



INSIDE:

FURTHER EDUCATION AND TRAINING ACT
PLANNED GIVING
STUDENTS UNIONS & THE CHARITIES ACT
EDUCATION NEWS

page 5
page 9
page 13
page 16

OUTPUT BASED SPECIFICATIONS
COMPANY LAW UPDATE
CHANGES TO TRADE MARK EXAMINATION PRACTICE

page 7
page 11
page 15

A PLEA TO DEVELOP AN AFFECTION FOR THE DATA PROTECTION ACT

The mere mention of the Data Protection Act (DPA) can evoke an intemperate outburst and a chain of expletives from otherwise unruffled staff. There is no doubt that the DPA is unwieldy and it is often invoked by the disgruntled member of staff or student who wishes to flush out the apparent crusade of which they are convinced they are the innocent victim. However, efforts expended to comply with the regime will produce rewards not only for the individuals it is designed to protect, but will also be beneficial to the running of efficient and successful institutions.

This article will examine each of the DPA principles to explore the benefits for colleges and universities and to identify some of the misunderstandings that have prevailed.

1. Fair and lawful processing

- **Fairness**

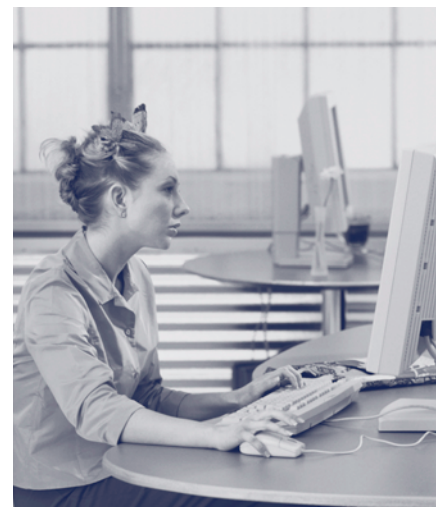
The DPA has its basis in the right to privacy under the European Convention on Human Rights. This

right is not absolute and can be interfered with by an institution provided it is in the pursuit of a legitimate aim (e.g. the institution's legitimate business interests), the interference is no more than is necessary in order to achieve that aim, and the individual is generally made aware of the circumstances in which the interference will take place.

This formula is replicated to some extent in the DPA. Consequently, the DPA does not present a barrier to the flow of information which is required by the genuine business or educational needs of the institution. What the DPA does require, however, is that institutions are open and transparent in their processing of personal information. Institutions should broadly indicate the purposes for which they obtain personal information about their staff and students, to ensure that those individuals are not deceived in any way and to protect them against unforeseen secondary uses of their information.

This is not an onerous task and requires a simple statement on the enrolment, recruitment or other forms seeking personal information, indicating in general terms why the institution wishes to obtain the information in question and any non-obvious disclosures to third parties that are envisaged.

Such openness is indispensable in the relationship between any business and its employees or customers, and is no less valuable in the context of an educational institution.





- **Conditions legitimating processing - non-sensitive information**

The DPA requires institutions to comply with one of a list of conditions on which processing of non-sensitive, personal information is justified. Many institutions mistakenly believe that consent must be obtained for all processing. Consent, however, is merely one condition amongst others that legitimate processing and is neither necessary or desirable in all cases. No institution could conduct its business effectively if it was required to obtain consent for all of its processing of personal information. Most processing by institutions is likely to be justified:

- because it is necessary to fulfil the institution's contractual obligations to its staff (e.g. assessing performance for salary reviews) and students (e.g. processing examination marks) or
- because it is in the legitimate interests of the institution, provided that there is no unwarranted inference with the privacy of the individual. This requires balancing the institution's genuine needs with the reasonable expectation of privacy on the part of the member of staff or student.

Take the example of posting examination marks in public places, which fulfils a genuine business need in most institutions concerned about the efficient application of their resources. Privacy will be protected if student ID numbers, rather than names, are used. In order to fulfil the requirements of fairness, students should be made aware in advance (e.g. in the data protection policy or exam regulations) that their marks will be posted so that they have the opportunity to object if necessary. The institution only has an obligation to consider objections and the DPA does not confer an automatic right on the student to demand that the practice is terminated.

- **Conditions legitimating processing - sensitive information**

Sensitive information (for example information relating to physical or mental health, including disabilities) will in almost all circumstances require the informed and written consent of the individual. Given the intrusion into privacy that is required in processing information about such matters, it is not unreasonable to obtain the consent of the individual concerned.

