



RESPONSE TO

CONSULTATION ON DEVELOPING AN

INSOLVENCY REGIME FOR THE

FURTHER EDUCATION AND SIXTH FORM COLLEGES SECTOR

DEPARTMENT FOR BUSINESS INNOVATION & SKILLS

Introduction

- 1 The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants and represents over 21,000 members who advise and lead business across the UK and in almost 100 countries across the world. ICAS is a Recognised Professional Body (RPB) which regulates insolvency practitioners (IPs) who can take appointments throughout the UK. We have an in-depth knowledge and expertise of insolvency law and procedure.
- 2 ICAS's Charter requires it to primarily act in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and protect their interests. On the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.
- 3 ICAS is interested in securing that any changes to legislation and procedure are made based on a comprehensive review of all of the implications and that alleged failings within the process are supported by evidence.
- 4 ICAS is pleased to have the opportunity to submit its views in response to the Consultation on Developing an Insolvency Regime for the Further Education and Sixth Form Colleges Sector issued by the Department of Business Innovation & Skills (DBIS). We shall be pleased to discuss in further detail with DBIS any of the matters raised within this response.

Response

- 5 The education policy set out in the consultation is one driven by political and societal objectives on which we do not express any opinion. Our comments are therefore limited to the insolvency related aspects of the proposals.
- 6 Unless otherwise specifically commented in this response, we are supportive of the proposals contained within the consultation paper.
- 7 We understand that the proposals have 2 intended aims. Firstly, to address legal uncertainty over whether existing insolvency legislation applies to insolvent further education establishments, and secondly to establish a regime which would protect a student's ability to complete education qualifications in the event of their further education establishment's insolvency.
- 8 We agree that if there is legal uncertainty over whether existing insolvency legislation can be applied to further education establishments then that should be clarified through appropriate legislation. We are broadly supportive of the approach taken by the draft clauses and Schedules which have been issued in support of the consultation to achieve clarity in this area.
- 9 We note in paragraph 56 that it is not intended to make MVL's available to solvent further education establishments as they are already able to dissolve. We would suggest that while there may not be additional benefit to colleges or learners in the MVL process being available, the MVL process allows a more orderly process of dissolution and provides greater clarity regarding settlement of creditors than the dissolution route may provide. We would therefore suggest that it would be beneficial to make available the MVL process at the same time as the remaining insolvency procedures.
- 10 While the principles of the proposed Special Administration Regime appear appropriate, the proposals make only a passing reference to the impact on creditors (paragraph 71).
- 11 Ordinarily, an administrator would only continue to trade an entity in administration where there would be an expected benefit in the anticipated return to creditors. In an education administration we consider that it would be highly unlikely that there would be benefit to creditors in continuing to operate the education establishment, the benefit only being to learners.

