

Briefing to Governors on the Legal Status of the University

1. Introduction

This briefing has been prepared by Eversheds LLP and arose from the University's Audit Committee review of the CUC handbook for members of audit committees published in March 2008. The CUC's guidance advocates that the Board of Governors should receive a formal briefing on Glyndŵr University's legal status, perhaps once every two years. For the sake of clarity this note outlines the salient provisions of the relevant law and regulation affecting the University's core operations. It does not attempt to be an exhaustive statement of the legal responsibilities of the University or its governing body. Finally, it does not attempt to trace the steps by which the University has achieved its current status. These are outlined in the history of the University which appears on its website.

2. Glyndŵr University's powers as a higher education corporation

Unlike, for example, universities established by royal charter which in principle can do anything an ordinary person can do provided it is not inconsistent with the charter, Glyndŵr University is a statutory higher education corporation established by The Education (Higher Education Corporations) (Wales) (No.3) Order 1993. It has only the powers expressly or impliedly given to it by statute. The powers of higher education corporations are set out in s.124 of the Education Reform Act 1988, as amended. In essence, they are to provide higher (and further) education, undertake research and do all that is necessary for such purposes.

These powers are sufficient for the ordinary working of statutory higher education corporations but from time to time issues arise, normally in relation to special projects. One issue which arose in 2007 was the question whether a higher (or further) education corporation could participate in a guarantee company. The Further and Higher Education Act 1992, as amended by the Learning and Skills Act 2000, made it clear that such corporations could participate in a share company but the wording in relation to guarantee companies was not so clear. The (small) doubt has been resolved by the Further Education and Training Act 2007 so such corporations now clearly have this power.

Other areas of potential difficulty can include the provision of guarantees and indemnities and participating in hedging arrangements in connection with loans to be obtained by the corporation. Advice on the specific transaction proposed should be obtained and in some case it may be necessary to obtain counsel's opinion and/or an order from the Charity Commission protecting the governors from potential liability.

3. Governance of the Institute under its Instrument and Articles

3.1 Introduction

The internal structure of higher education institutions is of concern to a number of groups of people:

- to members of the governing body and the senior members of staff of the institution to ensure that their respective roles are clearly set out and appropriately reflect the issues coming forward for decision and current good practice in the creation of policy and its application to particular situations;
- to staff and students of the institution to ensure that their interests and concerns are suitably considered;
- to the outside community and particularly stakeholders of and partners of the institution, including schools, local authorities and major employers;
- to the institution's funding bodies, regulators and ultimately national government to ensure the institution has suitable regard to national education policy;
- to those entering into transactions with the institution.

3.2 Instrument of Government

The governance of Glyndŵr University is subject to the Instrument of Government made by the Privy Council on 29 March 1993 and updated in July 2008 to reflect the conferment of degree awarding powers and University title. This is in similar form to that of other post-1992 universities and provides for the name of the corporation, the number of members of the Board and how they are appointed, tenure of office of Board members, appointment of chairman, establishment of committees and so on. Issues which the Board may need to consider from time to time in relation to the Instrument include the size and balance of the Board. A number of HEIs are considering moving to a smaller, more streamlined board but the Privy Council will expect proper account to be made of the need to consult students and staff over changes of policy. Any changes to the Instrument would need to be made by the Privy Council.

3.3 Articles of Government

The current Articles of Government of Glyndŵr University were made by the Board in March 2008 and approved by the Privy Council in July 2008. They set out the relative responsibilities of the Board of Governors, the Vice Chancellor and the Academic Board; the constitution of the Academic Board, delegation of functions by the Board to Committees of the Board, or to the Vice Chancellor, save that certain fundamental duties (e.g. determination of the educational character of the Institute, and its solvency) are non-delegable; procedures for meetings including rules as to quorum, notices, voting and declarations of interests. The Articles also make important provision relating to staff conduct, and academic freedom, for suspension and dismissal of staff (distinguishing procedures for those holding posts designated by the Board as senior posts from those holding other posts); and for the conduct of students, also for the provision of a students' union.

Unlike the Instrument the Articles do need to be reviewed regularly to take account of, for example, changes in employment law and the development of good practice standards in the governance of HEIs by (amongst others) the Committee of University Chairmen. The Articles can be changed by the Board with the approval of, or where required by, the Privy Council.