2. Specified and lawful purposes only

Personal information should be obtained for specified and lawful purposes, and should not be further processed in any manner incompatible with those purposes.

This principle exemplifies the culture of openness required by the DPA and prevents institutions from deviating from the stated purposes to use the information for unspecified, hidden purposes. This is not an unreasonable requirement of any business and it promotes trust and confidence between the institution, its staff and students. The purposes for which institutions process information are set out in two places: (i) in the Register of Data Controllers held by the Information Commissioner, which is sufficiently broad to cover all aspects of an institution's undertaking; and (ii) in the information provided to staff and students when they are recruited (e.g. data protection policy and/or enrolment/recruitment forms). If those statements relating to purposes are sufficiently broad, then compliance with this principle will not be onerous.



3. Information should be adequate, relevant and not excessive

This principle liberates institutions from the burden of amassing large amounts of unnecessary information. It also provides an incentive to institutions to make their procedures more efficient by obtaining only information which is relevant to, and sufficient for, achieving the specific purposes of the procedure in question, for example, making recruitment, admissions or disciplinary decisions.

4. Information should be accurate and, where necessary, kept up to date

No educational institution needs to be convinced of the value of accuracy of information. An incorrect grade or a disciplinary penalty recorded on the wrong file can have significant adverse consequences for a student or member of staff. In the interests of discharging its contractual obligations to students and staff, and in the interests of operating an efficient successful business, institutions should adopt procedures for ensuring that information is recorded accurately and that mistakes are dealt with promptly.

The duty to keep personal information up-to-date is a qualified one and is only required where necessary e.g. historical records do not require up-dating.

5. Information shall not be kept longer than is necessary

The DPA does not impose onerous retention periods on institutions. It simply encourages the destruction of information, once it has ceased to be of use. Institutions are therefore free to determine the period for which they keep records, provided they can justify that period by reference to a purpose warranting continued storage. This is consistent with modern efficiency measures and with the pressure for optimum use of space.

6. Rights of individuals

Arguably, the only burdensome right is the right of access of the data subject to his or her personal information. It is often exercised by staff and students on a pre-litigation fishing expedition, where they are not restricted by the requirements of relevance. The payment of a £10 fee does not usually reflect the cost of the resources applied to providing the right of access.

The burden of discharging the right of access is proportionate to the propensity of institutions to create written records. When a subject access request is then submitted, staff are overwhelmed by the enormous corpus of, usually email, information that has to be searched.





The existence of the right of access should induce a welcome change in attitude to recording information, particularly email correspondence. Institutions should review what information is required to be in written form and the manner in which it is written. If an email record is necessary, all staff should be encouraged to draft the text of the email in the expectation that it will be viewed by a third party e.g. the individual subject or a court. This may seem unnecessarily restrictive, but an unguarded comment or an unjustified criticism hastily sent may galvanise the data subject into commencing proceedings, which may not have occurred had the comment not been recorded in the email.

Mail generated in the course of employment should therefore be drafted with appropriate professional care. If the required degree of professionalism cannot be achieved, then staff should pick up the phone and have a chat instead.

7. Security of personal information

Institutions are required to adopt security measures proportionate to the harm that may occur in the event of inadvertent/unauthorised disclosure or accidental destruction of personal information. This



requirement does not impose stringent security measures, rather it requires a risk-based approach. Personal information is an asset in the education sector and would warrant protection in the absence of the DPA.

Where an institution engages a third party to process personal information on its behalf (e.g. a franchise partner), the DPA requires that there is a written contract with that third party which imposes requirements that mirror the security requirements of the 7th principle. It is prudent for any business to document its relationship with those with whom it has a business relationship.

8. Cross border transfers

Transferring personal information outside of the EEA (i.e. the EU member states together with Iceland, Lichtenstein and Norway) generally requires the consent of the

individual, unless the transfer is necessary for the performance of a contract between the individual and the institution, for example the provision of joint degrees or a mandatory year abroad. Institutions are likely to be able to rely on contractual necessity to justify the transfer in most cases. Compliance with this principle should not, therefore, be onerous in practice.

Conclusion

Information is truly the oxygen of the modern age. Personal information is an asset that requires protection in the interests of institutions' efficiency and success, and the DPA provides a useful framework for this purpose. It is arguable that if data protection regime did not exist, prudent businesses would have invented it.

Geraldine Swanton - Senior Associate, Education Team

T: 0870 763 1455

E: geraldine.swanton@martjohn.com



FURTHER EDUCATION AND TRAINING ACT

The Further Education and Training Act 2007 received royal assent on 23 October 2007.

