

# Students' Unions and Universities

# QC Opinion

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Bates Wells & Braithwaite  
SOLICITORS



# Introduction

As you will see from this briefing, NUS has sought and received clear and unequivocal advice from J Richard McManus QC that, in almost all circumstances that we are aware of, a students' union is separate from its university.

Indeed, Leading Counsel is doubtful that it could ever be lawful under the Education Act 1994 for a students' union to be integrated with its university. This doubt makes it unwise in the opinion of leading counsel for legal integration between a university and a union to be contemplated in any proposed restructuring.

This advice was given by Leading Counsel J. Richard McManus QC of 4-5 Grays Inn Square. Leading Counsel was instructed by Bates Wells and Braithwaite solicitors.

It is important that you look at the Royal Charter, Statutes, Ordinances or Instrument & Articles of your parent institution. If there is a reference to the students' union being expressly a part of the institution as opposed to it saying that there shall be a students' union, or if you have any other questions, please contact Jim Dickinson, NUS Director of Organising & Membership Development at <mailto:jim@nus.org.uk>

**Please note that the advice specifically relates to the law in England and Wales, although we are advised that the general principles are likely to apply in Scotland and Northern Ireland.**

# Students' Unions And Universities

## ADVICE

### INTRODUCTION

1. I am asked to advise the National Union of Students:
  - a. Whether, under the Education Act 1994, a Students' Union is, in general terms, a separate legal entity from its University,
  - b. On the assumption that the EA 1994 implies that a Students' Union is a separate legal entity the effect of the presence, or absence, of particular factors on that issue.

### THE EDUCATION ACT 1994

2. Section 20 of the EA 1994 defines "students' union" for the purposes of Part 11 of the 1994 Act. It is apparent from subsection one that a Students' Union, whatever else it is, is not a University. By contrast it is either an association of the generality of students (section 20(1)(a)), or a representative body whose principal purposes include representing the generality of students at an establishment to which the Act applies (section 20(1)(b)). Neither of these are the establishment to which Part 11 of the 1994 Act applies. Those establishments are defined by section 21 and include, by virtue of subsection 1(a), a University.
3. It is equally apparent that a Students' Union, as defined by section 20(1), is not a part of a University. A University does have legal personality either by virtue of being a legal corporation created by royal charter, or by virtue of having been incorporated under section 121 of the Education Reform Act 1988. Neither subsection (1) (a) nor (b) is concerned with such legal corporations. By contrast they are concerned with unincorporated associations "at" an establishment as defined by section 21. They are not concerned with part of an establishment as so defined.
4. It does not follow from this conclusion that Students' Unions are not subject to a degree of control by Universities. It is clear, from section 22 of the EA 1994, that there are a considerable number of areas where the Students' Union is subject to regulation by the governing body of the University. This though does not make them part of the University. It is no more than detailed statutory provision obliging the University to regulate various matters relating to the Students' Union.
5. It is notable that there is nothing in Part 11 of the Education Act 1994 which expressly provides that a Students' Union is part of the University.
6. A Students' Union is not invested with legal personality by virtue of anything in Part II of the Education Act 1994. By contrast the legislation assumes that a Students' Union will be an unincorporated association. That, of course is what a trade union typically is, although The Trade Unions and Labour Relations (Consolidation) Act 1992 does give such unions many of the important attributes of legal personality: see section 10(1). For the avoidance of doubt a Students' Union is not a trade union within the meaning of section 1 this Act because its members do not consist wholly or mainly of workers as defined by section 296. Students do not work, or seek to work, under a contract of employment, or to give personal service.
7. The EA 1994 only defines Students' Union for the purposes of that Act. Whatever the position under that Act cannot answer any question arising under any other Act, although it may incidentally cast some light on it. It is important therefore to focus on what question is being asked in what particular context.