3.4 Authorisation of transactions

Those proposing to enter into transactions with an HEI will want to be sure that they are properly authorised in accordance with the institution's internal constitutional arrangements. Lenders in particular will look for evidence that such steps have been or are being taken and will include these actions in Conditions Precedent. It is important that the Board and/or its appropriate committee give proper consideration to what is being proposed, ensure their approval is properly minuted and delegate implementation of their decisions (eg signature of relevant documents) in accordance with the Instrument Articles. In our experience institutions sometimes somewhat have difficulty in providing the necessary evidence of, say, the various changes of the institution's name which may have taken place over the years.

4. The University's status as a charity

4.1 Registration with the Charity Commission

If an organisation is in law charitable it must (unless exempt under Schedule 2 of the Charities Act 1993) register with the Charity Commission and make annual returns to the Commission. Glyndŵr University is currently exempt from registration but from a date to be fixed, probably the second half of 2009, will (like all Welsh HE and FE institutions) have to register with the Commission. This is because WAG has indicated it does not feel it would be equipped to take on the role of principal regulator of education institutions' compliance with Charity Law as HEFCE has agreed to do in respect of English HEIs. The Commission has indicated to us that Welsh and English HEIs will be treated in the same way with regard to compliance with charity law whether their compliance is monitored by the Commission or HEFCE.

4.2 Tax exemptions

Charities, whether registered or exempt, have exemption from corporation tax on income derived from their primary purposes, which can include trading in some circumstances although a non-charitable subsidiary will be needed where the trading is not in pursuance of the charity's primary purpose. Charities will however be unable to recover VAT paid eg on new building work, unless they establish a non-charitable subsidiary to procure the building.

4.3 Public benefit

In order to qualify for this favourable treatment charities have to demonstrate that their objects, both as set out in their constitutional documents and what they do in practice, are for the public benefit. Education charities can since 1 April 2008 no longer rely on the pre-Charities Act 2006 (rebuttable) presumption that their activities were charitable. General guidance on the meaning of "public benefit" has been published by the Charity Commission, which has also published draft guidance on the meaning of public benefit for education and fee charging charities. Fee charging charities, especially independent schools and universities, will need to consider how they can make their services as available as possible to the public, eg through offering

bursaries and making their facilities eg sports and arts centres open to the public when not needed by students.

4.4 Termination of charitable status

Charitable status is not an option which a body can decide to give up if it becomes inconvenient. However, the objects of an organisation can be written in such a way as to preclude charitable status, eg by providing for surpluses produced by the body's operations to be distributed to members. However, if a charity is wound up its assets will normally have to be transferred to a successor body so that they can be used so far as possible in accordance with donors' original intentions.

In particular certain assets may have been given to the charity with the intention that they never be disposed of, so that the charity can only spend the income produced but not the capital. Such assets are permanent endowment which can normally only be disposed of with the consent of the Charity Commission. Older universities (but not normally post-1992 universities or colleges) will often have significant permanent endowment. We are not aware that Glyndŵr University currently has any permanent endowment although the position may change in the future as the result of any fundraising initiatives the Institute may take.

4.5 Disposal of assets

Where land and buildings are not permanent endowment and can be disposed of charity trustees (ie normally the institution's governing body) are under a fiduciary duty to secure the best price reasonably obtainable and must have professional advice to confirm this. This is the result of the duty of charitable trustees to take all due care to preserve the property subject to the trust and apply it to the trust's charitable objects. In these respects and many others the requirements of charity law coincide with those of good governance and the obligations imposed by institutions' governing documents. It is therefore likely that institutions will not have to change their method of operation greatly to meet the requirements of their principal regulator or of the Charity Commission.

4.6 Consequences of exceeding powers

In principle if an action is "ultra vires" (outside the powers) of an institution it will be void or at least voidable once the matter is brought before a court of competent jurisdiction. In addition the trustees/members of the governing body who purported to authorise the transaction may be personally liable for any breach of trust they have committed. It is therefore vital that all practicable steps are taken to ensure that a transaction is within the institution's powers.

