

INTRODUCTION TO THE LEGAL FRAMEWORK AND CORPORATE GOVERNANCE OF HIGHER EDUCATION

THE LEGAL STATUS OF INSTITUTIONS

Background

1. The institutions which make up the current higher education sector have diverse backgrounds and traditions which are reflected in their constitutional arrangements and the structure and powers of their governing bodies. They can, however, be divided into two broad groups. In the case of the so-called pre-1992 HEIs, the constitution and powers of the governing body are laid down in, and limited by, the charter and statutes of the institution. For the so-called post-1992 universities and colleges, they are laid down in the Education Reform Act 1988 (as amended by the Further and Higher Education Act 1992), together with the instruments and articles of government or equivalent.

Pre-1992 universities

2. The pre-1992 universities include the ancient universities of Oxford and Cambridge, the federal University of London, the member institutions of the University of Wales, the 'civic' universities founded in the late nineteenth and early twentieth centuries, the former university colleges which awarded degrees of the University of London, the group of universities established in the 1960s, and the Colleges of Advanced Technology which achieved university status following the Robbins Report of 1963.

Post-1992 universities and colleges

3. Most of the post-1992 universities are former polytechnics which until 1988 (or 1992 in Wales) were part of, and funded by, local education authorities and awarded degrees validated by the Council for National Academic Awards. The Education Reform Act 1988 made them into independent corporations and established the Polytechnics and Colleges Funding Council (PCFC) which took over responsibility for funding these institutions in England. Subsequently the Further and Higher Education Act 1992 enabled these institutions to award degrees in their own right, and to acquire the title of university.

Colleges of higher education

4. The colleges of higher education which form part of the higher education sector in England were also funded by the PCFC following the passage of the Education Reform Act 1988. A number of colleges of higher education are supported by churches. These colleges often have ties to the providing bodies, which may have the right to be represented on the governing body, together with institutional trustees. The providing bodies have the power to determine the character of the institution, and in some cases also have jurisdiction over the institution's assets. The colleges can be divided into two groups: general colleges offering a range of courses and specialist colleges. Some colleges of higher education have been granted powers to award their own degrees and the title of 'university college'.

Legal status of institutions

5. Although the institutions in the current higher education sector are diverse in origin, size and organisation, they share the following characteristics of being:

- legally independent corporate institutions
- bodies with charitable status
- accountable through a governing body which carries ultimate responsibility for all aspects of the institution

Pre-1992 universities

6. Most of the pre-1992 universities were established by a royal charter granted through the Privy Council, with an associated set of statutes. This form of organisation is known as a chartered corporation.

7. A very small number of pre-1992 universities were established by a specific Act of Parliament, the operative part of which is a set of statutes. This form of organisation is known as a statutory corporation.

8. The structure of governance for each university is laid down in the instruments of its incorporation (i.e. the Act or charter and the statutes). The charter and statutes can only be amended on application to the Privy Council. Most universities have supporting governance arrangements in the form of ordinances and regulations.

9. The Universities of Oxford and Cambridge have neither an Act of Parliament nor a charter, but do have a body of statutes, changes to the more important of which require the authority of the Privy Council. Further exceptions are the London School of Economics and the Institute of Cancer Research, which are companies limited by guarantee.

Post-1992 universities and colleges of higher education

10. The Education Reform Act 1988 established as higher education corporations (HECs) certain higher education institutions in England previously maintained by local education authorities. The Act stipulated that any HEC should be conducted in accordance with articles of government approved by the Secretary of State. Model articles were prepared by the then Department of Education and Science to guide institutions in drawing up their own articles. The Further and Higher Education Act 1992 extended the provisions of the 1988 Act to Wales. It also amended the earlier legislation and set out the general format for an instrument of government, to be made by each HEC and approved by the Privy Council, governing the membership and constitution of the governing body. The Act also required HECs subsequently to make new articles of government to be approved by the Privy Council.

11. Some colleges are established as charitable trusts under a trust deed or through a scheme made by the Charity Commissioners. They are subject to supervision by the Charity Commissioners, and operate under instruments and articles of government approved by the Privy Council.

Charitable Status

12. All higher education institutions have charitable status. Under current legislation they are usually exempt or excepted charities, i.e. they are not subject to the jurisdiction of the Charity Commissioners. The Charities Act 1993 is currently under review, in particular in respect of the exempt status of HEIs and the need for regulation by the Charity Commissioners or other appropriate body, and members of governing bodies need to be aware of the implications this may have. The draft Charities Bill will, if enacted, have implications for university governance since it suggests that all those universities that are now exempt charities should, from the date(s) when a new Act comes into effect, not be exempt from regulation as charities. However, to minimise the burden of this new regulation, it is proposed that the duties of charity regulator would be taken on by the Funding Council, who would act as an agent for the Charities Commission and be known for this purpose as 'Principal Regulator'. The implications of this for members of governing bodies are that they would now be formally recognised as trustees of a charity and subject to the obligations this imposes under charity law.

For institutions there are possible implications in several areas, including: the style of financial reporting, which may need to be more like the SORP required for charities; greater disclosure of information on endowment and other restricted funds; and the Charity Commission's view on the acceptability of 'third leg' commercial activities that institutions carry out.

13. Charitable status confers the following benefits:

- exemption from capital gains tax, and from income tax and corporation tax on income other than trading income arising outside the course of carrying on the primary purpose of the institution
- 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.