Part 1 changes the structure and functions of the LSC, although no-one seems to believe this represents more than a temporary settlement. This article summarises some of the provisions affecting FE, and some issues which will also concern HEIs.

Incorporation, dissolution and intervention

Despite the LSC's uncertain future, the powers to incorporate and dissolve FE corporations, which have rested with the Secretary of State since 1993, and the intervention powers last revised in 2000, have been transferred to the LSC in England. This relocation of the power of dissolution, which requires neither specified grounds nor the consent of the corporation concerned, sheds no light on the question of whether it could be used to force a merger on an unwilling corporation. So far the power has only been used in (more or less) consensual mergers.

A disputed dissolution would be the most extreme form of intervention, but the separate intervention powers

may only be exercised where default of various kinds is established. Uncertainty about the circumstances in which the power to dissolve may be exercised is likely sooner or later to be determined on judicial review; there would be a strong argument for saying that as the intervention powers require specified grounds to be satisfied and due process to be followed, parliament could not have intended that these steps may be bypassed by the expedient of dissolution. Any attempt at dissolution without a process of explanation and warning by the LSC, and an opportunity to make representations by the corporation, would certainly be unfair and open to challenge in public law terms.

The grounds for intervention by the LSC in case of mismanagement by, or failure to discharge duties of, the governing body are worded as before, but the poor performance ground now refers to the college 'performing significantly less well than it might'. The LSC must give notice of intention to intervene to the Secretary of State and the governing body, with statements of reasons and intended actions.

If the LSC intervenes it may remove governors, appoint new ones, or give directions, including a requirement for formal collaboration arrangements. The LSC may not direct dismissal of staff, but can require governors to consider dismissal of senior post-holders, following the procedure in the articles. It must prepare a statement of its intervention policy, after consultation and subject to guidance from the Secretary of State, who may also direct the LSC to intervene. The original proposal to include an express power to dismiss principals has been dropped, although its effect would not in practice have differed greatly from the existing position.

The Secretary of State has the power to dissolve HE corporations, but there is no power to form new ones; this is why HEIs converting from trust status have to be established as companies. There are no equivalent statutory powers of intervention in HE.



Degree awarding powers

Old universities' powers to award degrees are contained in their charters, whilst new universities are given the power by statute. That power is now extended so that the Privy Council may specify FE colleges as competent to award foundation degrees, including honorary degrees and degrees for staff. The Privy Council is a splendidly ornate post box, and the real decisions will be made by QAA and DIUS. Foundation degree course students must have a planned route for progression, so collaboration between FE and HE will still be essential.



Subsidiary and joint venture companies

The Act clarifies the power of both FE and HE institutions to form or be involved in corporate bodies, and changes the way they may be used in FE. There was no such express power in the original legislation for either sector. The Act rectifies a lamentable cock-up which occurred when powers to be involved with companies were added in 2000. The wording then used permitted corporations to participate in share companies, suitable for non-charitable trading activities, but not guarantee companies, suitable for charitable endeavours.

In fact many universities and colleges did form guarantee companies, but had to rely on the sweeping-up power to do things necessary or expedient for achieving the principal objects. All this is swept away by simple statements that FE and HE corporations may form, participate in forming or invest in companies (of either type), or in the new charitable incorporated organisations (CIOs) to be introduced under the Charities Act 2006. This provision has retrospective effect.

The previous law was that a college could not use a company for the purpose of conducting the institution, and could use a company for LSC-funded provision only with the LSC's consent. In future, a college will be able to use or invest in a company (or CIO) for the purpose of conducting the institution, if the LSC consents. The restriction on use of companies for LSC-funded provision is unchanged.

These seemingly technical revisions could be employed for some entirely new structures in FE: single colleges or groups, run by companies combining the interests of FE and HE institutions, private providers, or other investors. But remember what happened to Carter & Carter.

Paul Pharaoh - Partner, Head of Education

T: 0870 763 1314

E: paul.pharaoh@martjohn.com



THE DEVIL IS IN THE DETAIL: THE BENEFITS OF OUTPUT BASED SPECIFICATIONS

Given that it is becoming more common for universities and colleges to outsource the provision of various services to third parties, and to embark on major projects for the provision of new student residential accommodation or academic or research facilities, how far should you go in specifying what you want from a service provider? Could less actually mean more?