A practical remedy where it appears that the institution may not have the necessary vires is to apply to the Charity Commission for an order under s.26 of the Charities Act 1993. This will give the trustees of a charity (including a charity exempt from registration with the Commission) protection against a later claim that the transaction was ultra vires.

If what is proposed would be on the face of it within the institution's powers but would put at risk its charitable status the institution should consider undertaking the activity via a non-charitable subsidiary company. This can then gift aid surpluses back to the institution so as to reduce or eliminate tax liability. However, it is not clear that an institution can do through a subsidiary what it would not be able to do itself: views differ on this point.

Where trustees act in good faith with the benefit of appropriate professional advice they can apply to the court or the Charity Commission for relief from liability for breach of trust.

Many institutions will purchase indemnity insurance for governors, although this will not cover criminal acts or losses resulting from deliberately ignoring professional advice.

In reality the prospects of a governor being sued for breach of trust are small. However, lenders take the possibility of transactions being ultra vires very seriously and will normally require an institution to provide a Legal Opinion covering powers and authorisation of the proposed transaction.

5. Funding and Quality Assurance

5.1 Funding

For Glyndŵr University as for most Welsh higher education institutions the sources of funding are:-

- (1) The *Higher Education Funding Council for Wales* (HEFCW) in relation to undergraduate teaching and basic research facilities. Separate funding methods apply to funding of teaching and research, with the latter determined by performance in the Research Assessment Exercise (RAE). Funding from the funding council is subject to statutory requirements and, in particular, the conditions imposed by the funding council through the *Financial Memorandum* with each institution. The Financial Memorandum also affects the ability of institutions to dispose of property acquired with public funds. Institutions receiving public funding have extensive financial audit requirements and to comply with these have their own detailed financial regulations dealing with procurement, financial control and internal and external audit.
- (2) *Students through fees* for tuition, accommodation and other services such as catering etc. Tuition fees became a more important source of funds from autumn 2007 as the result of the decision of WAG to allow institutions in Wales which enter "into a fee plan " with DCELLS to charge variable fees from that date. Like all other Welsh HEIs, Glyndŵr University charges the maximum fee allowed under the legislation (for 2007/08 £3070 per year) and provides means tested bursaries and scholarships. Welsh based students studying in Wales receive tuition fee grants covering the additional fees and are eligible for loans to cover the remaining cost of fees and, depending on family circumstances, loans and grants towards living costs. In addition Glyndŵr University, like most other HE institutions, is increasing the recruitment of students from outside the EU, in relation to whom the controls on tuition fees under education legislation do not apply.
- (3) The *research councils and charitable bodies* in respect of commissioned research.
- (4) *Commercial income* from conferences, consultancy and commercially commissioned research and development activities.

5.2 Quality Assurance

Like all other HEIs in receipt of public funds via the higher education funding councils Glyndŵr University is a member of and subscribes to the Quality Assurance Agency for Higher Education (QAA). QAA is a company

limited by guarantee, owned by the higher education sector, which undertakes quality assurance activities under contract to and on behalf of the funding councils. It has a distinctive approach to the quality assurance of Welsh HEIs, set out in its Handbook for institutional review - Wales. The last such audit was in 2007 and resulted in a finding of confidence in the soundness of the Institute's management of the quality of its programmes and of its academic standards. Any finding of lack of confidence would be reported to HEFCW and if not addressed by the institution concerned could lead to withdrawal of HEFCW funding for the programme(s) concerned. Further, as audit reports are published, there would be significant damage to the reputation of the institution concerned.

In addition to being subject to periodic review at the institutional level Glyndŵr University must have regard to QAA's Code of practice for the assurance of academic quality and standards in higher education, the precepts of which form part of the context for review, and the Framework for higher education qualifications in England, Wales and Northern Ireland. Glyndŵr University must also pay due regard to the requirements of Professional, Statutory and Regulatory Bodies (PRSB) that accredit its programmes.

