rather than as a separate element. This will not reduce the importance of governance: the government will still require governing bodies to seek the highest possible standards. Any serious shortcomings could lead to the appointment of additional governors by the Learning and Skills Council – this power is available as a result of the instrument and articles of government introduced in April 2001 in response to the Learning and Skills Act 2000.

Activity Formulating an action plan

Review the following ten weaknesses drawn from funding council inspection reports during the year 2000/01.

- 1 If your own college has been identified as showing any of these weaknesses in the past, note down what action you took then and what you learnt from trying to address them.
- 2 Underline any weaknesses which you think might apply to your governing body at the moment. For those you have identified, suggest action plans to overcome these weaknesses. You will need to consider:
 - what needs to be done

- who will be responsible for doing it (ie which member, committee or working group of your governing body)
- when it needs to be done by.

Weakness identified in inspection reports

- 1 Insufficient attention to setting and monitoring targets for retention and achievement
- 2 Inadequate governor training
- 3 Underdeveloped self-assessment of governance
- 4 Insufficient use of performance indicators in routine financial monitoring
- 5 Aspects of the operation of the audit committee
- 6 Inadequate overview of the college's strategic plan on the part of governors
- 7 Insufficient monitoring of policy by governors
- 8 No appraisal of senior postholders
- 9 Little awareness and implementation of sector good practice
- 10 Lack of openness and accountability.

Viewpoint

As with so many aspects of governance in the not-for-profit sector, there is no single correct way to address a weakness; it will depend on circumstances, priorities, interests and available skills. In *Module 5 Section 6* we touched on the idea of the learning organisation, and the importance of recognising and learning from mistakes or weaknesses, rather than hiding them or seeking to apportion blame. Identifying weaknesses and working out how to make improvements is a process which itself provides valuable learning that can enrich the governing body's capacity to deal with other difficulties that arise.

Seeking to address weaknesses and achieving change are not straightforward processes. Change is often messy and the outcomes may be different from those expected. You may have identified valuable learning from past attempts to achieve change that can be used in designing present and future action plans to address weaknesses.

Note down any ideas for improving your governing body's self-assessment arrangements in the *Action planner* in the **User's guide**.

The means of self-assessment

Using the new governance health check is one approach to helping governing bodies carry out self-assessments. Whatever approach is adopted it is important that members of the governing body:

- understand the place of self-assessment in seeking to improve standards of governance
- devote sufficient time to carrying out the self-assessment (a planning session may provide a more conducive environment than a meeting where members are expected to address a whole raft of issues)
- are prepared to accept the outcome, especially any identified weaknesses (although it is equally important not to become complacent about perceived strengths)
- work at formulating and implementing an action plan to address weaknesses
- are committed to monitoring progress throughout the year.

As clerk you are in an excellent position to support the self-assessment process but this does not mean that governors should feel that they can devolve all responsibility to you.

Section 8 Annual report of the audit committee

One of the requirements of the funding council is that each governing body receives an annual report of the audit committee. Usually the clerk takes the lead in preparing the first draft of this report.

What should be included in the first draft?

The most recent advice issued by the funding council (see supplement A to the Audit Code of Practice – Circular 98/15) suggests that the annual report of the audit committee should include:

- introduction (period covered, and so on)
- membership of the audit committee, highlighting changes
- summary of when meetings were held
- terms of reference of the audit committee, highlighting changes

- review of reports of the internal audit service
- review of the management letter of the external auditor
- review of other work done, for example, funding council reports, National Audit Office (NAO) reports, value for money work
- any other relevant matters
- the audit committee's opinion on the adequacy, effectiveness and reliability of the college's internal control system.

Activity What goes into your audit committee's annual report?

Go through the checklist below and indicate which items should be included in the first draft by putting a tick or a cross in the box.

- ☐ Number and dates of audit committee meetings in past year
- ☐ Names of committee members
- ☐ Names of chair and vice-chair
- ☐ Audit committee terms of reference
- ☐ Firms engaged by governing body for external and internal audit functions
- ☐ Dates and outcome of last management accounts review
- ☐ Frequency of cash flow forecast monitoring
- ☐ Number and purpose of internal audit days during past year
- ☐ Contents of external auditors' management letter
- ☐ Audit committee's view on quality of clerking arrangements
- ☐ Internal audit plan for coming year
- ☐ Names of responsible partners of external and internal auditors
- ☐ Dates of stationery store stock-taking
- ☐ NAO reports considered during past year
- ☐ Arrangements for reviewing performance of external and internal auditors
- ☐ Number of internal auditors' recommendations not accepted or acted on by college management.