Output based specifications have been used widely in the construction industry for some time and they are becoming much more common in IT contracts. They differ from a standard specification in that they focus on what the deliverables are in business terms i.e. the desired outputs of a service in business terms, rather than detailing how the services are to be delivered.

To take a simple example quoted by the British Computer Society, a traditional IT service description might state: "the supplier shall provide ten Unix based servers running back up Manager 2000 to be located at the Manchester site and connected to the estate by a ten Mbps network link, maintained by no fewer than two technicians. The back-ups shall run every night

between the hours of 6:00 pm and 6:00 am and copies shall be kept for one week".

In contrast, the output based specification concentrates on what the actual desired outcomes will be: "The supplier shall provide that all of the user data is to be recoverable to within one working day, with 99.9% reliability. Constraint: back ups must not interrupt work during business hours".

The output based specification leaves how the service is to be delivered to the service provider. You are after all tendering for services from people who are experts in their fields, and you wish to benefit from their expertise, their past experience and where possible any innovative solutions that they may propose which may lead to cost savings. Your overall aim is to transfer the risk in the service to be provided to the service provider. However, in order for the service provider to take that risk it will wish to control how the service is to be delivered. Therefore, the specification should not impose unnecessary restrictions on the service provider.

To draw up such a specification may require a change in mindset.

Traditionally major contracts have been approached with a fear that if you don't set out precisely what you want in great detail, then you won't get it! Universities and colleges are experts in the provision of education but are not experts necessarily in those services which they wish a third party to provide, where the aim is to reduce the risk. As such you need to focus on setting out the desired business outcomes. This will mean that you are less likely to specify the wrong technical details in fields where you are not an expert, and as such you place the risk on the service provider to deliver the outcomes.

What is required is upfront effort from the institution's team to take care and time to define the business requirements, but the end result will be a contract tailored to your needs. The information provided to you will be information which is based on the performance requirements and service levels and outcomes which you have set and which you can use. This ought to improve communication giving you the information which you actually need.



EDUCATION BRIEF

To adopt the output based specification approach relies on institutions accepting that risk has passed to the service provider, and that the contract will fail and that the transfer of risk will fail if the institution seeks to add extra assurances not related directly to what is required in business terms i.e. "tinkering with the specification around the edges", imposing further restrictions, or introducing specific detail not related to the business outcomes. This could result not only in the service provider refusing to accept risk but will ultimately affect the pricing which it offers. With any outsourcing contract or major project the institution needs a strong project team prepared to spend time at the pre-contract stage to capture the important business requirements, which at the end of the day should result in a greater understanding of them.

Having set the outcomes to be delivered it is necessary to ensure that those outcomes are achieved. Under the general law there is simply an obligation for the service provider to provide the services with reasonable skill and care, which is not a very precise or high standard and does not give much protection. As such any contract will need to

provide for carefully chosen key performance indicators and service levels. Again it is important that these are restricted to and focus upon the key business outcomes.

If the service levels are not met service credits will be payable by the service provider, or the institution can make specific deductions from the price to be paid. In addition a points system can be imposed with a certain number of points leading to termination. The aim is to ensure that you are only paying for the service which you receive. In addition the contract must provide that if there is a failure to meet the service levels the service provider will correct the situation at no extra charge, and will also correct the reason for the failure.

This is backed up by the institution reserving the right to terminate if certain levels are not achieved over a period of time, and there will also be the right to claim damages if the performance is so unacceptable. However, the service provider will resist any extension of the institution's remedies and will argue forcibly for the deductions of service credits to be the only remedy for service failure.

The benefits of the output based specification will only be realised if both parties concentrate on what they do best and where their strengths lie. The institution must be prepared to take the time to clearly define their key business requirements and to take a more hands off approach which may require a culture shift. The service provider will need to ensure that it seeks input from the institution where it needs it to ensure a full understanding of what is required. The output based specification and the carefully drafted service level regime concentrating on what is really important could, if applied with discipline, mean that less is more.



Carol Gunning - Senior Associate,
Energy, Projects and Commerce
Team

T: 0870 763 1533

E: carol.gunning@martjohn.com



TRANSFORMING PHILANTHROPY, US-STYLE: PLANNED GIVING AND THE FUTURE OF UK UNIVERSITIES

The phrase 'planned giving' is often used to refer to any form of charitable giving in which a degree of prior preparation ensures a gift is legally compliant, tax efficient, and provides maximum benefit to both donor and charity. However, 'planned giving' in the US sense refers more specifically to specialised legal structures utilised to make a charitable gift ('planned giving vehicles'). These structures offer a unique range of benefits to charities and donors, and have played a vital role in encouraging extraordinary increases in charitable giving in the US since their introduction in 1969, especially in developing large endowments for the education sector. Charitable Remainder Trusts (CRTs) and Charitable Lead Trusts (CLTs) are the two most common variants of planned giving vehicles, and are essentially mirror images of one another, differentiated by whether the charity beneficiary receives the 'lead' income stream from the gift, or the 'remainder' sum.

