

Charity Registration and Governance
A note by Joe Cooper, General Manager

1.0 Introduction and Background

- 1.1 The Charities Act (2006) removed the exemption that was in place for a number of types of organisation, including students unions. Over the past eight years, many students unions' have reviewed their governance structures to prepare for registration with the Charity Commission, many have reviewed their organisational status, and a majority have now successfully registered with the Charity Commission.
- 1.2 Much work has taken place over the past year, including utilising the College's solicitors to examine the Union's current constitution and prepare appropriate documents to prepare for registration.
- 1.3 One thing that has been lacking has been effective consultation with the current Trustees on the options available to the Union and seeking formal consent on the way forward.
- 1.4 This paper seeks to articulate the current options available to the Union and seeks decisions on some key areas from the Trustee Board. It also seeks to outline some of the implications of registration, and suggest some areas for further work to ensure that the Union complies with legislation and best practice, and to ensure that the Trustees are able to discharge their role as trustees effectively.

2.0 Choice One – Register or not?

- 2.1 The option of choosing not to register with the charity commission has been raised and it would be appropriate to present this as an option. However, it is difficult to judge if, and how, this option could be taken forward.
- 2.2 The Union is currently classed as an exempt charity by virtue of its administrative and financial links with the College. Although it is 'part of the college' in terms of its links with the College's statutes, it is clearly different from a college department – it has its own bank account, auditors, financial statements, VAT registration, governance and management structures and policy and decision making processes.
- 2.3 Deciding not to register, then, would not simply be a case of maintaining the status quo. The only way to adequately that the Union was completely separate to the Union and remove the requirement to register would be to remove these differences, and essentially not exist as a Students' Union as we know it. In

particular the ability of the Union to adequately reflect the views of students to the College would be compromised by the removal of the autonomy outlined above.

3.0 Choice Two – Organisational structure

3.1 The three relevant organisation structures available to the Union are:

3.1.1 Becoming a Charitable Incorporated Organisation (CIO)

3.1.2 Becoming a Company Limited by Guarantee

3.1.3 Remaining as an Unincorporated Association

3.2 The relative benefits and disadvantages of each structure are outlined in the table below.

Organisational Structure	Benefits	Issues
Charitable Incorporated Organisation (CIO)	Single registration and regulation regime (Charity Commission) Charity has its own legal form Liability of Trustees is limited	Not yet available Registration process unclear A new structure so implications and difficulties are not yet clear
Company Limited By Guarantee	Limited Liability of Trustees Union has legal identity in its own right	Dual registration/regulation regime. (CC and Companies House) Relatively complicated process involving dissolution of current charity Requirement to maintain a register of members and changes to the College's registration process will be required.
Unincorporated Association	The current situation – would need the least changes to governance document and lead to the quickest registration process. No requirement to maintain a record of members No requirement to dissolve current charity and transfer assets and liabilities	Union doesn't have its own legal identity – the Trustees are the embodiment of the organisation. No limit to liability of Trustees.

3.3 The idea of a the CIO form has existed for more than ten years, and has been 'close' to being implemented by the government and the Charity Commission for three years. The Charity Commission currently state that they 'hope' that charities will be

able to begin registering under the new form from Spring 2012. Given the history of this, and that there are no guarantees that the CIO option will be available in the Spring, and given that all the practical implications of using this mechanism are not yet clear, it is not recommended that the Union pursue incorporating in this manner.