## CHARITIES ACT 2006

8. Under section 3(2) of the Charities Act 1993 charities not exempted by section 3(5) had to be registered. The exemptions included those listed in Schedule 2: see section 3(5) (a).
9. Students' Unions were regarded as exempt charities under paragraph (w) of Schedule 2 to the 1993 Act. That provided that exempt charities included:

**“(w) any institution which is administered by or on behalf of an institution included above and is established for the general purposes of, or for any special purpose of, or in connection with, the last-mentioned institution;”**

10. The institutions referred to in subparagraphs (b) and (c) included various Universities. Students' Unions got their exempt status therefore parasitically from those Universities, either by virtue of being administered by them, or because they were established for the general purpose of, or for a special purpose of, or in connection with such Universities.
11. What section 11 of the Charities Act 2006 does, by section 11(6), is amend Schedule 2 to provide that paragraph (w) of Schedule 2 does not include any Students' Union. It is accordingly clear, as far as Charities law is concerned, that a Students' Union cannot be an exempt charity unless it falls within one of the other paragraphs of Schedule 2. Those now include not only Universities but also Higher and Further Education Corporations: see section 11(4) and (5) of the 2006 Act. Accordingly if the Students' Union is a University, Further Education, or Higher Education, Corporation then it can be, for the purposes of charity law, an exempt charity.
12. I understand that some Universities have sought to argue by reference to the Charities Act 2006 Act that Students' Unions are merely departmental divisions of the Universities. This is in my view a clear misreading of the relevant legislation. While it is clear that, for charities purposes, a Students' Union cannot be an exempt charity unless it is, inter alia, a University, it does not follow that it is a University, nor that, even if it was, its status for charities purposes governs its status for other purposes. Still less does it follow that if a Students' Union was a University for the purposes of the Charities Act 2006 that that would give the University greater powers to interfere in the affairs of the Students' Union than those given either by the Education Act 1994, or any existing constitution.
13. This leaves open the question whether, for the purpose of charities law, it can be said that a Students' Union is a University. In the absence of express provisions providing in a particular case that it was, I would be extremely doubtful whether this was the position. There is certainly no provision of education law that subsumes Students' Unions under Universities, or similar institutions, and the 1994 Act, as we have already seen provides that the Students' Unions are distinct from the Universities. Moreover if Students' Unions are now to be treated as Universities, then it follows that they always were, and the amendment to paragraph (w) of Schedule 2 to the Charities Act 1993 was unnecessary. It would simply have been, on this analysis, making clear that Students' Unions did not fall within, what was for them, a redundant provision.
14. It is doubtful that it was the intention of Parliament by this amendment to simply get rid of a redundant provision because Student' Unions enjoyed exempt status under some other provision. While it might have been a tenable view under the old law that it was beyond doubt that a Students' Union was simply part of a University (see paragraph 23 below) under the modern law it cannot be said that that is the position. At the very least in the light of the decision of the Court of Appeal in Commissioners of Customs and

Excise v University of Leicester Students' Union [2001] EWCA Civ 1972 it was open to doubt whether a Students' Union was part of a University. It was accordingly necessary for there to be a provision like paragraph (w) of Schedule 2 to the Charities Act 1993 if Students' Unions were to enjoy exempt status.

15. If, as I conclude, the intention of the Charities Act 2006 was to remove the exempt status of Students' Unions, it follows that that purpose would have been defeated by Students' Unions being merely part of a University. In other words the Charities Act 2006 does not support an argument Students' Unions are simply part of a University. If they were the amendment of subparagraph (w) to Schedule 2 to the Charities Act 1993 would have achieved no purpose. That Charities Act 2006 is therefore drafted on the assumption that a Students' Union will be a separate body from a University.
16. I note that the views I have expressed are consistent with those of Farrington and Palfreyman "The Law of Higher Education" at paragraph 9.01. After analysing a number of cases they say:

"Thus, the *Anyanwu*, *Ogilvy* and *Leicester* cases all point towards the SU not being part of, nor as it were a department of the HEI; it is an unincorporated association linked to the HEI in terms of sheltering within the HEI's charitable status (but not its VAT exemptions) and in terms of the HEI having some supervision duties imposed by the EA94 concerning freedom of speech, elections, affiliations, etc."
17. The case law, other than the Leicester case referred to in paragraph 20 below, is not desperately illuminating, but in so far as it assists at all, it is consistent with the above analysis. In *R v Thames Valley University Students' Union ex parte Ogilvy* [1997] CLY 2149 a student employed as a counsellor by Thames Valley students' union, sought judicial review of his exclusion from the union's premises on grounds of alleged misconduct. Sedley J (as he then was) held that the essential private law character of the student union (in that case held to be a voluntary association with a free-standing constitution, not incorporated into the university's structure) was not affected by the Education Act 1994, s 20 of which merely defines a student union and then "grafted on to the rules [of the union] the requirements of Parliament". Sedley J held that the provisions of the EA 1994 did not invest a Students' Union ... with a public law, or statutory, character. By contrast the Students' Union was held to be in essence a private members' club which was not amenable to judicial review, even though its decisions had major consequences for individuals.
18. This decision, inadequately reported, seems to have turned on the express terms of the constitution of the Students' Union concerned. The issue was the amenability to review of the particular union. It casts little light on the present question.
19. *Anyanwu and Another v South Bank Students Union and Another* [2001] UKHL 14 is similarly of little assistance. By the time the matter reached the House of Lords the issue was whether the University had aided the dismissal of the complainants by the Students' Union, contrary to section 33 of the Race Relations Act 1976. The Court of Appeal had held that they had not, because the University, and not the Students' Union, had been the prime mover behind the dismissal by the Students' Union of the complainants. The House of Lords held this was a misconstruction of section 33, and the case was not a plain and obvious one that it was appropriate to strike out. The Students' Union did not appear in the House of Lords and its position received little discussion. Clearly the case proceeds on the basis that the Union and the University were not the same person because otherwise the University could not have aided and abetted another person to do an unlawful act. However there is little analysis of the position. Lord Steyn merely commented, at paragraph 25, that the University was a corporate charity, and the Students' Union an unincorporated association regarded by the Charities Commission as having charitable objects deriving from its relationship with the University.

20. The most relevant case is now *Commissioners of Customs and Excise v Leicester University Students' Union* [2001] EWCA Civ 1972. It holds that the Students' Union was not the University for VAT purposes. In reaching that conclusion Rimer J analysed in some detail the Union and University constitutions. He relied in particular, at paragraph 37 of his judgment, that under the University's charter the Students' Union was not stated to be "of the University", whereas this expression was used in relation to other bodies and officers. This approach is not dissimilar from that I have adopted in relation to section 20(1) of the EA 1994. In the Court of Appeal a similar approach was adopted: see paragraphs 31 to 34 per Peter Gibson LJ, Arden LJ at paragraph 48, and at paragraphs 63 and 64 per Morland J.
21. Earlier cases are of little help. In *Baldry v Feintuck* [1972] 1 WLR 552, a member of a Students' Union sought an interlocutory injunction to restrain the payment of various amounts that he contended were not authorised by the Union constitution. The action was commenced not against Sussex University, but three senior officers of the Union, and an employee of the University who had power to countersign cheques on the union bank account. It therefore proceeds on the basis that the union was not the University and it was expressly recognised as an unincorporated association: see at page 557. Nobody suggested that this was an incorrect approach despite the provisions of the University charter, set out at page 555, which provided that the Union should participate in University administration. While it was accepted the Union was a charity (at 556) there was no analysis of any question of exempt status.
22. In *London Hospital Medical College v Inland Revenue* [1976] 2 All ER 113 the issue was whether the Students' Union was charitable. It was held that it was. It will be noted that the issue was raised by the College in proceedings against the Inland Revenue and that the Students' Union was not before the Court in any form (i.e. by joining some of its officers). The conclusion, on the evidence in that case, was that the union existed solely to further the educational purposes of the College: see 119H-J. While that is a conclusion on the evidence in that case, if it was applied generally, it would be against the conclusions I have formed in this case. *Attorney General v Ross and others* [1985] 3 All ER 334 is to the same effect although it is to be noted that there the Union was sued via its officers, and not via the polytechnic of which it was held to be part: see at pages 341h to 342a.
23. Neither of these cases at first instance sit happily with the decision of the Court of Appeal in *Commissioners of Customs and Excise v University of Leicester Students Union*. It is of note that the first of them was referred to at paragraph 33 of the judgment of Peter Gibson LJ, where it was interpreted as not holding that the Union was an integral part of the University:
- "I do not read the judgment of Brightman J in the *London Hospital* case as constituting an acceptance of an argument which had been advanced to him that the students' union in that case was an integral part of the charity that was the Hospital, as distinct from holding on the particular facts of that case that it was a charity in its own right with purposes ancillary to those of the Hospital"
24. The material parts of the judgment of Peter Gibson LJ were expressly endorsed by Arden LJ at paragraph 48, and Morland J at paragraph 64. It represents a shift in judicial policy that accords with the legislative policy to be found in the Education Act 1994 that Students' Unions are not to be regarded, in general, as simply part of the Universities at which they have members.
25. It is a more difficult question as to whether the Education Act 1994 prohibits a Students' Union deciding to be part of a University. There is no express prohibition to that effect although the Education Act certainly contemplates that a Students' Union will not be a University. On balance I incline to the view that there is no prohibition but without any

degree of confidence. I would not therefore recommend any decision by a Students' Union to become part of the University.