With a CRT, the donor makes an irrevocable contribution of assets to fund the trust, gets an immediate income tax deduction for part of the contribution's value, and receives income either for the rest of their

life or a fixed term, typically between 1 and 20 years. When the trust's term ends, the remainder of the assets belong to the charity beneficiary, like any other major gift or bequest. By contrast, a CLT means that the charity receives the lead interest - the income stream - for the duration of the trust's term or the donor's lifetime, and the 'remainder' of the capital/asset returns to the donor or a named beneficiary (such as a family member or heir) at the end of that term.

The recent 'Breakthrough Britain' report by the Conservative Party think-tank, the Centre for Social Justice, explicitly advocates CRTs as a key means of encouraging greater charitable giving by individuals in the UK. Moreover, both of the UK's leading political parties have called for UK universities to build large endowments and follow the US model of funding in order to secure their positions as leading international educational institutions; such a target is unlikely to be achievable unless individual giving is encouraged, as it has been so successfully in the US, by the introduction of planned giving vehicles. Given the strategic

significance of gift planning, most US universities now possess dedicated planned giving offices, and their websites are an excellent source of information on all aspects of CRTs and their kin (good examples are Duke University <http://giftplanning.duke.edu/index.cfm> and Harvard Medical School <http://www.hms.harvard.edu/ord/giftplanning/cga.htm>).

Perhaps the most appealing aspect of a CRT (or 'Lifetime Legacy') is that it enables donors who are not in the financial position to effect an outright gift to still make a major donation to a university in their own lifetime, rather than through a legacy upon their death. In the US, this has meant that major gifts are no longer the province of the extremely wealthy or those with property, cash or other 'spare' assets in abundance. CRTs allow a far greater range of asset-rich but cash-poor middle-class families to receive significant tax benefits in their own lifetime, such as relief on capital gains tax, and enjoy the personal satisfaction of making a major gift to a university with the potential to be actively involved in the organisation. One should not underestimate the prevalence and importance of CRTs in the US; these



EDUCATION BRIEF

charitable giving vehicles are believed to account for over \$100bn worth of charitable assets and more than 40% of endowments. It is important to realise just how profound an impact CRTs and their kin have had, not just in directly increasing the number of major gifts made, but in their transformative impact upon the overall culture of individual giving.

While there are a variety of generous tax reliefs available in the UK when making charitable donations, in the main they apply only to outright gifts and do not allow a donor to retain a degree of interest in the asset gifted. While equivalent donors in the UK might decide that they are able to leave a legacy to their university, (a) the university is not able to plan on this basis as it would with an irrevocable gift through a CRT, since even if potential donors inform it of their intention to make a bequest, they could alter their wills; (b) the tax reliefs on legacies compare unfavourably with most outright gifts of money, shares or property, and hence the benefits to the recipient university and incentives for the donors are decreased; and c) the donors will not see the philanthropic benefits of the donation in their own lifetime, greatly inhibiting what is perhaps the most powerful incentive for charitable giving: for donors to

see that their chosen cause is benefiting from their generosity. The inherent flexibility offered by CRTs would resolve these problems, incentivise donors, allow UK universities to plan their overall funding strategies with a greater degree of certainty, and seriously enhance the overall environment for charitable giving in this country.

A common misconception regarding planned giving is that these sophisticated structures require highly-priced legal expertise, putting them beyond the reach of all but the wealthiest of donors. However, the provision of model documents for the creation of CRTs by the IRS has played a major role in allowing US donors to set up and utilise these planned giving vehicles in a cost-effective and efficient way, without expensive and time-consuming legal advice. In the US, CRTs are often utilised for relatively modest charitable gifts and have proven vital in raising support for universities amongst large numbers of 'middle-earners'. Unfortunately other countries - including the UK - have failed to follow the US lead and introduce legislation that allows for tax deductions on charitable giving through structures such as CRTs. This is despite the fact that CRTs would facilitate the creation of secure, large-scale endowments for a wide range of non-profit

organisations ranging from international development NGOs to art galleries and universities.