- 3.4** The decision as to whether to incorporate as an CLG or remain as an unincorporated association should be a matter for the current trustees at this stage (although the final decision to dissolve the Union and transfer assets and liabilities to a new limited company will require the consent of the members).
- 3.5** In making a decision the trustees may wish to consider the relative risks of each option. Pursuing incorporation brings risks in terms of the relatively complicated nature of the process, the resources required to ensure compliance with two regulating bodies (three, if the College is included in terms of its role as a regulator under the Education Act (1994)).
- 3.6** Conversely the risks with remaining as an unincorporated association are largely related to the liability of trustees. Trustees of an unincorporated association are both jointly and severally liable for seven years following their trusteeship. Retaining indemnity insurance for trustees, which covers trustees for the decisions that they make, assuming, can mitigate these risks that Trustees were not knowingly negligent in their duties. It should also be noted that the limit to the liability provided by the CLG does not apply if a Trustee is found to be negligent.
- 3.7** It should also be noted that registering with the Charity Commission as an unincorporated association does not preclude the Union from incorporating at a later date.
- 3.8** Large Students' Unions have not universally chosen one of the two legal structures – there are examples of Unions with high turnovers that have successfully registered under each organisation structure.
- 3.9** The decision as to which form to pursue is an urgent one – but perhaps not as important, as discussed in 3.6 above, as the need to ensure that the governance and management arrangements of the Union are appropriate to ensure that the Trustees discharge their duties as trustees, can act effectively as custodians of the organisation, and ensure that they are not exposed to personal liability at any stage. This will be discussed later in the paper.
- 3.10** Another decision that needs to be taken at some point is whether the Union needs to take is as to whether a subsidiary trading company should be set up in order to manage the trading side of the Union. The judgement on the benefits and issues with such a move are relatively complicated, linked as they are to tax. It is recommended that this decision is investigated with the help of tax specialists, and

that the timing of registration should not be affected by the decision-making process on this. This can just as easily be implemented, if appropriate, after registration.

4.0 Implications of Charity Registration and the role of the Trustees

- 4.1 The changes that need to be implemented following registration are largely related to reporting to the regulator, the Charity Commission (and Companies House if the Union decides to incorporate). The Union's financial statements will need to be prepared following the Statement of Recommended Practice (SORP) 2005, and submitted to the commission annually along with an annual report. The Union will need to have a clear policy on reserves, and will need to ensure that the trustees details are registered with the commission, and that this information is regularly updated.
- 4.2 The Charity Commission publish some useful guidance on the requirements on Trustees, which is summarised below. It is important to note that, as the Union is already a charity (irrespective of whether we have registered yet), that these duties and responsibilities **already apply to the Union and the Trustees**.
- 4.3 The Charity Commissions' document *The Essential Trustee* is a very useful summary of the duties of trustees. The key areas are:
- 4.3.1 *"Trustees have and must accept **ultimate responsibility** for directing the affairs of a charity, and ensuring it is **solvent, well-run, and delivering the charitable outcomes** for the benefit of the public for which it has been set up.*
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- 4.3.2 *Trustees must ensure that the charity **complies with charity law**, and with the requirements of the **Charity Commission as regulator**; in particular ensure that the **charity prepares reports on what it has achieved and Annual Returns and accounts** as required by law.*
- 4.3.3 *Trustees must ensure that the charity does not breach any of the requirements or rules set out in its **governing document** and that it remains true to the charitable purpose and objects set out there.*
- 4.3.4 *Trustees must comply with the requirements of **other legislation** and other regulators which **govern the activities** of the charity.*
- 4.3.5 *Trustees must act with **integrity**, and avoid any personal **conflicts of interest** or misuse of charity funds or assets.*
- 4.3.6 *Trustees must ensure that the Charity is and will remain **solvent**.*

- 4.3.7 *Trustees must use charitable funds and assets reasonably, and only in **furtherance of the charity's objects**.*
- 4.3.8 *Trustees must avoid undertaking activities that might place the charity's endowment, funds, assets or reputation at **undue risk**.*
- 4.3.9 *Trustees must take special care when **investing the funds** of the charity, or borrowing funds for the charity to use.*
- 4.3.10 *Trustees must use reasonable care and skill in their work as Trustees, **using their personal skills and experience** as needed to ensure that the charity is well-run and efficient.*
- 4.3.11 *Trustees must consider **getting professional advice** on all matters where there may be material risk to the charity, or where the trustees may be in breach of their duties.*
- 4.4 In addition to this broad advice, NUS, UUK and Hefce produced a 'code for good governance for practical steps that can be taken to ensure best practice in terms of good governance. This is provided for information below, and the sections on 'Clarity on the role of the Board' and 'Effective Trustees and Board performance'.

