
Commercial Education Brief Autumn Edition 2023

In this Edition

- Consumer law reforms to impact upon edtech businesses;
- An important development affecting school outsourcing of services;
- Do you need to revisit your disciplinary policy?
- Know your customer – in the education sector its not straightforward.

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“Freeths provided a breath of fresh air and it was a relief to find a firm not only actively willing to help, but willing to go the extra mile to ensure the issue was resolved.”

The Legal 500, 2023

Welcome to the Autumn 2023 edition of Commercial Education Brief

Welcome to the latest edition of Commercial Education Brief. Once again, we are providing briefings on issues and developments that we believe will interest you and your colleagues.

Our key message is to make you aware that we are about to enter a period of significant change in several areas of the law, that could impact upon your business activities.

Whilst much publicity has been given to the progress of the Online Harms Act 2023 as it now is, Parliament has been busy progressing a number of issues that sit on its post Brexit reform agenda.

Last year saw UK designed subsidy control laws come onto the statute book and a series of further developments covering public procurement, data protection and consumer rights in relation to digital products are now emerging from the legislative process.

All are on the Freeths' radar screen and we will be covering these in some detail in Commercial Education Brief. We start in this edition by outlining aspects of the Digital Markets, Competition and Consumers Bill. Your business most likely deals with platforms and providers such as Google, AWS and Microsoft making this article a must-read item.

Other topics covered include, a guide to the different categories of schools – helping you to understand exactly who your sales contract is with, how Russell Group universities are looking at AI as a force for good in education settings and an important update if your business involves LGPS participation arrangements.

Finally we provide our regular data protection and dot.gov updates.

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Marketing and selling your digital products and services to consumers?

– Reform is on its way!

New legislation, recognised as the Digital Markets, Competition and Consumers Bill 2023, has reached its Report Stage, and is likely to become law next year.

In this article, Commercial Associate, Josh Day outlines the key features of the Bill and what it will mean for businesses, when it comes into force.

What is the Digital Markets, Competition and Consumers Bill 2023?

The Digital Markets, Competition and Consumers Bill 2023 (“**DMCC Bill**”) was formally introduced in the House of Commons on 25 April 2023.

Its introduction is somewhat long awaited and follows not only a Green Paper published in April 2018 (establishing both digital and consumer markets as a priority for reform), but various other government consultations that have taken place in the last 4 years.

The DMCC Bill recognises an increase in the digital consumer markets–focussed work undertaken by the Competition and Markets Authority (“**CMA**”) and aims to reform both domestic competition and consumer protection laws.

The DMCC Bill introduces not only a new regulatory regime for digital markets but proposes changes to consumer protection law as well as the regime governed by existing UK competition law, enforced by the CMA.

The CMA will be supported through its pro-competition Digital Markets Unit (“**DMU**”) which was set up as an administrative function (and has been operating within the CMA) since its inception in April 2021.

When will it come into effect?

The DMCC Bill is currently at Report Stage, allowing MPs an opportunity to consider further amendments to the DMCC Bill following its Committee Stage examination.

It is expected that the DMCC Bill will come into force at some time in 2024.

What will the DMCC Bill achieve?

1. Digital Market

An overarching aim of the DMCC Bill is to regulate digital markets, by preventing those organisations with larger market shares from creating ‘barriers’ to market and thereby allowing easier entry for smaller digital companies and tech start-ups.

In achieving this aim, the DMCC Bill grants the CMA enhanced powers and obligations. These include:

- **Strategic Market Status (“SMS”)**: Under the DMCC Bill, the CMA (through the DMU) will be able to assign a firm with SMS status, requiring them to adhere to the DMCC Bill’s Code of Conduct and where applicable, Pro-Competition Interventions. A firm will be assigned SMS status in situations where a firm has:
 - Global turnover of £25 billion or UK turnover of £1 billion and
 - A position of strategic significance and
 - “Substantial and entrenched” market power.
- **Conduct**: The CMA will be granted authority to impose conduct requirements (through the DMCC Bill’s Code of Conduct) to regulate a SMS firm’s behaviour in respect of the activities for which they have been designated.