Viewpoint

The total number of ticks will vary according to the practices developed by your audit committee but you should have at least seven ticks corresponding to the items listed in the Audit Code of Practice referred to above.

The funding council recommends that the annual report of the audit committee should be prepared as promptly as possible so that it is available to the governing body by the time the annual financial statements are signed.

Section 9 A governing body intranet site

Many governing bodies are making use of the internet (a world-wide network) to provide information on their work. As the holder of key documentation, you will almost certainly become involved. The rate of technological development is so rapid that even if you already have an intranet (internal network within the college) site devoted to your governing body you will probably want to review it at least once a year.

The potential benefits of a governing body intranet site include:

- increased awareness within the college of governing body business
- an up-to-date set of documents available in one place
- improved communication both within the governing body and between the college and the governing body.

Activity Establishing an intranet site

Imagine that you are asked to develop an intranet site for your governing body.

Both you and the governing body as a whole are committed to the Nolan committee's seven principles of public life (see *Module 2 Section 1*) which include a requirement for openness and accountability. You are confident that you have satisfied the requirements of the instrument and articles of government. Registers of interests are in place and available for public review as are all appropriate governing body and committee documents. Despite this good practice – confirmed by inspection and self-assessment – there is a low level of awareness of the governing body within the college as a whole and even a degree of suspicion on the part of some staff.

The national report of the FEFC inspectorate – *Raising Standards in Further Education: the Work of College Governors* (October 2000) – includes an example of the use of the intranet to support the work of governors. This case study prompts a discussion between you and the chair as to how your college intranet site could be used to foster openness and accountability and increase awareness of the role of the governing body.

The college has had an intranet in place for two years but you are not sure how to develop a governing body site. You are also concerned that your IT skills are not up to setting up and managing an intranet site.

You agree to arrange a meeting in three weeks time to be attended by the chair, the vice-chair and the principal when you will present an outline proposal for a governing body intranet site and the resource implications.

You need an action plan. Before looking at the suggestions below, spend a few minutes making a note of the action points that you would need to address.

Viewpoint

Compare your ideas with the steps suggested below. Consider whether any of the ideas you missed would also be useful.

- 1 Use the internet to visit other college's websites. Check whether the governing body is mentioned and, if so, what documents are available for review. (Bear in mind that governing body documentation may be restricted to the in-house intranet facility.)
- 2 Use your contacts. Over 150 clerks exchange information on a daily basis through email. Any clerk can join this email network. You can also contact other clerks through the regional networks of the Association of College Registrars and Administrators (ACRA). See *Useful resources* in the **User's guide** for details of how to contact the clerks' email network and ACRA.
- 3 If your own college has an intranet site, have a good look at the contents, even if there is no material on the governing body. Compare it with other sites in the sector.
- 4 Make a list of the materials you would like to include on your intranet site and note their relative priorities. You may have to adopt a stepwise approach rather than trying to have everything in place on day one.
- 5 If your college has an intranet or internet site, meet the college 'webmaster', ie the person responsible for the site's development and maintenance. The webmaster's role is to take your ideas and help you translate them into an attractively designed easy-to-use site. The webmaster's support will be invaluable especially if your own IT skills are limited. (Now could be the time to improve them with some suitable training).
- 6 With the help of your webmaster, prepare a realistic timetable for the launch of the governing body intranet site and identify how this is to be supported. If you can enlist some secretarial or administrative help, this would be valuable.
- 7 Prepare a mock-up of the front page of your new site. Make this page very clear and easy to use – many first-time users never return to a complicated site that takes too long to access.
- 8 Consider the scope for further expansion of the site (see below).

- 9 Test out your proposals with colleagues before presenting them to the chair, vice-chair and principal.

There are a number of good examples across the further education sector of governing body intranet sites. Use these to benefit from the experience of others. There is no reason why you should have to start with a blank sheet unless that is your preferred approach.

Once you have the basis of an intranet site in place, you can go on and develop the facility in the light of your own experience and feedback from users. You might like to think about:

- email enquiries coming directly to the clerk from the intranet site
- email links between you and members of the governing body
- adding reports (agenda items) on key issues
- providing links to other Internet sites such as the DfES, funding council, Ofsted, Adult Learning Inspectorate, etc.

A final word of warning – don't underestimate the impact of launching a governing body intranet site. People will expect information to be available and up-to-date and it will instantly be spotted if you forget to add the minutes of your most recent meeting! Once in place, the site will need to be updated on a weekly basis.