Democracy: The Students' Union can evidence:
The students' union is established as a democratic organisation that fundamentally exists to represent the needs of its membership.
Strong democratic structures and systems are in place to ensure that the students' union is led by its membership.
Fair and open cross-campus ballots are undertaken for all major office positions, in line with the requirements of the 1994 Education Act.
Clear processes and procedures for democratic structures are in place. Rules and regulations are fair, the process is transparent and an elections appeals process is place.
Democratic processes are scrutinised and an independent returning officer is appointed to oversee elections.
A range of opportunities exist for the entire membership to make meaningful contributions to decision-making and the SU strives to broaden the range of people who access these opportunities.
The SU Board understands of the make up of the SU membership, and seeks to establish what they want from their SU and uses this to inform all of its decisions.
There is a clear statement about how the SU's governance, democracy and operations interrelate which is reviewed regularly.

There is a clear statement defining the decisions the Board is required to take and those where the membership can be empowered to decide.
Openness and accountability: The Students' Union can evidence:
Governance systems are transparent and information is shared openly. Restrictions only apply due to legal or commercial considerations.
Governance processes and structures are communicated in a range of formats and mediums which are accessible to all.
There is a clear statement of the eligibility criteria for membership, associated voting rights and how students can opt out of membership.
The membership is informed about how the students' union operates and how they can influence the undertakings of the Board.
The Board seeks to understand the needs of their entire membership and is committed to ensuring that the SU is inclusive of all.
The Board works strategically to anticipate the issues that will be of importance to future members and works to ensure that the SU is positioned to respond.
The Board is accountable to the membership and the membership is clear about how to uphold this accountability.
The SU is financially accountable to their HEI, as their principal funder, and demonstrates strong financial performance and sound return on investment.
Key stakeholders have been identified including: membership, staff, HEI, local community and there is a clear understanding of each party's stake in relation to the SU.
A strategic communication plan is in place which identifies and addresses the particular needs of each stakeholder.
The SU recognises the HEI as a key strategic partner and works to build and maintain strong working relationships with HEI representatives at all levels.
The SU recognises and addresses the SU's responsibilities to the local community and wider society, including community relations and environmental impact.
Procedures are in place to ensure that feedback and complaints are handled effectively and that learning points are captured and used to inform and improve future practice.

Clarity about the role of the Board: The Students' Union can evidence:
The SU has an established Board of Trustees who are collectively and ultimately responsible for the governance of the SU.
The Board has adopted a statement of principal responsibilities covering, as a minimum: 1.democracy, 2.strategic direction, 3.organisational performance, 4.financial performance, 5.legal compliance 6.risk management, 7.delegation, 8.senior level staff management (where applicable).
Trustees are bound by an overriding duty, individually and as a Board, to act in the interests of the organisation and of its present and future members.
Trustees recognise their particular responsibility for ensuring that the union is democratically run and work to empower the membership to take a lead role in directing the undertakings of the union.
Trustees have a written statement detailing their role and responsibilities.
External and Student Trustees are able to demonstrate an understanding Trusteeship prior to standing for election/selection.
Potential candidates for Officer positions which include Trusteeship are fully informed of the associated responsibilities prior to standing for election.
Trustees who are also elected Officers are able to clearly differentiate between the two roles and act accordingly.
The role of the Chair of the Board is designed to provide a key leadership role to the Board and to ensure that it functions effectively which is defined in writing.
The role of Vice-Chair is defined in writing and designed to provide assistance to the Chair.
Applicable to SUs with staff
The senior staff member provides an important link between the Board, the membership and other stakeholders and ensures that the Board has access to the information that they require to make informed decisions.
The Board is responsible for the recruitment and selection of the senior staff member. The senior staff member's role has a clear job description and person specification which links to their performance management
A formal mechanism is in place for setting the remuneration of the senior staff member.
The Chair of the Board line manages the senior staff member, ensuring that they have appropriate supervision and opportunities for personal development, within a performance management framework.
The Board recognises that the senior staff member is formally responsible for the performance of the staff team. A scheme of delegation is used to appropriately delegate decisions to staff, who are held to account through the internal line management structure.