- **Pro-Competition Interventions (“PCIs”):**

Following investigation, the CMA (through the DMU) will be able to impose PCIs which require businesses to address an adverse effect on competition. The PCI may take the form of:

- An order imposing conduct requirements or
- A recommendation of steps to be taken by a business to address the concern.

The CMA will also be granted the power to enforce PCIs by issuing fines of up to 10% global turnover for infringement.

So, when new material comes onto the market, commercial providers should be on the look-out for any tell-tale signs that material might have been copied from what is already out there and protected by copyright. If they recognise that their own material has been substantially copied, then they would be able to take steps to have the material withdrawn by ONA.

- **Merger Control:**

The DMCC Bill sets out new thresholds for mergers, under which the CMA will have authority to review acquisitions where the buyer or the target of a transaction has a market share of supply (or purchases) goods/services of 33% and that party has a turnover in the UK of £350 million.

2. The existing competition law regime

The DMCC Bill also provides changes to the existing competition law regime that applies in the UK. These changes include:

- **Territorial scope of Chapter I prohibitions:** The CMA will now be able to investigate agreements that are implemented outside of the UK, but the effect of which arrangements are likely to result in “direct, substantial and foreseeable” effects in the UK. Currently, the CMA can only investigate agreements that are implemented in the UK.
- **Exemplary damages:** The DMCC Bill grants the High Court and the Competition Appeal Tribunal (“CAT”) the authority to award exemplary damages (damages awarded in excess of a claimant’s loss) in private competition law claims.

3. Consumer law protections

Thirdly, the DMCC Bill will grant authority to the CMA to decide whether or not consumer protection law has been breached. The proposals here are particularly important to businesses in the EdTech sector where sales are made to consumers – especially on a subscription basis.

The CMA will be granted investigatory and enforcement powers in respect of consumer law.

Following investigation, the CMA will be able to impose penalties in respect of organisations failure to comply with consumer law or its own investigatory requirements. Such penalties may be up to 10% of global annual turnover for a consumer law breach, or up to 1% of global turnover where an organisation provides information that is “materially false or misleading” during an investigation.

The DMCC Bill further seeks to strengthen consumer protection laws by implementing more stringent rules and requirements on organisations that are by nature, consumer facing. Examples include:

- Making consumers aware of the availability of an Alternative Dispute Resolution (“ADR”) scheme;
- Protecting consumers from “Subscription Traps; and
- Combatting fake reviews.

Key takeaways

The DMCC Bill will not only result in a significant impact to the regulation of digital markets, but to competition and consumer protection laws in the UK.

Given the volume of content included within the DMCC Bill, the reforms to take place, and the enhanced tools at the CMA'S disposal, it is expected that the CMA (or indeed the DMU) will publish supporting guidelines for use by organisations to navigate the various changes when the DMCC Bill takes effect.

Whilst a formal date of entry is not set, and there are other 'hurdles' to overcome before we see the DMCC Bill in full force and effect, businesses should be keeping a close eye on the DMCC Bills' progress to ensure that they are aware of, and continue to comply with, their regulatory obligations in the UK.

In coming editions of Commercial Education Brief we will explain the impact of the Bill's measures on the use of reviews for marketing purposes and subscription based products.

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“They really push the pace of deals without compromising on client direction and interaction, and without compromising on quality.”

The Legal 500, 2023

Department for Education Pensions guarantee applies to academies outsourcing

The Minister for Schools recently announced an extension to the guarantee given by the Department for Education (“DfE”) to academy trusts in respect of Local Government Pension Scheme (“LGPS”) liabilities which may make it easier for academies who wish to outsource services like catering and cleaning.

Academy trusts are automatically employers in the LGPS and when they outsource services, they must ensure that the pensions of transferring employees who are in the LGPS are protected (academies are subject to the governments New Fair Deal policy).

The contractor will need to be admitted to the LGPS so that the transferred employees can continue their active membership of the scheme. Being an employer in a defined benefit pension scheme of course carries risks. The future cost of providing the promised pensions is uncertain and, at least to some extent, outside of the employer’s control. From the contractor’s point of view, greater certainty may be attractive and “pass-through” arrangements can give that. These arrangements reallocate risk from the contractor to the outsourcer and mean contractors can better understand what the cost of pension provision will be through the life of the contract.