Richard Bendell, European Association for Planned Giving
T: 01622 859356
E: richard@plannedgiving.org.uk

The **European Association for Planned Giving (EAPG)**, an international membership association and UK registered charity which currently has chapters in London, Birmingham, Dublin and Geneva, campaigns for the introduction of planned giving vehicles in the UK, and provides a gateway to expertise in Europe and North America through its network of professional members and associates. Martineau Johnson has taken a lead role in establishing the EAPG chapter in Birmingham.

If you have any questions about planned giving or EAPG's activities, please contact Richard Bendell at EAPG or Stephen Claus at Martineau Johnson (T: 0870 763 1330 E: stephen.claus@martjohn.com).

To learn more about the current state of cross-border charitable giving and utilise the new EAPG International Directory of Advisors and Resources for Charitable Giving and Philanthropy, a free online resource, please visit the website at www.plannedgiving.org.uk



COMPANY LAW UPDATE

The first significant implementation of large portions of the Companies Act 2006 (the Act) took effect on 1 October 2007. The majority of the sections not implemented on this date are anticipated to come into force with effect from 1 October 2008. The changes will vary in their significance for education institutions depending upon the extent to which they are involved with and have an interest in limited companies.

Whilst the sheer volume of the legislation coming into force is considerable (approximately 200 sections), many of these sections restate the law under the Companies Act 1985. However, some changes are significant and this article is intended to highlight those that will be of most relevance to institutions involved with limited companies. These are principally to be found in parts 10 and 13 which deal with directors, resolutions and meetings.

Directors

The most notable change in this area (indeed perhaps the entire Act) is the codification of directors' duties to be found in sections 171 to 177, and of greatest interest is the general duty in section 172 to "act in the way [the director] considers, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole". In doing so the director must now have regard to:

- the likely long term consequences of the decision
- the interests of the company's employees
- the need to foster business relationships with suppliers, customers and others
- the impact on the community and the environment
- the desirability of maintaining a reputation for high standards of business conduct
- the need to act fairly as between members.

Section 172 has generated a great deal of interest and many commentators have been concerned that the duty will result in an increased number of claims against directors.

In our experience education institutions which operate companies often have senior managers or governors as directors. Anyone occupying the position of company director should carefully consider their duties in light of the new legislation, and we recommend that details of directors' general and specific duties are documented, perhaps in the contract of employment but at the least in some form of statement of duties. Directors occupying other posts within the institution should also consider that they owe duties to the company and that these duties may conflict with their obligations to their institution or other bodies. This can place them in a difficult position and advice should be taken where directors consider there is a serious risk of conflict. The law governing conflicts of interest will not change until next year.



Whilst there is still some uncertainty as to the impact of this codification, we are advising directors not to over-react to the introduction of section 172. Directors should always be aware of their duties and the factors they should consider, but these duties are still owed to the company, not to other parties. The courts will be reluctant to interfere where the directors have acted in good faith, even when, with the benefit of hindsight, the directors' decision has had adverse consequences for the company.

Resolutions and meetings

The Act makes significant changes to the procedures by which company decision-making is effected. Generally, the changes are intended to simplify the way that companies, particularly private companies, are able to make decisions at shareholder level. This will hopefully make life easier for education institutions who are frequently the only shareholder, or at least one of very few.

The key change is the ability of a private company to pass written resolutions with the signatures or agreement of shareholders holding the appropriate majority of voting rights that would be required were those resolutions being passed at a general meeting. Under the 1985 Act unanimity was required. There are also now detailed provisions on the manner in which written resolutions must be circulated and can be approved, which should be helpful once directors become familiar with them.

In addition, the concept of extraordinary and elective resolutions will no longer apply, nor will the concept of extraordinary general meetings. All such meetings will now be simply 'general meetings' and will only require 14 days' notice, even if a special resolution is proposed. In fact private companies are no longer required to hold an annual general meeting if they feel there is no need. Essentially the 'elective regime' that was frequently adopted under the 1985 Act will become the default regime for private companies.

For an analysis on how the Act as a whole might impact on education institutions please see our September 2007 Education Bulletin which can be found at <http://www.educationsolutionsonline.co.uk>

John Nicholson - Solicitor,
Corporate Group

T: 0870 763 1434

E: john.nicholson@martjohn.com





STUDENTS' UNIONS AND THE CHARITIES ACT 2006 - FAQs

- **Will Students' Unions be required to register with the Charity Commission?**

Yes, unless their income is less than £100,000.