The Board recognises its responsibility for supporting the welfare and development of the students' union's staff team.
Succession planning takes place and leadership skills are developed so that it is possible for existing members of staff to apply to undertake key leadership positions in the future.
Effective trustees and Board performance: The Students' Union can evidence:
Collectively the Board has a range of skills, experience and knowledge to enable it to govern effectively and efficiently in an SU context.
The Board strives to reflect the diversity of the SU's membership.
No more than 50% of the Trustees are employed by the SU. If the 50% mark is exceeded the SU is able to provide a written justification as to why this is in the interest of the SU.
Procedures for joining and leaving the Board are clearly understood by all trustees and the membership is informed of the ways that trustees can be removed from their position.
A balance exists between continuity and Board renewal when setting the maximum period that each trustee can serve on the Board.
Succession planning is in place to ensure the recruitment of new trustees is timely and any transition run smoothly.
Trustees are recruited in accordance with the SU's governing documents and relevant legislation.
Processes are in place to ensure that candidates are not disqualified from Trusteeship. Incorporated SUs also check that they are not disqualified from becoming a Company Director.
All trustees are given an induction which enables them to fully understand the terms of their appointment to the Board and the associated responsibilities.
The importance of group dynamics is recognised by the Board and trustees jointly agree and commit to a set of ground rules for their interactions.
The performance of the Board is reviewed annually.
A quorum is established and observed for the Board and committees and clear procedures are in place for voting, recording decisions and declaring business reserved.
The Board meets a minimum of four times per year, either in person or virtually aided by the use of electronic communication technology.
Board papers are circulated well in advance and information is timely, well presented and in a format that supports the conduct of business.
The Board does not rely excessively or exclusively on one source of advice and professional services are called upon when specialist information is required to inform important decisions.
The SU's governing document includes the provision for collective decisions making to take place in between scheduled meetings.

Applicable to SUs with staff
Staff time is assigned to servicing the Board to ensure that it functions effectively and efficiently.
Larger SUs have a designated Clerk, who is appointed by the Board.
Delivering organisational purpose: The Students' Union can evidence:
The purpose for which the SU exists as set out in the SU's governing document remains relevant and reflects their charitable objects.
The SU has a clear strategic direction, led by the membership and true to the SU's charitable objects.
A 3-5 year strategic plan is in place which provides a guide to how the SU will achieve its vision, mission and values and links to operational plans which are approved by the Trustees.
Strategic review is undertaken periodically to ensure that the SU's strategic plan remains relevant to the needs of the organisation and its membership.
The SU reports on the impact the work of the SU has on its key stakeholders.
There is s commitment to continuous improvement and quality standards.
Governance is reviewed regularly to ensure that the structures, processes and systems in place are fit for purpose and enable the SU to operate efficiently and effectively on behalf of its membership at least every 5 years.
Applicable to SUs with staff
Staff time is assigned to engaging the membership and other stakeholders in the development of the SU's strategic plan
Performance management systems are in place throughout the SU's so all staff have performance targets that are linked to the SU strategic plan.
The SU invests in the professional development of its staff team and encourages a culture of continuous improvement.
Exercising control: The Students' Union can evidence:
The SU complies with the rules and regulations set out in its own governing documents.
The SU complies with all relevant legislation examples of which include; data protection, equalities law, health and safety, employment law, charity law, company law (for incorporated SUs) and licensing law (for SUs running bars).
Equality and diversity is promoted throughout the SU and anti-discriminatory practice is applied.
The Board reports to the HEI in line with the requirements laid out in the 1994 Education Act and any conditions attached to funding e.g. grant conditions
The Board maintains an oversight of SU operations; internal reporting systems are in place to ensure Trustees are regularly informed of the SU's performance against operational plans.

