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IGNORANCE OF THE LAW IS NO EXCUSE!

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OK, so you are a university administrator/manager and, sensibly, you do *not* worry about legal issues: the risk of you inadvertently landing the HEI in a legal mess, or (even worse!) yourself at the same time, is reassuringly and vanishingly low. This is partly because UK HEIs are, generally, well-run (well, at least compared with Marconi, Equitable Life, Barings, the Robert Maxwell corporate empire, Enron, Tyco, WorldCom, HMG/Whitehall tackling BSE and FMD...); and partly because our routine business is fairly simple in legal terms and also does not involve the mega-bucks that generate litigation ‘in the real world’. Hence you can remain relaxed (but not, of course, complacent!) despite the scary newsletters that firms of solicitors delight in circulating to their clients in the hope of drumming up lucrative work by way of the HEI purchasing yet another ‘legal health-check’.

That said, however, the risk of a legal dispute has increased for the HEI over recent years as a result of: a developing ‘rights-consciousness’ amongst students and employees (some would refer to ‘a blame-culture’ or ‘a culture of compliant’); HEIs doing evermore complicated ‘deals’ in legal terms and with a wider range of commercial partners (eg franchising, PFI, IP exploitation); and the Law becoming steadily more complex, extensive and intrusive (eg EC public procurement regulations, disability discrimination legislation, freedom of information/data protection regimes, the Human Rights Act 1998...). Arguably, therefore, the competent and professional HE administrator of today needs to be more ‘legally aware’ (rather than ‘expert’) than his/her counterpart of twenty years ago.

And it really is not that difficult to come up to speed on legal issues in HE. This article will provide a quick canter over the legal landscape inhabited by the HEI, and our ‘reflective practitioner’ colleagues (‘office swots’!) can study the legal geography in greater detail by taking a look at: Farrington, *The Law of Higher Education* (Butterworths, 1998 second edition of his pioneering 1994 first edition, which was a much expanded version of the 1990 CUA *Universities and the Law*); or Palfreyman & Warner *Higher Education Law* (Jordans, 2002 second edition of the 1998 Open University Press first edition), as updated on-line at the OxCHEPS web-site (oxcheps.new.ox.ac.uk) and as supported by an on-line case-book via the same web-site (you can search the case-list by HEI name and see whether your employer features and which university manages to be the most cited, implying either that its administrators are in great need of legal-awareness training or that its management is robustly litigious!).

In what follows the references are to the chapters or paragraphs in Palfreyman & Warner 2002 (some of which will now have been updated on-line) and to HEI cases readily accessible via the OxCHEPS on-line case-book. The legal issues

discussed below are dealt with in the order they appear in *Higher Education Law*, and hence not in any order of potential seriousness or likelihood of their cropping up in your working-life. And, once again and as that sage Corporal Jones would counsel, 'Don't Panic!': it almost certainly will never happen, but, if a legal problem begins to emerge, then, hopefully, having become that little bit more legally-aware, you will spot it all the sooner, stop digging deeper within any hole you have inadvertently fallen into, call for specialist help, and in accessing £200 an hour lawyer services be a more astute and clued-up client. By the way, *HEL* deals only with English Law; Scots law is, for our purposes, not, in fact, that different, but Farrington does cover Scotland.

So, here come 'the big issues' in HE law where you just may foul up and cause the HEI legal hassle and expense, or (still worse) end up being disciplined for incompetence, or (yet worse) find you personally are the target of criminal or civil proceedings, or (nightmare!) you are then abandoned by your caring employer and left with paying for your own defence-lawyers...