6. Membership of the University of Wales

Glyndŵr University, and its predecessor NEWI, has been a full member of the University of Wales (UW) since 2004. UW is a chartered body which has until recently provided a federal arrangement similar to the University of London, including as members or associated institutions all the HEIs in Wales except for the University of Glamorgan. However, the former UW Cardiff merged with the UW College of Medicine and seceded from the federal university in 2004, having secured not only degree awarding powers but its own university title. It remains an affiliated institution of UW. The Royal Welsh College of Music and Drama has a strategic alliance with the University of Glamorgan but retains its name as a separate legal entity from that university, even though technically a subsidiary of it. It remains an affiliated institution of UW. Although merger talks between Glamorgan, Newport and UWIC were suspended in 2005, pressure from WAG for further mergers is likely to continue.

After a major review in 2004-5 UW has now secured the charter changes need to move to a new role as a provider of services to accredited and affiliated institutions. The position with the individual accredited institutions is as follows:

- Lampeter had its own degree awarding powers before joining UW but on joining agreed to hold them in abeyance;
- Glyndŵr University (from 2nd July 2008), Aberystwyth, Bangor, Swansea, Swansea Metropolitan and UWIC have secured degree awarding powers and university title, but have decided not to use the powers for the time being;
- Newport has held taught degree awarding powers since 1995 but currently its students receive UW degrees.
- Trinity College Carmarthen currently does not have degree awarding powers or university title. Its students receive UW degrees. Trinity College Carmarthen has also applied for taught degree awarding powers with a view to seeking university college status.

Glyndŵr University currently operates under UW's model of devolved responsibility for quality assurance. A UW appointed assessor monitors standards and reports back to UW on them and on external examiners' reports.

7. Related organisations

7.1 Subsidiary companies

Glyndŵr University has at present two subsidiary company. Such companies are regularly used by HEIs, for example to commercialise intellectual property developed within the institution and undertake commercial activities which may not be consistent with the institution's charitable status, or for building projects where the institution, being charitable, would be unable to recover VAT on building costs. Although it is not currently a requirement of HEFCW, it should be noted that HEFCE requires English HEIs to have a memorandum of understanding with their subsidiary companies to ensure appropriate high level accountability of the company to the institution. Where such companies make surpluses their liability for corporation tax can be reduced or eliminated by gift aiding surpluses back to the institution.

7.2 Students' Guild

It was noted in section 3.3 above that Glyndŵr University is required by its Articles of Government to have a students' guild. The relationship between a higher education institution and its students' guild is often ambivalent. On the one hand, the institution may wish to distance itself from the union's activities, particularly if they sometimes cause disquiet in the local community. On the other hand, the institution will generally accept that it must have a general oversight of the activities of the union to ensure these do not harm the standing of the institution or, for example, its charitable status. (On occasions students' unions have tried to undertake political activities and have tried to use funds provided by students for educational charitable purposes to pursue such aims).

Whether or not a students' guild is in law a part of the institution may be unclear. Decisions of the VAT Tribunal and High Court in relation to Leicester University mean that an examination of the constitutional documents of the institution and the union will be required to answer this question in detail. As a post 1992 established through the national model of Instrument and Articles of Government it will usually be the case that the guild is an unincorporated association separate from the parent institution although subject to varying degrees of control by it. Controls will include approval of the union's annual report and accounts by the governing body and regular review of the guild's constitution and of the institution's arrangements to ensure freedom of speech for members of the institution and visiting speakers. These are essential in order to ensure that the institution is complying with its duties under the Education (Number 2) Act 1986, the Education Act 1994 and the Human Rights Act 1998.

Some institutions have sought to resolve these tensions by encouraging their students' guilds to incorporate as companies limited by guarantee. A few have encouraged their guild to register with the Charity Commission rather than taking advantage of the university's own exempt status. Registration of the guild is likely to become mandatory once the Charities Act 2006 is fully in force. The 2006 Act will also create the possibility of incorporating as a charitable incorporated organisation, avoiding the necessity of registering with Companies House as well as the Charity Commission. It is therefore timely for both institutions and their students' guilds to be considering their respective roles and

relationships so they are ready to deal with the process of registering with the Commission.

8. Concluding remarks

We hope that this outline of the main legal features of Glyndŵr University's status will be helpful to governors. We would be pleased to discuss any of the matters covered in this briefing with you and with Glyndŵr University's senior management team. We would also stress that the legal context within which Glyndŵr University operates is subject to frequent change and accordingly this statement should be reviewed regularly to ensure it accurately reflects current conditions.

Eversheds LLP

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