Legal status of pre and post 1992 universities

The governance framework in most pre-1992 universities is set down in the charter, statutes and ordinances. Charters give the governing body general control over the affairs of the institution, specifically the management and administration of the finances and property. Most of these institutions were established by Royal Charter; as such they are formally chartered corporations and are often referred to as ‘chartered universities’. More detailed duties are usually contained in the statutes. The structures in England, Wales and Northern Ireland are very similar, but there are some differences in Scotland.

A few pre-1992 universities were established by a specific Act of Parliament; they are known as statutory corporations, as their Acts include their statutes and their internal structures of governance are similar to those of chartered corporations. There are also a few institutions set up as companies limited by guarantee, and the Universities of Oxford and Cambridge have neither a Royal Charter nor an Act of Parliament, but a body of statutes.

Although the governing bodies of pre-1992 universities are formally responsible for the oversight of the whole institution, and most have accepted that they have ‘unambiguous and collective responsibility’ there is usually a distinct role for the senate or academic board. Charters and statutes set out the senate’s role as the body with responsibility for academic matters and the oversight of teaching, examining and research. In the pre-1992 universities there are usually a number of council members nominated by the senate, often together with academic staff elected by and from the whole of the academic staff. In addition, some senior staff may have ex-officio membership of both senate and council. Thus there is usually a significant awareness in the council of the status and role of the senate, which will soon be apparent to new independent members.

The post-1992 institutions comprise of the former polytechnics and colleges of higher education. They are higher education corporations, whose structures of governance derive from the 1988 Education Reform Act and the 1992 Further and Higher Education Act. The governing arrangements are set out in an instrument of government and articles of government, which are generally very similar, having all been subject to the approval of the Secretary of State for Education. In contrast to the pre-1992 universities, their model of governance specifies:

- A more powerful role for the vice-chancellor as chief executive
- A larger majority of external members on the governing body
- Limited participation of staff and students in governance
- And a lesser role for the academic board

A small number of post-1992 institutions are established as companies limited by guarantee (for example the University of Winchester) and one (the Royal Agricultural College) is a private limited company (though its shares are not publicly available). It has been reported that the University of Central Lancashire is applying to become a private company as part of a move to a group structure. The governing instruments of these institutions are a memorandum and articles of association, which incorporate the provisions of the instruments and articles of government common to the post-1992 sector. For these institutions the governing body also acts as the company board of directors.

The standard instrument of government in post-1992 institutions usually contains little on the work of the governing body, but the articles of government generally contain five standard responsibilities of the board:

- Determination of the educational character and mission of the institution and oversight of its activities
- Effective and efficient use of resources, solvency of the institution and safeguarding of its assets.
- Approving annual estimates of income and expenditure
- The appointment, grading, appraisal, suspension, dismissal and determination of the pay and conditions of service of holders of senior posts (usually the vice-chancellor/principal, deputy principal(s), clerk, and director of finance)
- Setting a framework for the pay and conditions of service of other staff

In post-1992 institutions the position concerning academic governance is rather different from that in the pre-1992 universities. The articles of government give the governing body responsibility for determining the institution’s educational character.
and mission and give the academic board an advisory role in the development of academic activities, except in matters directly concerning academic quality. There are generally fewer staff and student members on the board of governors, and it is very rare to find senior officers in membership other than the vice-chancellor/principal. Other officers may well attend meetings as observers and interact with governors, but the nature of the relationship with the academic board is different from that in pre-1992 universities.

Charitable status

Almost all universities and colleges have charitable status. The effect of this is that members of governing bodies are also charity trustees and subject to the requirements of charity law. In June 2010 Hefce became the principal regulator for the 110 higher education institutions in England, which had previously been exempt charities. The Financial Memorandum now includes provisions reflecting this principal regulator role. The web sites of English higher education institutions provide standard core information about their charitable status and these ‘gateway’ pages may also be accessed via the Hefce web site.

In June 2010 students’ unions, the autonomous Cambridge, Durham and Oxford colleges lost their exempt charity status. They are expected to register with the Charity Commission.

In Wales charities are subject to the same legislation as in England. The Welsh Government is moving to a position where there will be no exempt charities in Wales. All Welsh charities will then be regulated (as charities) by the Charity Commission. In July 2010 Cardiff became the first university to register with the Charity Commission.

The Charities Act (Northern Ireland) 2008 will lead to all charities in Northern Ireland being required to register with the new Charity Commission for Northern Ireland. There will be no exempt charities and no concept of a ‘principal regulator.’ A need has arisen to secure further clarity and legal certainty in relation to the definition of “charity” and the application of a public benefit test as set out in the Charities Act (Northern Ireland) 2008. The Department for Social Development is currently giving detailed consideration to the matter with a view towards bringing forward any necessary legislative amendment as expeditiously as possible.

In Scotland the Charities and Trustee Investment (Scotland) Act 2005 has been in force for some time. Scottish charities have had to register with the Office of the Scottish Charity Regulator (OSCR). There is no concept of exempt charity in Scotland. The OSCR has already issued extensive guidance. Charitable status confers benefits and raises issues for governors.

The Charity Commission has published guidance on research carried out by institutions particularly that conducted with non-charitable organisations.

A research report was published in June 2012 on the impact of the public benefit requirement, originally introduced by the Charities Act 2006. This covers both registered and exempt charities and is therefore relevant to higher education. The Charity Commission is consulting on its revised draft public benefit guidance; the consultation closes on 26 September 2012. The existing guidance dates from 2008. All charity trustees must have regard to this public benefit guidance.

The Institute of Chartered Secretaries and Administrators (ICSA) has updated its guidance to charity trustees and secretaries on ‘Matters Reserved for the Board of Trustees’.