Section 10 Managing meetings

Meetings are the primary way by which the governing body takes decisions. As the clerk, you play an essential role in managing and servicing meetings. The rules for convening and conducting governing body meetings are in the college's instrument, articles, and standing orders. Usually, the clerk is responsible for fulfilling certain of these requirements. They include:

- drawing up the agenda
- calling the meeting and distributing papers
- taking and writing minutes
- publishing minutes and papers.

The clerk is also responsible for ensuring that meetings are quorate and that voting is carried out properly.

Frequency and timetabling of governing body meetings

There must be at least one governing body meeting a term. However, meetings should be frequent enough to ensure effective decision-making. In practice, the amount of business and the pace of change in education mean that governing bodies invariably meet more than once a term.

It is usually the clerk's job to timetable the cycle of meetings and agree the schedule with the chair and principal before putting it to the governing body. It is easiest to do this in advance, on a college year basis. In producing the timetable, the clerk needs to be aware that key aspects of the college's management cannot proceed until they have been approved by a meeting of the governing body.

Calling meetings

Meetings of the governing body must be called by the clerk, giving at least seven calendar days written notification of the meeting together with a copy of the meeting's agenda. Relevant papers should accompany the notice. It is good practice to give more notice, say ten days, to allow governors time to read the agenda and papers.

You might find it useful to publish meeting dates further in advance to try and maximise attendance; for example, you could choose to publish dates a year in advance, rolled forward every three months.

A special meeting may be called by the chair or at the request in writing of at least five members. Where the chair directs that there are matters demanding urgent attention a shorter notice period may be specified in standing orders. If a meeting is called to consider some aspect of the clerk's position, the chair should send out the agenda item and relevant papers.

The agenda

Only an agenda sent by the clerk has authority. Under the instrument of government, governing body members may only propose an agenda where a special meeting has been called by the members. It is sensible, however, to have some mechanism (through standing orders, for example) by which members can suggest items for inclusion in a future meeting.

The circulation of papers

Although not required by the instrument of government, it is good practice to circulate any supporting papers at least seven calendar days before a meeting. If a report is not available, the agenda should be circulated with a note stating that the report will follow.

Activity Late papers

A supporting paper for an agenda item has not arrived by the time the agenda needs to be circulated. What should you do?

Viewpoint

There will always be pressure to circulate reports late or to table them at meetings. This is poor management because governors need time to read and digest papers. Try to prevent this by agreeing a production schedule for reports, identifying: the authors; the deadline for the principal's approval of the report; and the delivery date of the final typescript.

Where this approach has failed, it may be appropriate for the governing body to receive a late report. One way to deal with this would be allow time in the meeting for governors to read the paper. If the paper is substantial and its content significant, it may be preferable to defer the agenda item to another meeting.

Confidential papers

Under the instrument, all papers received by the governing body, including minutes, are open to public inspection unless an item covers:

- a named employee or prospective employee of the college
- a named student or candidate for admission to the institution
- any matter which the governing body is satisfied should be dealt with on a confidential basis, eg commercially sensitive material.

Arrangements for determining confidentiality need to be consistent. Confidential papers should be very uncommon. Usually it will be possible to write a paper in general terms without naming individuals. The governing body should always be able to justify its decision to classify a document as confidential. One useful approach to consistency is for the clerk to take the lead in labelling papers as confidential when the agenda is being drafted. The chair and report author can then be involved, as appropriate, in making the final decision.

Conduct of business at meetings

The instrument lays down rules for the conduct of meetings. These will usually be supplemented by the college's standing orders.

Your role as clerk is to assist the meeting to make decisions, and to advise the meeting on questions of procedure. You must advise the meeting if you think the governing body (or chair) risks acting outside its statutory powers or charitable objects, or risks breaching its own procedures or the legal requirements for the conduct of business. The clerk should also advise members when they may have interests that should be declared.

For information on the quorum, voting arrangements and eligibility to vote see *Module 3 Section 7*.

Reconsideration of resolutions

A resolution of the governing body cannot be rescinded or varied at a subsequent meeting unless reconsideration of the item appears on the agenda for the meeting. In general, the governing body should not casually vary a validly made decision.

Preparing minutes

Minutes provide a formal record of governing body proceedings. Their accuracy and completeness are essential to the governance and public accountability of the college.

The clerk prepares the minutes, except where the clerk has left a meeting because the clerk's position is being discussed.