Outsourcing also presents risks for LGPS Funds. The risk for them is that the employer will not be able to pay contributions which are due to the Fund. To mitigate the risk of default, admitted bodies can be required to have a bond (an insurance policy which pays out a certain amount in the event of employer insolvency) or guarantee. In 2013, the DfE put in place a guarantee so that administering authorities of LGPS Funds would see academy trusts as low risk employers. In the event of an academy trust closing, the Fund would not be left with unfunded liabilities.

If the academy trust could not pay, the DfE guarantee would ensure the Fund was not left out of pocket.

Pass-through arrangements could increase exposure under the guarantee and academy trusts have to obtain approval from the Education and Skills Funding Agency before agreeing them.

The government says the new policy means that approval will no longer be needed in the following circumstances:

- Employees eligible for LGPS who are working for the academy trust are transferred to a contractor or on future re-tenders as part of an outsourcing contract.
- Employees eligible for LGPS who were working for the local authority in a maintained school, then transferred to a contractor under TUPE, prior to the school becoming an academy, and where the outsourcing contract has passed to the academy trust following conversion to an academy.
- Employees eligible for LGPS who are working for the local authority, which is providing services to the academy trust under a contract, and the trust decides to outsource this contract to a third-party provider. Therefore, the employees transfer from the local authority to the new contractor.

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Introducing Pensions Partner, Kim Jones

Tell me a bit about your background

I joined the pensions team at my former firm over twenty years' ago which was a very interesting time in the pensions world (yes, you read it correctly, something interesting happened in pensions law!) This was the introduction of the Pensions Act 1995 introduced due to Robert Maxwell's actions relating to the Mirror Group's pension schemes.

What changes are you seeing in pensions law at this time?

Pensions law continues to evolve each year whilst becoming more niche. This area of law is highly regulated, complex and fast-changing. The Pensions Regulator is certainly becoming more assertive in its approach to trustees and employers in relation to pension arrangements.

Unfortunately, there has been a significant decline in the number of lawyers who now practice pensions law – strangely, it is not seen as a particularly attractive area of law to practice in(!) but for me it is something that I thoroughly enjoy and certainly keeps me on your toes!

Each day is different and incredibly varied. One day I may be advising a sponsoring employer on the best way to deal with its defined benefit pension scheme whereas the following day, I may be advising an administering authority in relation to a contractor's admission body status.

What trends are you seeing in Pensions?

We are seeing more pension disputes both in the private and public sector and more businesses who, unbeknown to them, have inherited a pension liability either as a result of a historical TUPE transfer or following acquisition of a company.

I previously spent a lot of my time working with a company's human resources department due to the pension scheme being used as an employee retention tool.

More often, I now tend to work with a company's finance director due to the financial implications a pension scheme may have on the business.

Historically, we mainly advised on defined benefit pension schemes but more often, we are now regularly advising companies who have inadvertently breached their automatic enrolment duties and assisting them in remedying the breaches. In some cases, the fines imposed on these companies by the Pensions Regulator can be significant in comparison to the size of the business.

How can you help clients with issues in this area?

I am able to help those with responsibility for pension schemes manage their obligations and mitigate risk.

I deliver clear targeted advice in all areas of pensions law for our clients, allowing them to achieve their objectives as quickly, and with as few hurdles, as possible. My advice is tailored to ensure that I deliver what is required by decision makers (whether that is a formal 'chapter and verse' report to support strategic decision making or a short email to support a 'go/'no go' decision).

I am a subject matter specialist but also deeply commercial and I am not afraid to share my views on what is 'market' and what is not when advocating for my clients' interests.

What about the team supporting this area of practice?

My team comprises of lawyers who have worked in some of the largest pensions law teams of global and national law firms. As a result, there are not many aspects of pensions legal work we have not undertaken. We are subject matter experts, but we are also ready to meet the new challenges and problems which are 'on the horizon' as pensions law continues to evolve.

What keeps you motivated, Kim?

I am surrounded by an amazing team who are highly experienced and well-regarded pension lawyers who also have a passion for nuances of pensions law (and are geeks like me!).

In addition to being a partner of a great pensions team, I am also Exec Sponsor of Freeths LLP's Disability Network. I feel incredibly passionate about supporting and improving the working lives of my colleagues with additional needs and/or long-term conditions.