Internal reporting includes financial, human resources, health and safety, estates management and feedback and complaints.
Where appropriate sub-committees are set up focused on Audit, Risk, Remuneration, Nominations and Governance.
Active risk management processes are in place and a comprehensive risk register is maintained.
The Board acts prudently and avoids taking action that might place the SU; its members, staff (where applicable), volunteers, property, assets or the reputation of the SU, at undue risk.
A system for delegation of authority is in place, formally approved by the Board and defined in writing.
Outside of the approved delegated authority, 'Chair's Action' is only utilised in circumstances where opting to delay the decision would be detrimental to the SU.
Use of 'Chair's Action' is documented accordingly and reported to the other Trustees at the earliest opportunity.
Applicable to SUs with staff
The senior staff member regularly reports to the Board regarding the SU's performance in relation to points 6.01-6.08. They flag issues of concern or anything that could lead to the SU's failure to comply with their legal requirements.
Behaving with integrity: The Students' Union can evidence:
Trustees adhere to high standards of conduct, as a minimum, they comply with the 'Nolan Principles'.
Trustees act impartially, solely in the interests of the SU on behalf of its current and future members.
Trustees are scrupulous to avoid any private benefits, whether financial or otherwise, except where benefits are ancillary to the interests of the SU and permitted by law.
A conflicts of interest policy is in operation, which includes guidance on the receipt of gifts or hospitality, which requires Trustees to identify and promptly declare conflicts of interest as they arise.
Procedures are in place detailing how declared conflicts of interest are subsequently managed.
Trustees are entitled to claim for reasonable expenses to be paid to ensure they are not out of pocket as a result of undertaking duties on behalf of the SU. The SU has a policy and procedures in place to support this.
Where Sabbatical Officers are paid, they are employed by the SU in accordance with the 1994 Education Act. Paid Sabbatical positions are subject to regulations enshrined in employment law. In accordance with Principle 4.3 of this Code, paid sabbaticals are calculated in the percentage of employed trustees,
Employment of Trustees within the SU is declared as a possible conflict of interest and trustees are not involved in setting their own remuneration.
Safeguards are in place to ensure that a trustee or former trustee does not gain an 'inside track', or any unfair advantage because of their Trusteeship when applying for a paid position within the SU.

Trustees who are also employed by the SU are not involved in decision making relating to their own remuneration.
Clear procedures are in place for the removal of a trustee from their position, which are understood by the membership and reviewed regularly.
Procedures for removing trustees who also hold a Sabbatical Office are congruent with the procedures for removing a person from their political position.

- 4.5** Given the requirements and best practice above, the trustees may wish to make a judgement as to whether the current governance arrangements outlined in the constitution are adequate. The work undertaken to date by the college's solicitors and others have worked on the assumption that the arrangements should change as little as possible and any more fundamental review will take more time and resources.

5.0 Way Forward

- 5.1** The board are requested at this stage to make judgements on the following issues:
- 5.1.1 Whether the Union should register as a Charity
 - 5.1.2 Which legal for the Union should take
 - 5.1.3 Whether the Union should set up a subsidiary company for trading, or defer this decision for a later date
 - 5.1.4 Whether changes should be made to governance arrangements ensure compliance with CC and other guidance.
- 5.2** Any new governing document of the Union needs to be approved by the Union's membership (through Union Council, the Trustee Board, and the College (through College Council), in that order. This process will need to be completed before submission to the Charity Commission.
- 5.3** Following the approvals outlined above, it is envisaged (in accordance with indications with the College's solicitors) that the registration process will take up to two months, and it may take approximately another month for the transfer of assets etc. to any new limited company to take up to another month.
- 5.4** Clearly approval from the membership will need to take place during term time, and College Council meetings are scheduled for the 11th May 2012 and 13th July 2012. It would be sensible to aim for the May meeting, and the July meeting can be used as a 'fallback position' should the process take longer. It would certainly preferable to complete the process during one academic year.
- 5.5** In order to ensure that the process is well managed and that approval processes are smooth, it is suggested that, once the Trustee Board give a steer on the direction

they wish the process to take, that a small working group is set up to steer the work required to ensure it is successful. A suggested membership is outlined below

- 5.5.1 **Union President**
- 5.5.2 **1 x Deputy President**
- 5.5.3 **1 x member of Union Executive**
- 5.5.4 **1 x Member of the Board of Trustees**
- 5.5.5 **General Manager**
- 5.5.6 **1 x representative of College (Jon Hancock)**

- 5.6 The group should meet every three weeks (or as often as is required) to ensure that the work moves forward and that consensus is reached at each stage. Interim reports on progress should be provided to the Trustee Board, either at meetings or via email. The board should give direction to the group on the desired outcomes.