Well-drafted minutes should:

- record the outcomes of discussions, but not generally who said what unless specifically requested by an individual governor
- be comprehensible to someone who was not at the meeting; they should contain sufficient information to stand on their own without reference to other documents
- record all formal decisions and votes
- list any documents circulated or tabled in support of agenda items
- record all those in attendance, distinguishing between governors and others, and noting times of arrival and departure.

Confidential items should be minuted separately or, if acceptable to the governors, the minutes could simply record that a decision has been taken without mentioning the discussion or individuals involved. Separate minutes may also be taken of items requiring the withdrawal of a student governor, staff governor or the clerk. These individuals are not entitled to see such minutes.

Producing the minutes

After preparation, the clerk should forward the minutes to the chair and appropriate members of the management team for clearing for publication. Alterations to the meaning of the draft minutes should only occur if the clerk and chair agree that the draft is incorrect.

Once the draft minutes are cleared by the chair they are then in the public domain. It is important to clearly label these minutes as 'draft' or 'unconfirmed minutes'. They can then be circulated to members straightaway or kept for sending with the agenda for the next meeting.

The draft minutes are presented at the next governors meeting, and the governing body is asked to confirm their accuracy. Any proposed changes to the minutes are subject to the agreement of the majority of governors present at the meeting considering the minutes. After appropriate amendment they are signed and dated by the chair, as are any appendices and separate confidential minutes.

Changes are generally handwritten on the top copy before it is signed by the chair and are recorded in the minutes of the meeting at which they were approved.

This section has looked at the procedural arrangements for servicing meetings in line with the instrument and articles of government. It is, however, worth bearing in mind that the clerk often needs to draw on the softer people management skills discussed in Module 5 to service meetings successfully. When interpreting written procedures for governors, the most appropriate course of action to adopt is not always clear-cut. The governing body or the chair may sometimes need to make a judgement on how to apply general rules to specific situations. It is in these grey areas that the clerk needs to be clear, open and direct in supporting the governing body to ensure business is conducted properly. The final activity in this section looks at just such a situation.

Activity Declaring interests

You are aware that an agenda item at a governing body meeting has moved to discussion of an issue where you believe two members have interests. (See Section 6 if you have not already worked through this topic.) So far no one has declared an interest. What would you do?

Viewpoint

As clerk you should be aware of the registered interests of members so that you can alert the chair when a conflict of interests might arise. (You could do this by passing a note or by a verbal prompt in general terms – ‘Chair, could you remind members to consider whether they need to declare an interest’.) It is not always clear when an interest should be declared. A member might sometimes need direct prompting, through the chair. The chair may need to take a position if an interest is not clear-cut and advise the member(s) accordingly.

Section 11 Drafting standing orders and terms of reference

This section describes the function and scope of governing body standing orders and the clerk’s role in drafting and reviewing them. It provides an opportunity for you to review the standing orders approved by your own governing body. The section also examines the application of standing orders and terms of reference to governing body committees.

What are standing orders?

The instrument and articles of government provide a framework for the operation of the governing body and, to a limited extent, for the functioning of some of its committees. There is provision in the articles of government for the governing body to make rules and by-laws for the government and conduct of the college. These rules and by-laws, often referred to as **standing orders**, must not be confused with the provisions of the articles.

Some clerks have argued that the instrument and articles of government are too prescriptive and detailed and, drawing comparisons with private sector practice, have suggested that individual governing bodies should be allowed more discretion in determining the conduct of their own business. However, the articles of association for companies limited by shares must comply with the Companies Act 1985 which is itself a very detailed and complex document

compared to which the instrument and articles of government appear relatively simple and non-prescriptive.

One of the responsibilities of the clerk is to support the governing body in the drawing up of standing orders and in keeping them under review. It is good practice for this review to take place on an annual basis.

Activity Do the standing orders approved by your governing body meet current local needs?

Work through the list of headings below, which are drawn from the standing orders of a range of governing bodies.

- 1 Put a tick against those headings which appear in your current standing orders.
- 2 Put a cross against those which do not appear and which, in your view, do not justify inclusion in the standing orders.
- 3 Put a question mark against those which do not appear but which you feel should be included in the next review.