At present, nearly all universities and colleges are exempt from registration with the Charity Commission. Students' Unions have also been treated as exempt, on the basis that they were 'administered by or on behalf of' the parent institution, and for a compatible purpose. This is changed by the 2006 Act, which specifically excludes Students' Unions from exempt status on these grounds.

HEFCE was prepared to take on the role of principal regulator of English HEIs as charities, but not of their Students' Unions. In Wales, universities and colleges will themselves have to register with the Charity Commission, but Students' Unions in England and Wales will be in the same boat.

Registration as an independent charity will be possible only if a Students' Union is an autonomous body and not an integral part of its parent university or college. Most Students' Unions probably are autonomous, although many

institutions are gingerly stirring this sleeping dog for the first time. A number of cases have been decided to that effect and a QC commissioned by the NUS agreed.

Initially it seemed that all autonomous Students' Unions would be required to register, unless they were below the small charities income threshold of £5,000.

However, the final version of the Act provides that Students' Unions which were previously exempt will instead become excepted charities, a status previously enjoyed by church bodies and the boy scouts, which have a much higher registration threshold. The effect is that Students' Unions will have to register with the Charity Commission only if their income is more than £100,000.

- **Does the Act require Students' Unions to change their legal structure ?**

No. Most Students' Unions are constituted as unincorporated associations. Some have already changed their legal status to become companies limited by guarantee. A few did this years ago and others are taking voluntarily steps now, but there is no requirement to change.

Unincorporated associations or guarantee companies are equally eligible for charitable status.

- **Is it a good idea for Students' Unions to incorporate anyway ?**

Probably, if the Students' Union has significant commitments.

Because an unincorporated association has no separate legal identity, it has to operate via the legal identity of some of its members, usually the executive. These people are fixed with the responsibilities of charity trustees, and are likely to be personally liable for the commitments of the Students' Union, although entitled to be indemnified out of the Students' Union's assets.

That's a pretty uncomfortable way to run a high turnover enterprise, so like many other bodies originally established as trusts or unincorporated organisations, Students' Unions are increasingly attracted to the corporate structure of a company limited by guarantee, which has its own legal identity.



EDUCATION BRIEF

This both removes trustees' individual liability (except in case of wrong-doing), and limits the liability of members to the nominal amount of their guarantee.

● **Is incorporation a major exercise?**

It's not rocket science, but does involve a substantial amount of work and expense, which the benefits to be secured must justify.

The process involves forming a company, transferring the undertaking (including staff, who will have TUPE rights) to the new company with the approval of the Charity Commission, and winding up the unincorporated institution.

The Students' Union's current constitution will probably require resolutions of members, not just of the executive, which may present practical problems. The way the current constitution deals with the possibility of winding up or transfer to another body is important in determining what involvement of the Charity Commission will be required.

Working collaboratively with their parent institutions, some Students' Unions which have incorporated have built in to their new memorandum and articles of association restatements of the institution's statutory obligation to ensure that the Students' Union operates in a fair and democratic manner, and is accountable for its finances. Many Students' Unions which are not yet themselves incorporated are already familiar with the company regime, because they have non-charitable trading subsidiaries established as companies limited by shares. Guarantee companies (appropriate for charitable bodies) have essentially the same structure but some important differences. Also bear in mind that the shape of company constitutions will change in future as a result of the Companies Act 2006 (see page 11 above).



● **Can Students' Unions become charitable incorporated associations?**

Only if they become registered charities - see above.

CIOs will be a new form of legal structure, with their own legal identity and limited liability, registered only with the Charity Commission and not - unlike a guarantee company - with Companies House, so there will be only one set of filing requirements and a single regulator. The part of the Charities Act creating CIOs is expected to be in force in 2008, but the necessary regulations have not yet appeared.

CIOs are intended to reduce bureaucracy and may well be attractive to larger Students' Unions wishing to incorporate in future.

Paul Pharaoh - Partner, Head of Education

T: 0870 763 1314

E: paul.pharaoh@martjohn.com



CHANGES TO TRADE MARK EXAMINATION PRACTICE

Trade marks are a valuable tool in protecting your brand. A wide variety of marks can be registered, from words to logos to even sounds and smells. A trade mark is something that distinguishes your goods and services from those of another undertaking and, once registered, will give you the exclusive right to use your mark for the goods and services for which it is registered.

Trade marks are not simply a device for protecting your brand. They can also be valuable business assets and can provide a source of revenue through the exploitation of your rights. Furthermore, if someone uses your mark without your consent, an action for trade mark infringement could result in the court ordering them to cease using the mark and pay damages or an account of their profits resulting from their use of the mark.