I am grateful that in addition to advising on an area of law which I love, my job also provides me with an opportunity to hopefully make a difference to my colleagues' working experience at Freeths LLP and raise awareness externally as to the challenges faced by individuals with additional needs and what can be done to best support them.

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Understanding who your customer is – in the education sector it's not always straightforward!

Having problems securing payment of your invoices from schools? Do you find they can be rejected requiring you to reinvoice in a completely different name? If things take a turn for the worse and you issue legal proceedings to recover payment, are you certain who to address the claim to? This article will help you navigate a route through these surprisingly complicated scenarios.

The English state-maintained system has always had its complications around ownership – with the state having assumed responsibility many years ago for all public funded education to a background of charitable, foundation and church funded education settings – all playing a valuable role in the education of England's children.

Over the past near 15 years, ownership of schools has increasingly had to accommodate a desire held by successive governments for schools to become more independent from the local authorities that previously served as a single conduit for funding the day to day maintenance requirements of schools – this leading to the creation, initially of academy trusts assuming ownership of a single school quickly followed by the development of the concept of a multi-academy trust which assumes ownership of multiple schools.

Understanding quite who owns a given school can be important in many ways including:

- Being certain who to address your invoice to
- When dealing with a school governing body understanding where legal liability for commitments entered into sit
- If commissioning a teacher to provide content for a product you are publishing being sure as to how to ensure effective assignment of copyright to your business
- When dealing with something more complicated, where some form of legal interest over part of the school site is involved and ownership of the land is involved

- If an individual employed at a school (such as a school caretaker) is to transfer to you as a result of TUPE.

For each of these circumstances, certainty as to who from a legal point of view you are dealing with will be of vital importance.

So, what are the current arrangements for school proprietorship (to use the formal term applied under schools' legislation)? Here is a brief summary covering the vast majority of situations you will encounter.

How is day to day expenditure contracted?

• Local Authority maintained schools

Whilst the move to academy status for schools has had significant momentum over the last few years, there remain many schools outside of the academy sector continuing to have the status of local authority maintained.

All schools in this category have a governing body. It is legally recognised as an incorporated entity. For day to day spending decisions the governing body has an important say. For many years a system of delegated budgets has been in place allowing schools to make decisions associated with their day to day spending independently of the local authority. Funding provided as maintenance grant can be applied across various heads of expenditure ranging from books and other materials to technology and even redecoration of the school.

Importantly, however, the concept of delegation of the budget does not mean that the governing body is the legal party you are contracting with. This will still be the local authority and any contracts entered into will be with the local authority. You could say that the school governing body is acting as an agent of the local authority. Invoicing in the school's name is undoubtedly still desirable, and that approach should be used.

- **Voluntary aided and voluntary controlled schools**

Schools in these two related categories exist to ensure that a connection remains with typically, the religious body or order that founded or provided financial support to the school concerned at the time when the system of local authority maintenance of schools came into effect. In both cases maintenance grants are made available to the school through and liability for the expenditure lies with the local authority.

- **Foundation schools**

Schools in this category have historically had a foundation (most likely of a charitable nature) acting as the proprietor of the school. The site on which the school is located will have been held on trust for educational related charitable purposes. As with other categories the maintenance of the schools is now the responsibility and liability for the expenditure lies with the local authority.

- **Academy schools**

Initially, academy schools emerged using the model of a company limited by guarantee. This is a company without shareholders but with a membership and board structure developed along similar lines to a company with share capital. The Board of Directors is generally referred to, perhaps confusingly, as the Board of Trustees.

The company will be your customer.

As the number of schools moving to academy status grew, it quickly became apparent to the Department for Education that the single academy model would be difficult to administer in terms of funding and oversight.

It came as no surprise that the concept of a Multi-Academy Trust soon emerged – still a company limited by guarantee but with proprietorship of a number of schools within it. This is a particularly flexible model as more schools can join the MAT and as has happened in a number of cases, schools transferred from one MAT to another.