Checklist: Governing body standing orders – possible contents

- ☐ The Nolan committee seven principles of public life
- ☐ Attendance at meetings by members of the governing body, including the agreed performance indicator for attendance, arrangements for apologies, etc
- ☐ Access to meetings of the governing body by persons other than its members and the clerk
- ☐ Publication of minutes and papers
- ☐ Proceedings of meetings, including declaration of interest, arrangements for voting, withdrawal of members, etc
- ☐ Appointment of chair and vice-chair
- ☐ Rules of debate at meetings
- ☐ Arrangements for compiling agendas for meetings
- ☐ Criteria for inclusion of any other items of (urgent) business
- ☐ Delegation of powers by the governing body to the chair and the principal
- ☐ Arrangements for actions to be taken by the chair on behalf of the governing body ('chair's action')
- ☐ Criteria and arrangements for calling special meetings
- ☐ Use of the governing body seal

- ☐ Minutes of meetings
- ☐ Allowances payable to governing body members
- ☐ Training policy for members of the governing body and the clerk
- ☐ Resolving difficulties
- ☐ Policy on statements made on behalf of the governing body to the press etc.
- ☐ Arrangements for determining the calendar of meetings and the business to be considered at the meetings (this enables the annual calendar of business to be formalised)
- ☐ Procedure for amendment of the standing orders.

Now refer back to those items you have marked with a cross and make sure that you feel able to justify their exclusion from your governing body's standing orders.

Viewpoint

There is no single 'correct' approach to standing orders; if there were, it may as well appear as a supplement to the instrument and articles of government. The importance of this activity is that you as clerk should carefully consider the content of your own governing body's standing orders and be prepared to propose changes as and when necessary.

Whether they are brief guidelines or a comprehensive list of points, it is essential that standing orders:

- are approved by the governing body
- are regularly reviewed by the governing body (preferably annually or at least every other year)
- take full account of the instrument and articles of government and no attempt is made to detract from these key documents – to do so would place the governing body's actions outside statutory arrangements
- are given to all members of the governing body (for new members this should be part of the induction process)
- are available for inspection to members of the public (including students and staff of the college) on the same basis as agendas and minutes.

The checklist above is not an exhaustive one. ACRA has produced a standing orders template which provides a comprehensive list of points to include, according to the needs of individual governing bodies.

You also need to determine whether the standing orders only apply to the full governing body or if they also apply to the governing body's committees. One approach – favoured by a number of clerks – is for each committee to have standing orders meeting the specific needs of that particular committee.

Many of the standing orders of the full governing body may not be relevant to individual committees.

Standing orders of committees

Standing orders prepared specifically for an individual committee are likely to include, as a minimum:

- membership of the committee and members' term of office
- the quorum
- frequency and arrangements for calling of meetings
- access to meetings by individuals other than committee members
- conduct of meetings, including arrangements for publishing minutes and other papers.

The standing orders will also identify the clerk to the committee. This is usually the clerk to the full governing body.

Other aspects of the standing orders will depend on the arrangements adopted by individual governing bodies – for example, the chair and vice-chair of the committee may be appointed by the full governing body or by the members of that committee only. In the latter case, the governing body should take a decision in advance on which members are eligible for appointment. (For example, governors might want to consider whether it was appropriate for the principal or staff or student members to be appointed as chair or vice-chair of a committee.)

Terms of reference of committees

The governing body is required by the provisions of the instrument and articles of government to establish, at the very least, three committees: the audit, search and special committees. It is up to individual governing bodies to decide what other committees are appropriate to meet local needs.

Some governing bodies have considered or moved to the corporate policy governance model proposed by John Carver . This seeks to streamline governance by adopting the statutory minimum number of committees. It is favoured by some, but not all, colleges.

Regardless of the number of committees established, the governing body must determine clear terms of reference for each one so that there is no doubt as to the extent of delegated powers and the functions to be carried out on behalf of the governing body. When considering terms of reference, the governing body will need to take into account the provisions of the instrument

and articles of government which specify that certain responsibilities cannot be delegated (for example, approval of the budget).

Activity Reviewing the terms of reference of your governing body's committees

This activity will provide you with the opportunity to look at the existing terms of reference of the committees established by your governing body.

Do the terms of reference of each committee:

- state clearly the precise nature of the committee's responsibilities as determined by the governing body
- make it clear whether the committee exercises a decision-making or an advisory function in relation to each responsibility
- set out any financial or other limitations on the extent of delegated powers
- specify arrangements for presenting decisions and recommendations of the committee to the full governing body?

Viewpoint

If this activity has highlighted any issues which need to be addressed by your governing body, you may want to note them down in the *Action planner* section of the **User's guide**.

Seeking information from other clerks on such matters as the terms of reference of committees can be a valuable aid to evaluating your governing body's own arrangements.

The ACRA regional network meetings are one means of exchanging information with other clerks on issues of interest and concern.