14. All higher education institutions are normally exempt from VAT on the supply of education and research. They may however be liable for VAT on trading activities.

15. Requirements that members of governing bodies need to bear in mind in relation to the charitable status (only the last of which is affected by the draft Charities Bill) of their institutions include:

- applying the assets and income of the institution only for the defined charitable purposes
- acting only within their legal powers
- taking particular care in organising trading activities which may not be regarded as charitable
- managing and protecting the property of the institution
- providing information and returns to the appropriate charity regulator (the Charity Commission or the Funding Council).

Other Legal Compliance

16. Governing bodies should ensure that their institutions comply with all relevant legal requirements - for example Health and Safety; Human Rights; Data Protection; Freedom of Information; Race Relations; Gender, Age and Disability Discrimination - and other legal obligations, such as contracts made in the institution's name, and should ensure that appropriate processes and procedures are in place to achieve such compliance.

THE FRAMEWORK OF GOVERNANCE OF HIGHER EDUCATION INSTITUTIONS

Post-1992 universities and colleges of higher education

17. These institutions operate mostly under articles of government.

Governing Body

18. The articles state that the governing body shall be responsible for:

- the determination of the educational character and mission of the institution and for oversight of its activities
- the effective and efficient uses of its resources, the solvency of the institution and safeguarding its assets
- approving annual estimates of income and expenditure
- the appointment, grading, suspension, dismissal and determination of the pay and conditions of service of the head of the institution, the clerk to the governing body, and such other senior post-holders as the governing body may determine
- setting a framework for the pay and conditions of service of all other staff
- the appointment of external auditors.

19. The 1992 Further and Higher Education Act and the instruments of government state that the governing body shall consist of no fewer than 12 and not more than 24 members (plus the head of the institution unless he/she chooses otherwise). Of the appointed members:

- up to 13 must be independent members, namely people appearing to the appointing authority to have experience of, and to have shown capacity in, industrial, commercial or employment matters or the practice of any profession, and who are not members of staff or students of the institution or an elected member of the local authority
- up to two may be teachers of the institution, nominated by the academic board, and up to two may be students of the institution, nominated by the students

- at least one and not more than nine shall be co-opted members, nominated by the members of the governing body who are not co-opted members.

20. At least one of the co-opted members must have experience in the provision of education. Elected members of any local authority are excluded from membership of the governing body, other than as co-opted members.

21. Subject to the above maxima and minima, the governing body itself can determine the number of members in each variable category, but must ensure that at least half of all members of the governing body are independent members.

22. Governing bodies should meet not less than four times a year.

Academic Board

23. The academic board is responsible for academic affairs, including academic standards, research, scholarship, teaching and learning, and courses at the institution, and for considering the development of the academic activities of the institution, subject to the overall responsibilities of the governing body and the head of the institution.

24. Where the power to award degrees exists (as it does for all post-1992 universities and some higher education colleges), it is provided under the Further and Higher Education Act 1992, which specified that this power should rest with the governing body. The academic board's responsibility for the administration of any awards is therefore by virtue of delegation from the governing body.

25. The articles specify that the academic board should normally consist of not more than 30 members, although exceptionally membership of up to 40 may be permitted. Additionally, the articles state that individuals in senior management positions (i.e. deputy and assistant principals, deans of faculty or equivalent, heads of schools and departments) must make up at least 50 per cent of the membership.

Officers

26. The articles of government of the post-1992 universities and colleges make provision for each institution to appoint to senior posts, which must include those of the principal and the clerk to the governing body. A brief description of senior positions follows.

Chancellor

27. Some post-1992 universities have appointed chancellors who may, among other non-executive functions, carry out ceremonial duties - for example, conferring degrees at degree congregations.

Chairman of the Governing Body

28. The chairman of the governing body is appointed by the governing body from among its independent members.

Head of the institution

29. Subject to the responsibilities of the governing body, the head of the institution is the chief executive of the institution, and is responsible for:

- making proposals to the governing body about the educational character and mission of the institution, and for implementing the decisions of the governing body
- the organisation, direction and management of the institution and leadership of the staff
- the appointment, assignment, grading, appraisal, suspension, dismissal and determination - within the framework set by the governing body - of the pay and conditions of service of staff other than the holders of senior posts
- the determination, after consultation with the academic board, of the institution's academic activities, and for the determination of its other activities
- preparing annual estimates of income and expenditure, for consideration by the governing body, and for the management of budget and resources, within estimates approved by the governing body
- the maintenance of student discipline and, within the rules and procedures provided within the articles, for the suspension or expulsion of students on disciplinary grounds and for implementing decisions to expel students for academic reasons.

30. The head of the institution, working with the secretary or clerk to the governing body, must ensure that the governing body receives proper and appropriately timed information to fulfill its responsibilities.

Deputy (or Deputies) to the head of the institution

31. The Deputy (or Deputies) to the head of the institution assists the head of the institution and has specific management responsibilities. In some institutions they are appointed on a permanent basis and in others for a fixed term. They may be

responsible for providing leadership in academic or related functions. In some instances they may be designated as pro vice-chancellors.

Secretary (or Clerk) to the Governing Body

32. The secretary or clerk to the governing body normally has other management responsibilities within the institution. Some are designated as secretary, registrar, deputy or pro vice-chancellor.