Academies are funded directly by the Department for Education through the Education and Skills Funding Agency with some funding passed down through the local authority. The equivalent of maintenance grants are paid to the MAT but within arrangements in which much of the devolved expenditure model that was explained above in relation to local authority maintained schools still applies. Each school's funding reflects DfE funding rules for the availability of maintenance grants – with criteria such as pupil numbers and pupil premium enhancements reflected in the funding provided. Importantly, however, the budget for an individual school can be top sliced by at MAT level to ensure that the costs of operating the MAT are financed. In addition, economies of scale can be taken advantage of with major contracts such as IT and facilities management awarded at MAT level with contributions then being made from the individual school delegated budgets.

It's useful to know that every Academy Trust will have in place a Scheme of Delegation. This should be publicly available on the Trust website.

What about the funding of capital expenditure?

There are various routes under which capital funding is made available to schools – sometimes as a direct decision of the Department for Education but in other cases made available to the local authority and then allocated down to individual schools.

Voluntary aided schools are subject to special rules under which the relevant faith body with an interest in the school is required to make, typically, a 10% contribution to any capital expenditure required. The local authority will occasionally step in and make a grant contribution to cover all or part of that amount.

If we need to understand land ownership arrangements, what should we know?

It will always be worth checking the position on land ownership with, in most cases the local authority likely to have the primary interest as landowner. The academy arrangements that generally apply involve a long term full repairing lease being granted to the academy. In the case of voluntary aided, voluntary controlled and foundation schools', ownership of land may in whole or in part be with trustees. School playing fields are sometimes found to be an exception to that.

Who employs the school staff?

The local authority is, in most cases, the employer of staff working in a school. The exceptions are Foundation and Voluntary Aided Schools where the employment will be through the school governing body.

Having problems in securing payments from a school customer?

We hope that the above helps but we also know that complications can arise. Proprietorship of schools can and does change – for example when a local authority school moves to academy status. And over recent years there has developed a practice of “re-brokering” a school with the school transferring from one MAT to another.

You can help keep track of your customers in a number of ways. We suggest the following as specific steps to take:

1. For each school customer you are dealing with make sure you have a record of that schools unique registration number with [DfE Get Information about Schools](#). That number should never change unless the school is dissolved and its operations merged with another
2. Make sure you work with a purchase order system – allowing you to direct a new school proprietor to the correct documentation relating to the original purchase
3. Have to hand a copy of the DfE information note on academy to academy transfers – available [here](#).

If the above does not answer an issue for you then get in touch with Frank Suttie or Stephen Pearson. We are sure we can help!

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“First-class legal. A firm which understands its clients and fosters an exceptional working relationship.”

The Legal 500, 2023

World ethical data foundation publishes “Me-We-It: Open standard for responsible AI”

The World Ethical Data Foundation has published an open standard for responsible AI designed to “clarify the process of building AI by exposing the steps that go into creating it responsibly”.

The Open Suggestions Framework is a free online forum allowing users, developers, technologists, data scientists and others to build upon suggestions, approaches and share knowledge, clarifying processes and information relating to the build, testing and development of AI to ensure accountability without restricting innovation.

It is hoped the Framework will act as considerations that will be used by everyone to ensure ethical development of AI, evolving and updating with suggestions and amendments and setting an actionable standard.

Key Takeaways

Here are some key points to note:

- **Me-We-It is defined as:**

Me – The questions each individual who is working on the AI should ask themselves before they start and as they work through the process.

We – The questions the group should ask themselves – in particular, to define the diversity required to reduce as much human bias as possible.

It – The questions we should ask individuals and the group as they relate to the model being created and the impact it can have on our world.

- **These are split into 3 key steps and the Me-We-It questions to be asked at each Step are:**

Me – what are the questions asked of you and how do the answers evolve?

We – what are the questions asked of the group and how do the answers evolve?

It – what are the questions asked of the algorithm and how do the answers evolve?

- **Steps:**

1. Training – Data Selection and Ingestion
2. Building – Creation or Selection of Algorithms
3. Testing – Managing Test Data and Tagging

Our View

The new open suggestions framework is available for immediate use and we hope will encourage developers, users and other interested parties to engage and develop the framework to provide a consistent standard for responsible AI and promoting discussion and engagement throughout the life cycle of the process.

It is designed to ensure accountability for the development of AI, providing an open and transparent source code repository with open access and contribution.