1. **ACTING ULTRA-VIRES:** if you are senior enough in the management hierarchy, you may be responsible for allowing your HEI to do something which is beyond its legal capacity, powers and authority as explicitly set out for a statutory HEI in its Statutes and the relevant Act of Parliament creating it, or as explicitly limited for a chartered HEI by its Statutes (where, otherwise, the chartered corporation as an artificial person in Law has all the legal capacity of a natural person). Now, unless you are a Member of Council (for a chartered, pre-1992 HEI) or of the Board of Governors (for a statutory, ex-poly HEI), as is the VC, or an officer of the corporation (as, again, is the VC and as is, in the chartered HEI, the Registrar), you, dear Reader, really have little to worry about. It's the Big Cheeses who need to ensure the HEI is operating within its legal capacity; if they get this very basic aspect of governance wrong, they may also be personally liable to compensate the HEI for any financial losses which it incurs as a result of any gross negligence on their part. See chapter 2 of *HEL* on the legal status of an English HEI (as a charitable corporation aggregate, either lay eleemosynary chartered or statutory) and chapter 3 on its governance (within the law of corporations and with reference to the charter, statutes, ordinances, regulations, by-laws, etc, as applicable).
2. **BREACH OF CHARITABLE TRUST:** again, one more for the senior folk. The HEI (probably) holds its general corporate assets on trust, and many HEIs will also hold other assets on specific trusts (eg a legacy to do X or Y, but nothing else with the income/capital). The HEI itself is the trustee, but charity law makes the individual members of councils/boards of governors themselves de facto charity trustees and hence potentially personally liable for any financial losses to the charitable assets incurred by negligent management (including their misapplication to inappropriate purposes). See chapter 4 on charity trusteeship, including the Trustee Act 2000.
3. **THE LAW OF MEETINGS:** the HEI needs to reach valid decisions through the decision-making processes set out in its governing instrument

(charter, statutes, etc) and in the common-law where the governing instrument is silent. Hence all administrators must know the basics of the law of meetings: such exciting stuff as terms of reference/committee remits, the powers of the chair in controlling meetings and in terms of delegated authority for taking ‘chair’s action’, notice of meetings, the quorum, voting, the putting of motions, the validity of the minutes, ultra vires and intra vires, the rectification of procedural irregularities, the (mis)use of AOB, the rules of natural justice/due process... Of key concern is the delegation of authority down the decision-making hierarchy, whether from senior committee to lesser committee or from committee to chair or from senior administrator/officer of the corporation to junior colleague. All this is *the law of agency*, including the very remote risk that the individual committee member or employee becomes personally liable for the dodgy decision/action along with the HEI or (even less likely) instead of the HEI. And the law of agency is mixed up with the legal concept of *vicarious liability* (the HEI usually being lumbered with responsibility for the unauthorised and unconstitutional actions of its lesser committees/officers/employees, no matter how stupid!). See *HEL* chapter 5 and note the discussion of the Cambridge CAPSA IT fiasco (paras 5.28-5.30), as further explored in OxCHEPS Occasional Paper No. 2 on, more generally, proper governance in the chartered HEI; see also Oxford’s *Malcolm* case concerning agency (para. 5.22 and via the case-book), and note from the on-line updating the Visitor ticking off the University of Birmingham (and more recently also Hull) for an improper decision taken by the VC without due authority since Council was unable in Law to delegate to the VC its duties under the redundancy provisions of the Model Statute (as covered in *HEL* chapter 11).

4. **DEFAMATION:** this is a legal issue potentially of relevance to *all* HEI administrators. It is covered in paras 5.13-5.18. You can certainly land your employer in it via vicarious liability if you say or write unfortunate things at/for committee or in/for any meeting, and your comments are not protected by ‘qualified privilege’ (ie they are true, relevant and accurate, and are not being made beyond the appropriate need-to-know group). *And* you personally can be sued if the individual defamed is especially aggrieved and is not content with the usual route of pursuing only the HEI as ‘the deep pocket’ (and your caring employer may be all the more angry with you in turn since, in relation to defamation, it is less likely to be covered by comprehensive insurance policies than if you settled merely for burning down the admin bunker!). You are most at risk when writing references, whether for another employee or about a (ex-)student: see *HEL* 6.38; and when you are grumpy and sound off in a ‘flame-mail’ (paras 14.12-14.15). In theory, even if the HEI has insurance and the insurance company eventually pays up, the HEI (or, in practice, the insurance company using its name under the law of subrogation) can try and recover from you personally the damages it has paid and the legal costs it has incurred; in practice, insurance companies waive their subrogation rights in relation to the insured’s employees and, if the HEI itself chased you (where, say, it did not have insurance cover), doubtless

the AUT or other relevant union would be supportive (unless perhaps where you had been not ‘merely’ hugely incompetent or even recklessly irresponsible, but downright malicious and dishonest in abusing your position to seek revenge by defaming a colleague or student!).