Benefits of charitable status

Charitable status confers the following benefits for institutions:

- Exemption from capital gains tax and from income tax and corporation tax on income other than from trading arising outside the primary purpose of the institution. (All institutions are normally exempt from VAT on the supply of education and research, but may be liable for VAT on trading activities)
- The ability to recover income tax deducted from deeds of covenant and receipts under gift aid
- Exemption from inheritance tax for donors to institutions
• Substantial relief on business rates

Issues for the governing body to bear in mind in relation to charitable status include the need to:

• Apply the property and income of the institution only for recognised and defined charitable purposes
• Act only within their legal powers. If in doubt as to whether actions contemplated may take them outside the law, the governing body should seek expert advice. The ‘principal regulator’ (e.g. in England Hefce) and institutional legal advisers are likely to be the obvious choice, although the charity commissioners remain a valuable source
• Take particular care in organising the trading activities of the institution, as these may not be regarded as charitable
• Manage and protect the property of the institution
• Provide information and returns to the charity regulator

Charities in England are required to include public benefit statements in their annual reports.

Charitable status of student unions

As a result of the Charities Act 2006 student unions lost their exempt charity status in June 2010. Most have now registered, or are in the process of registering, with the Charity Commission.

Most guidance (e.g. from NUS and professional service firms) points student unions towards registration as separate legal entities. In many cases this requires significant managerial input from those responsible for student services and student union liaison, finance, possibly property management and the clerk's office. It is also likely to prompt requests from student unions for additional funding, given the greater autonomy in governance and management that would be required.

Within the next few years, all governing bodies should consider both an implementation report for the 'spin-off' of the student union, and revised communication and monitoring arrangements to clarify and inevitably formalise substantial aspects of the institution/student union relationship. Further advice is expected as the secondary legislation for this aspect proceeds.

Relevant legislation

1. Equality, diversity and disability legislation: In recent years institutions have been faced with new requirements focused on the national equality and diversity agenda, in particular the Race Relations (Amendment) Act 2000, the Disability Discrimination Act 1995, the Special Education Needs and Disability Act 2001 (SENDA), and regulations relating to sexual orientation and religious belief. In addition, legislation on age discrimination and preventing incitement to religious hatred have also come into force. This legislation put the responsibility for compliance on governing bodies, which must ensure that their institutions are non-discriminatory and have action plans in place to implement the legislation and monitor progress against targets. The Equality Act 2010 replaces much of the previous legislation and strengthens the law in this area.

2. Health and safety legislation: The governing body is ultimately responsible, under health and safety at work legislation, for the health and safety of staff, students and visitors. It must ensure that the institution has a written health and safety policy, and that there are management systems in place to implement it, and generally to manage health and safety matters. Most governing bodies place the managerial responsibility on the Vice-Chancellor/Principal (who in turn will identify a senior officer to be operationally responsible), and require regular reports - at least annually - on the operation and success of the policy.

3. Procurement: Procurement for services has to comply with both UK and European law, and governing bodies will need to assure themselves that their institutions are complying with relevant legislation.

5. **Freedom of Information**: This gives a general right of access to information, and applies to all institutions. All institutions should have a scheme in place and have published it, together with procedures to deal with requests under the Freedom of Information Act. The Act will also give access to governing body papers and minutes if they are not already published. In general, it will be wise for governors to assume in future that all governance documents are for public access unless otherwise stated.

6. **Data Protection**: The Data Protection Act 1998 requires institutional compliance with a number of principles, and gives data subjects the right to find out what personal information is held on computer and systematic paper records, to require removal if it is not necessary to hold it for the purposes in question, and to require amendments to rectify inaccuracies. The Act is often invoked by staff or students with a grievance, which may ultimately find its way to the governing body.

7. **Charity law**: Almost all universities and colleges have charitable status, which means that members of governing bodies are also charity trustees and subject to the requirements of charity law. The Charities Act 2011 received Royal Assent in December 2011 and came into force in March 2012. The Act consolidates all the provisions of the Charities Act 1993 and most of those of the 2006 Act.

**Getting legal advice**

The first stop for any legal enquiry should always be to the clerk or secretary of the governing body concerned, who will usually be responsible for securing legal advice for the governing body and liaising with the institution's solicitors and legal advisors. There is a surfeit of legal and sector advice across the whole range of the law as it relates to higher education. Governing bodies may find that the main problem is distilling the essentials (in terms of rights and responsibilities) from a mass of cases, policy guidance, strategic direction and procedural regulation.

**The legal role of the clerk or secretary**

In addition to his or her secretariat functions, the clerk or secretary to the governing body generally has legal responsibilities and is expected to advise on:

- The **legal status of the institution** and its component parts, particularly to verify capacity to enter into legal contracts and agreements
- The broad **legal and statutory framework** within which the institution operates, as a basis for understanding issues relating to the enforcement of agreements, and statutory and regulatory obligations
- Securing specific **legal advice** (or identifying who secures such advice) to address issues, risks and challenges

In undertaking these roles, the clerk is acting as a check that the governing body acts within its powers and complies with its legal obligations. The activities of governing bodies are subject not only to those laws concerning their own powers and conduct, but also to other applicable legislation, for instance, to charities and to employers in general. The clerk cannot be expected to be a legal expert or to be acquainted in detail with the full range of the law, but like a good lawyer the clerk should know where to look, who to refer to, and should (from time to time) seek legal advice for the board before it takes or authorises decisions.

The clerk needs to be conversant with the specific legislation that relates to the duties, powers and procedures of governing bodies, and have a general grasp of the scope of legislation which affects the conduct of the institution.

Find more information and resources on this topic on our website at:

[www.lfhe.ac.uk/en/governance/regulatory-framework/legal](http://www.lfhe.ac.uk/en/governance/regulatory-framework/legal)