Other companies have their own standards for AI currently and this is hoped to bring a standardised, developing way of working with AI, with openness and transparency allowing suggestions, contributions and achieving better AI solutions. This is a new framework and the engagement remains to be seen.

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Russell Group universities offer support to AI-promoting principles

A set of guiding principles, established with the aim of assisting both staff and students in becoming “AI literate” have been backed by Vice-Chancellors at leading UK universities.

Background

In July 2023, the Russell Group, a self-selected association of twenty-four leading, public research universities in the UK, established a set of principles to guide the use of Artificial Intelligence (“AI”) in education.

In its preamble, the universities affirmed their commitments towards the ethical and responsible use of generative AI and the enhancement of teaching practices and student learning experiences; with a view that this will not only lead to the increase in innovative methods of teaching but will also ensure that students develop skills for the future.

What are the principles?

The principles, which can be found [here](#), are broken down into five components, and aim to ensure that generative AI tools can be used for the benefit of students and staff alike.

The five guiding principles set out by the universities are:

1. Universities will support students and staff to become AI-literate
2. Staff should be equipped to support students to use generative AI tools effectively and appropriately in their learning experience
3. Universities will adapt teaching and assessment to incorporate the ethical use of generative AI and support equal access
4. Universities will ensure academic rigour and integrity is upheld
5. Universities will work collaboratively.

Each principle offers examples of how universities, in conjunction with students, schools, FE colleges, employers, sector and professional bodies, can work towards preparing staff and students to be leaders in an increasingly AI-enabled world.

The principles therefore affirm the fundamental importance of “collaboration, coordination and consistency” which is recognised as not only assisting with this aim, but in achieving the implementation of generative AI tools across the education and professional sectors.

Comments

The introduction of the principles follows statements released by the Department for Education earlier this year, which praise the “transformative abilities” of AI to reduce workloads, by performing tasks and activities that would usually be time consuming for teaching staff.

It will be interesting to see how the UK’s leading universities pave the way in this space.

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Is your employee disciplinary policy up to scratch?

The case we profile below is from an education setting but equally applicable to employers generally demonstrating that, when considering dismissal as an option, applying zero tolerance criteria needs to be treated with great care.

In *Mr A Hewston v OFSTED*, the EAT considered the fairness of a dismissal for gross misconduct in the context of the employee having no indication from any policy or guidance that his conduct might amount to gross misconduct.

Mr Hewston was a School Inspector and on one visit a group of school children came in soaking from the rain. He brushed rainwater off the head of one child and put his hand on the child's shoulder.

The school complained to OFSTED about this conduct and, after an investigation, Mr Hewston was dismissed without notice for gross misconduct (making physical contact with a child). There was no "no touching" policy in place at OFSTED and it was accepted that here was no harm intended to the Child.

The Tribunal found that the dismissal fell within the range of reasonable responses and was fair.

The EAT overturned the Tribunal's decision, finding that:

- Whilst it is understood that an employer does not need to set out in its disciplinary policy every conceivable type of behaviour that might amount to gross misconduct, *"it is not fair to dismiss an employee for conduct which he did not appreciate, and could not reasonably have been expected to appreciate, might attract the sanction of dismissal for a single occurrence"*.

- Physical contact with a child was not on the list of gross misconduct offences in the employer's disciplinary policy, there was no other document that addressed the issue of physical touch or indicated that there was a no-touch policy or gave guidance on the circumstances in which touch would or would not be regarded as permissible.
- The failure to provide Mr Hewston with the following documents was unfair:
 - The written account of the pupil involved
 - The school's complaint to OFSTED
 - The record of the determination of the Local Authority Designated officer (LADO)

This was particularly the case as the school's complaint "glossed the child's own words to a degree", so it was important that the employee saw the original account.

This case is a reminder to employers that whilst they cannot be expected to identify every potential type of gross misconduct in its Disciplinary Policy, if the nature of its work is such that it takes a zero tolerance approach to conduct that might in other contexts not amount to gross misconduct, it needs to make that clear to employees.

See the case of *Mr A Hewston v OFSTED* [here](#).