5. **BREACH OF THE STUDENT-HEI CONTRACT TO EDUCATE:** this and **JUDICIAL REVIEW** is where most HE litigation arises, and hence where statistically you are most likely to get something wrong which has legal repercussions for your employer and, via subsequent disciplinary action, possibly for you personally in career terms. It is a combination of *the law of contract* (with elements of *consumer law*) and *public/administrative law*, the former in the chartered HEIs leading ultimately to a ‘petition’ to the HEI’s Visitor who (rather than the Court) has exclusive jurisdiction over such student/HEI disputes and both the former and the latter in the case of the statutory HEIs culminating in Court (which now applies the Human Rights Act 1998). See chapter 6 concerning the academic contract and ‘Practical Preventive or Remedial Action’, chapter 7 on student discipline and complaints (especially the need for due process with regard to hearings and appeals), chapters 8 & 30 on the Visitor, chapter 9 on the principles of judicial review, and chapter 29 on students as consumers of the HEI’s academic (and housing) services. For an exhaustive, and indeed exhausting(!), list of student:HEI contract and jr cases, see Appendix 1 to chapter 6 and those cases as set out in the on-line case-book. The *Clark* case (Court of Appeal, 2000; University of Lincolnshire and Humberside) is the leading one on the student:HEI contract and on handling disputes arising under it. There are (too) many other cases showing how HEIs mess up on simple due process requirements, and seem not to learn from the mistakes of others. The Australian cases of *Fennell* and *Dudzinski* demonstrate how time-consuming and hence also expensive litigation can be even if the HEI is eventually totally exonerated (and show how the HEI’s administrators can also end up personally receiving writs, not just the HEI and occasionally its academics). Under ‘New Material’ within the on-line update page we set out how a student would bring a legal action (seeking ‘remedies’), and how, if it were successful, his/her compensation (‘damages’) could be calculated. (See also the *Rycotewood College* case concerning ‘disappointment’ damages; at the OxCHEPS web-site, ‘Law Update’ Page, para. 29.38, and, within the same Page, also in ‘New Material’ item 4.) Of course, this same area of the law of contract is key to handling mergers (chapter 16), franchising (chapter 17) and PFI (chapter 18), where (as with the student contract) the relevant critical aspect of contract law is the concept of ‘misrepresentation’-eg does the reality of campus facilities and ‘the teaching experience’ match with the lavish description of Coketown University given in the Prospectus, Course Handbook, etc; think of package holiday litigation and you’ve got the picture! (see paras 29.36-29.38). If any Law is to be taught to HEI staff it needs to be ‘Janet & John do Contract’ as being basic to much we now, and increasingly, concern ourselves with in managing HEIs.

- 6. EMPLOYMENT LAW & DISCRIMINATION LAW:** in *HEL* we don't cover general employment law (there are many 'Noddy goes to an Employment Tribunal' guides covering the employment contract: termination, unfair dismissal, redundancy, workplace bullying, etc), but in chapter 10 we do try to explain those aspects of the HEI employment contract which are very specific to HE ('academic freedom', 'tenure', and dismissal for 'good cause'). These elements will not usually apply to the contract under which a HEI administrator is employed, but understanding them may well be relevant for the better performance of his/her job (see also the *Fishel* (University of Nottingham) case at paras 10.24-10.26, and in the on-line case-book, for discussion of the fiduciary duties of an academic towards the HEI: it's not an entirely one-way contract!). That said, his/her employment contract will come sharply into focus for an administrator if something goes sadly wrong: the key implied (and rarely explicit) contractual term for us in the context of rather flexible job descriptions and fuzzy ideas of just what is a satisfactory performance is that of mutual confidence and respect (neither side, including domineering VCs trying to be 'chief executives', should behave *really* badly!). In chapter 11 we explore the Model Statutes and the provisions for termination of academic (and some academic-related) contracts on the grounds of 'misconduct', 'incapacity', etc. Often employment disputes concern discrimination, as also do some student-HEI legal wrangles: see paras 7.60-7.64 on the latter, and chapter 22 on the impact of the Disability Discrimination Act 1995 as reinforced by the Special Educational Needs and Disability Act 2001 upon HEIs in relation to staff, students and conferencing (there have already been some HE cases, as noted in the on-line update and case-book).
- 7. INTELLECTUAL PROPERTY LAW:** the current squabble within the University of Cambridge over management plans to capture the IP of its scientists illustrates the potential high stakes involved in IP exploitation (notably patents and licensing). This area is very specialist, and our chapter 12 provides merely an introduction of interest to those of you who one day may be senior enough to be in charge of such specialist colleagues and need to appear informed. The more humble administrator does, however, need to be au fait with copyright law, lest he/she inadvertently lands the HEI in the legal mire by not spotting an infringement of a third-party copyright, including in relation to web-pages and databases, such as the OxCHEPS on-line bibliography, law updates and case-book (you have been warned!): copyright is covered in chapter 12.
- 8. DPA 1998 & FoI 2000:** here even the most general of administrators must be aware of data protection and freedom of information issues, even if he/she will usually be supported by specialist colleagues. See chapter 13 concerning, for example, the confidentiality of degree results and access to references; and also chapter 25 on data protection issues in relation to alumni activities.
- 9. THE INTERNET:** all HEI administrators must be sufficiently legally aware to protect the HEI against possible legal hassles in connection with