26. It is apparent that a University cannot by diktat make a Students' Union part of a University. Although Students' Union constitutions will differ, the initiative for constitutional amendment will typically have to come from the Students' Union itself. Such amendments will also typically require the students themselves to vote by a two thirds majority to amend the constitution. Without this process being embarked upon by the Students themselves the sole power the University has is approve and review the constitution at intervals of not more than five years under section 22(2)(b) of the EA 1994.
27. It would be contrary to well established principles of public law were a University to seek to use its powers under section 22(2)(b) of the EA 1994 to review and approve the constitution of the Union to force it to become part of the University and thereby seek to give itself greater powers than it enjoys under that Act. That would be to use its powers for an improper purpose and would infringe the well known rule in *Padfield v MAFF* [1968] AC 997.

## QUESTION 2-THE EFFECT OF PARTICULAR FACTORS

28. I am asked to consider the effect of the following factors on the status of a Students' Union:
  - a. Union Staff being employed by the University
  - b. The Union having multiple stakeholders
  - c. The Union electing Union leaders and Officers
  - d. The University being in control of the Union finances or preparing the Union accounts
  - e. The University entering into agreements with external parties on behalf of the Union for the purchase of materials.
29. It seems to me that, just as in the Leicester VAT case, the most important consideration is whether the legal instrument setting up the University provides that the Union is part of it. None of the factors set out in paragraph 28 above seem to me sufficient either on their own, or taken together, to lead to the consequence that the Union is part of the University in the absence of such a constitutional provision. For completeness I consider each factor in turn.
30. The employment of University staff on Union business does not, of itself, seem to me to make a Students' Union part of the University. What matters is who is directing the Union's affairs. Policy will be directed by Officers of the Union and not staff who implement decisions made by officials they do not elect.
31. The fact that a Union has multiple stakeholders is probably in most cases going to be a neutral factor. Where though some of those stakeholders, such as in London University, consist of incorporated bodies, as is the case with King's College London Students' Union, it seems to me even harder to say that the Students' Union is simply part of the University.
32. The election of Union Leaders is a requirement of section 22(2) (d) of the Education Act 1994. It has to be by ballot of the Union members. This factor seems to me to point away from the Union simply being part of the University because it has the consequence that people the University does not appoint are in control of the Union. The University's role, in relation to such elections, is simply to take such steps as are reasonably practicable to ensure the Students' Union have them: section 22(2)(d).
33. If a University is in control of a Unions' finances that is a factor pointing to the Union being part of the University but not in my view sufficient to establish this. It is to be noted that existence of financial support from the University was apparently relied on in

the London Hospital case as a reason for holding the Union was part of the University: see at 120B. However, as advised in paragraph 23 above, that case was substantially reinterpreted and confined by the Court of Appeal in the Leicester case. Withdrawal of finance may put a Union out of business and the threat of such withdrawal may, in any given case, compromise the independence of a Union but none of this points to the Union simply being part of the University.

34. If a University contracts with third parties for the benefit of the Union it tells us nothing in itself about whether the Union is in fact part of the University. A University may enter into the relevant contract simply because it wishes the Officers of the Union not to incur the personal liability that goes with them being Officers of an unincorporated association.

## **CONCLUSION**

35. For the reasons given above, I consider that, in general, Students' Unions will not be seen as part and parcel of a University. While it cannot be ruled out that there may be some Students' Unions that are part of a University, I would regard this as a highly exceptional case.

J.R.MCMANUS QC  
4-5 GRAY'S INN SQUARE  
GRAY'S INN  
LONDON  
WC1R5AY  
Telephone: 0207-404-5252  
Email: rmcmanus@4-5.co.uk