- 12 The costs associated with continuing the operations of the educational establishment (the administrators trading deficit) would therefore be borne by creditors and as a result an education administration would have a significant detrimental impact on the return to creditors unless the administrators trading deficit and administrator's costs directly associated with the continued trading are underwritten by the Secretary of State. Such indemnity would require to be in addition to the indemnity proposals as set out in paragraphs 72 and 73. We therefore support the proposal that the Secretary of State be able to make grants, loans, issue indemnities or make guarantees as set out in paragraphs 82 and 83 and would anticipate that such provisions would require to be utilised in most education administrations.
- 13 In the same way that the public should have trust in company directors, the public should have trust in those who act as governors of educational establishments. We therefore support the view that provisions in the Insolvency Act 1986 and the Company Directors Disqualification Act 1986 relating to the conduct of directors should apply equally to governors.
- 14 In addition to the conduct identified in paragraphs 98 to 108 of the consultation, we would suggest that the provisions of sections 206 – 212 of the Insolvency Act 1986 should be applied in a similar manner in relation to educational establishment insolvencies.
- 15 Due to the short period of consultation available, we have not had the opportunity to consider the draft clauses and Schedules which have been issued in support of the consultation in detail. We have however made some comments on these in [Appendix 1](#).
- 16 We note that the scope of the proposals within the consultation extend to England only, although it is indicated in paragraph 30 that the Welsh Government are also being consulted on whether the provisions could also apply to Welsh colleges. Paragraph 31 states that it is not proposed to legislate in relation to Scotland or Northern Ireland as different legislation governs matters in these territories. While this is correct in relation to Northern Ireland, many of the provisions of the Insolvency Act 1986 also apply in Scotland. Broadly the provisions in relation to CVA and Administrations remain a matter for Westminster, the process of receivership is fully a matter for Holyrood and provisions in relation to winding up are split between Westminster and Holyrood. Education is devolved to the Scottish Parliament and therefore any education policy is for the Scottish Government to decide. If the education policy concerns addressed by the proposals were also of concern to the Scottish Government, then it is possible that the scope of the proposals could be extended to Scotland in a similar manner to Wales, with appropriate legislative consent orders where appropriate.
- 17 Audit Scotland recently issued a report on its [Audit of Higher Education in Scottish Universities](#) (July 2016). The report notes that overall the Scottish higher education sector is in good financial health, however the strong financial position masks the reality of underlying risks within the sector. A further report is due to be published later this month (August 2016) in relation to Scotland's colleges.
- 18 We would therefore suggest that enquiry may wish to be made with the Scottish Government whether there would be a desire to introduce similar provisions in respect of Scottish educational establishments.

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Appendix 1 – Comments on draft clauses and Schedules

Provision	Comment
s.5	The use of 'ordinary' appears inconsistent with the use of 'normal' in s.3 when reference is being made to the same procedure. We would suggest that terminology should be consistent.
s.12(2)(c)	We would suggest that the use of 'keeping it going' has highly negative connotations and would suggest that 'continue its operation' or similar would be more appropriate.
s.13(2)	s.388 of the Insolvency Act 1986 sets out the meaning of "act as an insolvency practitioner". This sets out the meaning in relation to companies, individuals and insolvent partnerships. The scope of companies, individuals or insolvent partnerships does not appear to extend to further education bodies. In addition, with the commencement of partial authorisation provisions within s.390A of the Insolvency Act 1986 it is unclear the extent of authorisation that would be required in order to be authorised to act as an insolvency practitioner to a further education body. We would therefore suggest that this section refers to a person being eligible for appointment as an education administrator as being a person who has full authorisation or is authorised only in relation to companies.
s.24(6)(g)	The use of 'Scottish firm' and which is subsequently defined as being a firm constituted under the law of Scotland is considered to be unclear. We assume that this is intended to cover a Scottish partnership. The terminology of Scottish partnership is used in other legislation (see for example s.390B((4)(a) Insolvency Act 1986) and would be clearer to be used in this context.
s.28(2)	We would strongly oppose Rules being made in relation to Special Education Administration without the involvement of the Insolvency Rules Committee (IRC). Insolvency is a highly complex and technical area and the impact of unintended consequences of legislation can be significant. The IRC play a vital role in ensuring the legislation is clear, practical and free from unintended consequences. Special insolvency regimes are designed for key strategic and special purpose situations and the oversight provided by the IRC is fundamental and perhaps even more crucial where special insolvency regimes are involved.
Sch 2, 1(2)	See comments in paragraph 14 of main consultation response regarding application of sections 206-212 Insolvency Act 1986
Sch 2, 1(3)(a)	<p>We would suggest that para 57 of Schedule B1 be applied to Education Administrations with appropriate modification. It is important that creditors are able to be involved in the Education Administration especially as their interests are superseded by the purpose of the special administration regime. The establishment of a creditors committee would provide for their involvement and provide transparency regarding their interests.</p> <p>We would suggest that para 80 of Schedule B1 is also applicable (with modification). It seems that termination where the objective is achieved is likely to be an exit route applicable, especially where a rescue of the further education body as a going concern (per s.12(2)(a)) is achieved.</p> <p>No provision has been made to amend the provisions of para 86 of Schedule B1. We assume that any notice would be given to the Secretary of State rather than the registrar of companies.</p>