Module review

This module has looked at the clerk's role in managing the process of governance. If you have worked through the whole the module you should now be confident that you can:

- outline the differing roles of the chair, the principal and the clerk
- explain to the governing body and others the arrangements for:
 - the appraisal of the clerk
 - appointing a new principal
 - establishing a special committee
 - appointing the chair and vice-chair of the governing body
- ensure the governing body maintains the register of interests in line with statutory requirements and good practice
- assist governors in assessing the performance of the governing body and producing the annual report to the audit committee
- set up and maintain an intranet site for the governing body
- manage meetings
- draft standing orders and terms of reference.

Summary of key learning points

An open and effective working relationship between the chair of the governing body, the clerk and the principal, in which each understands and respects the others' roles, will help to promote a good standard of governance.

The clerk should receive an annual appraisal by a panel comprising the chair and up to two other members of the governing body. The purpose of the appraisal process is to review past performance, agree future performance targets and identify training and development needs.

The clerk to the governing body plays a key role in the appointment of a new principal or chief executive. You will need to make sure that arrangements for both the resignation of the outgoing principal and selection of their replacement comply with the provisions of the instrument and articles of government and with more general legal (eg contractual) requirements. The appointment of a new principal cannot be delegated by the governing body.

The special committee is activated to examine the case for dismissal of a senior postholder and to make recommendations to the governing body. You should familiarise yourself with the membership and terms of reference of the special committee, which could be called at any time.

The governing body must appoint a chair and a vice-chair. These should usually be annual appointments. The clerk has responsibility for making sure that governing body procedures are in line with best practice and conform to statutory obligations and, where relevant, standing orders.

To help ensure that the governing body maintains the highest possible standards of conduct, the clerk needs to keep a register of members' interests which is disclosed to the governing body and open to public inspection. Although this is not yet a statutory requirement, it is good practice to record relevant non-financial interests as well as the financial interests demanded by the instrument.

Governing bodies undergo annual self-assessment which is validated by external inspection on the four-year cycle; there may be an annual internal validation process as well. You as clerk have an important role in supporting self-assessment but should not have to take sole responsibility for it. The governance health check introduced in February 2001 should be a valuable aid to self-assessment by providing comparative (benchmark) data.

The clerk usually prepares the first draft of the annual report of the audit committee as required by the funding council. Your report should be in line with the Audit Code of Practice.

Governing bodies are making use of college intranet sites to increase awareness of their activities within the college and to foster openness and accountability. As clerk, you will probably become involved both in setting up and managing such a site and you should be aware of the help available to do this, including support from the college webmaster.

The clerk plays a key role in the management of governing body meetings. As well as statutory responsibilities related to procedure, the clerk has a people management role and may need actively to intervene to support the governing body in cases where written guidance is not clear-cut.

The articles of government make provision for individual governing bodies to make rules and by-laws, called standing orders, for the government and conduct of the college. Separate standing orders can be drafted for the various committees set up by the governing body where they operate alongside the committees' terms of reference.

Where next?

You have now completed work on *Module 6 Managing the process of governance*. If there are areas in which you need more guidance or information, they may be covered in other modules in the pack. Turn to *Check your current knowledge and skills* in the **User's guide**. This self-assessment questionnaire will help you to decide which modules or sections of modules may help to fill these gaps. Tick the useful sections for further study.

If you cannot find the information you need within this pack, turn to the *Action planner* in the **User's guide**. Note down what further information, support or guidance you would like. The Action planner gives advice on who may be able to help, and how.

Putting it into action

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

Further reading

Raising Standards in Further Education: The work of college governors published by FEFC in 2000 contains useful examples of good practice in the sector.

All clerks will find it useful to read Sir Patrick Lowry's *Report on Cricklade College, Hampshire* published by FEFC in 2000.

Most FEFC publications are available online at feffc.ac.uk

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ACRA The Association of College Registrars and Administrators is a national organisation which provides professional support to business managers and clerks. The services for clerks include seminars, conferences and network meetings to share good practice and become familiar with new initiatives.

LSDA The Learning and Skills Development Agency is one of the leading research and development organisations operating in the field of post-16 education. Its mission is to be a strategic national resource for the development of policy and practice in post-16 education and training.

AoCSW The Association of Colleges, South West is the regional arm of the national Association of Colleges (AoC) which represents further education colleges and provides a range of services to members.

Eversheds is one of the leading firms of legal advisers to the education sector in the UK, working with over 300 further education colleges.

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