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Upskilling your business – how to develop an apprenticeship programme

The UK government, in its determination to secure growth in our economy, has placed the promotion of apprenticeship programmes at the heart of its growth strategy. Whether or not you are subject to the employer's apprenticeship levy, an apprenticeship programme is possible and could play a role in your own future success. This article looks at some key questions we are asked by employers.

My business does not meet the £3m payroll threshold for levy contributions. Can I still provide apprenticeships?

Yes, is our response – and the good news is that the costs of the apprenticeship (excluding certain expenditure – particularly the apprentice's wages) will come from the government. 95% of eligible training costs will be paid for by the government. You must engage with a registered training provider who will take responsibility for the training and you should be prepared to employ the apprentice for 12 months and with a relevant job likely to be available at the end of the apprenticeship.

Can apprentices be recruited in any of the areas within our business where we have a need for new skills?

Most likely yes. For several years now, employer groups have been engaged with to devise standards to be achieved through apprenticeship based training across a vast number of business areas. A wealth of information is available on the Institute for Apprenticeships website – follow [this link](#) to see how available apprenticeship standards could relate to your business requirements.

Should I have a contract with the Training Provider?

It is important that you do have a contract covering the provision of training services.

The contract must be consistent with the requirements of the the Department for Education guidance on apprenticeship funding.

What evidence is available?

Department for Education guidance on apprenticeship funding has recently been restated and can now be found in a single document linked [here](#). There are compliance requirements that the training provider must meet throughout the delivery of the apprenticeship, and you should make sure you can enforce those obligations. But less well known is the fact that the employer also has duties to comply with and with DfE having a right to undertake compliance audits. Key points to be aware of are:

- Eligibility and prior learning rules that must be taken into account
- The rules relating to what is described as “Eligible Expenditure” – against which claims for levy drawdown or for non-levied employers grant funding can be made
- Ensuring the apprentices ability to have access to “off the job” training in line with the DfE guidance
- The importance of the evidence pack – this being the documented evidence of the apprenticeship tracking the apprentice's participation and progress made.

What other point should I be aware of?

First and foremost, the individual overseeing apprenticeships should be familiar with the DfE guidance. It's lengthy but a pretty straightforward read. It's important that the relationship with the Training Provider is managed at employer level and that can only be achieved with a good understanding of the guidance that the training provider is expected to follow in the delivery of the training.

It is also important to understand the process for end point assessment – the activity completed with an appropriate end point assessment organisation that leads to successful completion of the apprenticeship being achieved. Employers can select the organisation concerned from those that are accredited in connection with the apprenticeship standard being followed.

Most likely the Training Provider will propose contracting under the standard terms and conditions of the provider. This is usually appropriate but take care to review the contract. You will want to be sure that it refers to (currently) the 2023/24 DfE guidance. If it does not, a number of the contract terms are likely to be out of date and therefore not in conformity with DfE requirements.

Take a look also at the confidentiality clause. Training Provider personnel have more access to your business than many other suppliers and the protection of your confidential information needs to be assured.

Review the pricing information and be sure to understand the elements of training costs that will be funded either through levy paid or DfE grant funding.

Each apprenticeship standard has a cap on expenditure that can be claimed and if the costs of the apprenticeship claimed by the Training Provider are in excess of that this is a cost to be met by the employer.

If you have any questions about apprenticeships, Freeths can help.

We have invested time in understanding the complexities of the funding guidance and for larger employers considering tendering opportunities can provide a model apprenticeship training provider service contract that can be put to training providers as the terms of the contract to be entered into.

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Dot.Gov

Our regular round up of new developments from government and other agencies.



Ofsted publishes a review of School appreciation of the importance of technical qualifications

Ofsted has published a review of how well schools are promoting the importance not just academic but also technical and skills based pathways as part of their career counselling. The report suggests that most providers are making good progress in the quality of information provided, with greater emphasis being demonstrated in relation to available options such as apprenticeships and technical qualifications.

None the less the report draws attention to the continuing issue that confronts FE and Skills providers in their efforts to promote courses to schools and with limitations existing in teachers' knowledge of technical pathways – particularly T Levels.

The report places emphasis upon schools developing a broader perspective in their strategic planning around careers programmes and a greater focus on the best options for individual students.

The report can be viewed [here](#).