The value of your mark and your brand lies in its exclusivity, and so it is important to police not only any infringing activity but also other trade marks, to ensure that they are not too similar to your brand. However, the way in which you do this is likely to have to change as a result of changes to UK Intellectual Property Office (UK IPO) procedures

for its examination of applications to register trade marks. Prior to October 2007, the UK IPO had the power to refuse to register trade marks which it considered to be too close to existing registrations or applications. When an application was filed, the UK IPO carried out a search of the register and would require applicants to overcome any problems caused by prior conflicting rights, whether by coming to an agreement with the existing rights holder or by amending their application.

Now, the UK IPO will still carry out a search of the register for earlier rights and, in the event that there is a conflict, will notify the applicant in order that they can make any changes that they feel are necessary. However, if you are the owner of a prior right, you cannot rely upon the UK IPO to refuse those applications which you may consider are uncomfortably close to your own registrations.

If you own a UK trade mark, you will be sent, unless you opt out, a notification if the UK IPO considers that an application may conflict with your mark. However, if you own a Community Trade Mark, you need to 'opt in' to the notification procedure if you want to be informed about potentially

conflicting marks being registered in the UK. If you do not do so conflicting marks could be registered without you having the opportunity to oppose registration.

There is an official fee of £50 for opting in, payable every 3 years for each Community Trade Mark. You will be notified by email and will have a limited time in which to oppose the registration if you see fit.

An alternative is to subscribe to a trade mark watching service. The advantage of this is that you can request a service which covers all of the Member States covered by the Community Trade Mark. The service will notify you whenever there is an application for a potentially conflicting mark in any Member State. While this is more expensive than opting in to the UK IPO notifications, it does overcome the limitation of the UK IPO scheme in that it covers all Member States rather than just the UK.

Having developed your brand and consumer confidence, it is vital to ensure others don't get a free ride on the back of your hard work.

Zoë Robertson - Solicitor, IP & Technology Team **T:** 0870 763 1640
E: zoe.robertson@martjohn.com



MARTINEAU JOHNSON

T: 44(0)870 763 2000

F: 44(0)870 763 2001

www.martineau-johnson.co.uk

E: lawyers@martjohn.com

EDUCATION NEWS

Univer-Cities: capturing economic and regenerative impacts

At the end of September, together with planning consultants, Turley Associates, we sponsored the British Urban Regeneration Association's latest Univer-cities Conference. The eighty strong audience included a cross-section of universities, professional advisers and developers active in the HE sector.

Some of the themes which came out of the conference included:

- The huge contribution which universities make to local, regional and national economies.
- The positive social, environmental and aesthetic impact which universities provide to their regions.
- The size and complexity of regeneration projects which universities undertake is increasing.
- Joint ventures, both with private and public sector partners, allied with the size of projects, means that contractual and financial models are becoming more complex as universities balance out the risks and rewards available over longer term developments.

- Universities are at the leading edge of some of the sustainable management issues.
- While universities themselves make significant contributions to their regional economies, the early experiences of Science Cities intensifies the regional benefit of research and development and the local knowledge economy.
- Studentification is in some towns and cities making way for the "renter gentrifiers" and therefore the retention of graduates is a key boon as graduates stay in a region as young professionals.

A detailed summary is available from BURA (contact Emily Miller at emily@bura.org.uk or www.bura.org.uk), or contact Clive Read, partner in our Property Group, on T: 0870 763 1439 or E: clive.read@martjohn.com

New Head of Planning

The continued expansion of our property and planning services has seen us recruit Iain Johnston as a partner.



Iain has more than twelve years' experience of advising on all manner of planning agreements,

compulsory purchase orders, planning appeals and challenges under the Planning Act and judicial review. He is already advising on a strategic s.106 Agreement to support a university's 10 year masterplan. For more information on planning services contact Clive Read.

Our friends in the North

Don't forget we are now running our Breakfast Briefings in Leeds, as well as Birmingham and London. We hope that a Leeds venue will enable more to take part in what are always lively, interesting and enjoyable events.

If you would like any further information about this edition of Education Brief, or about our work for education clients, please contact Paul Pharaoh, Partner and Head of Education, on T: 0870 763 1314 or E: paul.pharaoh@martjohn.com

Education Brief aims to introduce you to legal issues of concern to managers in education. It is not a substitute for taking appropriate specialist advice in individual cases. Education Brief may be photocopied for the use of colleagues within your institution.