New Free Schools

The government announced on 22nd August 2023 that 15 new free schools are set to open in areas with poorest education outcomes. They will not be run by the local authority but rather other organisations such as academy trusts and will have greater freedom.

“The new schools will include 3 schools run by the high performing Star Academies and Eton College, located in Dudley, Teesside and Oldham, spreading the highest standards of education across the North East, North West and West Midlands. These schools will help rapidly increase the progression of talented local pupils into top universities including Oxford and Cambridge.”

Education Secretary Gillian Keegan said:

“We want to make more good school places available to families, and these 15 new free schools will bring brand new opportunities to young people from Bradford to Bristol.”

“Free schools bring high standards, more choice for parents and strong links to industry – and all in the areas where those opportunities are needed most.”

“These new schools build on this government’s work to drive up school standards since 2010, with 88% of schools now rated good or outstanding – up from 68% – and high performing academies and free schools in all parts of the country.”

GCSE British Sign Language (BSL) proposed subject content

Following a proposal from Signature (an awarding body for deaf communication and language qualifications) as well as campaigning by the National Deaf Children’s Society (NDCS) and deaf young people, such as Daniel Jillings, the DfE committed in 2018 to introducing a GCSE in BSL. The government sought views on the proposed subject content for a new GCSE in BSL. The consultation ran from 15th June to 8th September and the findings will be taken into account when finalising the subject content.

Guidance on Reinforced autoclaved aerated concrete (RAAC) in education settings

The DfE have published guidance for responsible bodies of state-funded education estates on identifying RAAC. The guidance sets out how to identify RAAC and what these bodies should do if they identify it in their buildings, which can include vacating and restricting access to the spaces. Guidance can be found [here](#):



T Levels Report

T levels are new 2 year courses taken after GCSEs and broadly equivalent in size to 3 A Levels. They launched in September 2020. T Level Transition Programme (TLTP). 20th July 2023 – Ofsted published a final thematic review report on T levels and the TLTP. The DfE commissioned the report to assess the implementation of the new qualifications, and this follows on from the interim report which was released in October 2022.

His Majesty's Chief Inspector, Amanda Spielman, said:

"As with many new qualifications, there are some teething issues with T levels, but in most cases providers and employers seem to be working well together to address them. However, we saw a range of shortcomings which providers and the Department for Education will want to address."

"When done well, they can be a strong option for learners who prefer a vocational route through education as a path to their intended career."

Read the interim report [here](#).

Read the report [here](#).

Information Commissioner's Office (ICO) publishes new guidance on sending bulk communications by email:

The ICO issued a warning on 30 August 2023 to organisations using the blind carbon copy (BCC) email function when sending emails with sensitive personal information. The ICO has recently published new guidance on good practice around protecting personal information when sending bulk emails which can be found [here](#).

Michaela Jembei, ICO Director of Regulatory Cyber said: *"Failure to use BCC correctly in emails is one of the top data breaches reported to us every year – and these breaches can cause real harm, especially where sensitive personal information is involved"*

They recommend using alternatives to BCC, such as bulk email services, mail merge, or secure data transfer services.

Schools Bill set to fall lapse at the end of parliamentary session.

The government presented the Schools Bill (*Long Title: A Bill to make provision for the regulation of Academies; about school and local education funding; about the attendance of children at school; about the regulation of independent educational institutions; about teacher misconduct; and for connected purposes*) to the HoL in May 2022 where it was scrutinised and tabled for its third reading in the HoL on the 14th September 2023, however Secretary of State for Education (Gillian Keegan) has confirmed that the Bill will not progress to its third reading, and it is expected to lapse at the end of the current parliamentary session (October 2023). The Bill had been criticised for giving excessive powers to the Secretary of State for Education.

A look ahead to the next Commercial Education Brief

Due out in the run up to BETT 2024 our next edition will feature an important article on how the Digital Markets, Competition and Consumers Bill will affect businesses that make products available to consumers on a subscription basis.

We will also be sharing with you some hints and tips around managing your business risks when negotiating agreements with suppliers and customers. As the role of AI rapidly grows within the education sphere a new column is planned to appear focussing upon legal and ethical issues associated with generative and other aspects of AI.

If there are particular topics you would like us to cover in future editions please do get in touch with [Hollie Bryan](#)

Awards and accreditations



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