the campus use of the Internet, even if the central computing service will be the specialist function for drafting the HEI's AUP and for monitoring campus IT activity. The key areas are: defamation in e-mails, on web-sites, and in 'texting'; copyright infringement on HEI-hosted web-sites; hacking/spamming; down-loading porn; data protection; e-mail harassment; and surveillance of Internet use by employees... all covered in chapter 14. Note in para. 14.10 and its on-line update the very real risk of criminal prosecution even for 'fairly innocent', by way of say inadvertently down-loading an unsolicited e-mail and opening its unpleasant attachments, dabbling with child porn material: try convincing PC Plod that the stuff got into your PC by accident, that you really meant to delete it all or were just keeping it as evidence for when you got around to reporting it to computing services... **ADVICE:** don't open attachments to what already looks like a dubious e-mail, aim straight for the delete button; if the e-mails keep coming, call in the campus IT 'police'; if offensive material does get into the memory, either keep it for immediate reporting to the IT 'police' or even the real Police or make sure you really have deleted it; don't even think of sending it on to somebody else, even if only to warn 'em of what is circulating or to share with 'em your genuine disgust.

10. **TRADING COMPANIES & STUDENT UNIONS:** most colleagues will not need any *company law*, but senior folk will and also any HEI employee accepting nomination by the HEI to the board of directors of a spin-off company in which the HEI has shares. The essence is that the nominee-director owes no duty at all to the HEI and must be concerned solely with the best interests of the company, even if they conflict with those of the HEI as a share-holder: see chapter 15 and note that any breach of the nominee-director's fiduciary duty to the company could leave him/her personally liable for any financial losses it thereby incurs. In chapter 19 we consider a similar legally complex relationship between the HEI and 'its' SU, including the issues of: HEI liability for the actions/debts of the SU; the SU's charitable status (back to chapter 4); HEI statutory responsibility for sustaining campus free-speech...

11. **HEALTH & SAFETY IN HEI PREMISES & RESIDENCES:** perhaps *the* greatest personal legal risk faced by a HEI administrator is being tangled up in a criminal prosecution for breach of H & S legislation, for the caring HEI can't pay its employee's hefty fine (and nor will any HEI insurance policy) nor 'do porridge' on behalf of the hapless employee. (At present (May, 2003) the current Commissioner of the Metropolitan Police and his predecessor are on trial at the Old Bailey accused by the H & S Executive of failing in their statutory duty of care towards police officers as employees by not doing enough in terms of safety training to warn them of the dangers of chasing suspects over rooves...) The risk is greater for more senior colleagues as 'the controlling mind' of the HEI, but lowly science academics have been prosecuted for dangerous lab experiments and the whole level of risk will ratchet up if Government talk of 'corporate manslaughter' legislation is backed up by action. **ADVICE:** Simply refuse to take H & S risks, even if it appears the HEI really can't

afford the resources needed to reduce the risk; or at least do so until somebody senior instructs you, in writing, that a formal risk assessment has now been undertaken and the HEI has decided to proceed. In this section of *HEL* we also consider ‘the HEI and its property’: see chapter 20 re campus security (including the use of ‘reasonable force’ and the Private Security Industry Act 2001), the legality of vehicle clamping, laboratory H & S, CCTV (and the Regulation of Investigatory Powers Act 2000), the occupier’s liability legislation (note the HEI Court of Appeal case of *Ratcliffe*), student occupations (where else!: the Essex *Djermal* and the Warwick *DeGraff* ‘revolting students’ 1970s cases), and the theft of exam papers. Chapter 21 looks at the Houses in Multiple Occupation legislation, and chapter 23 the management of student residential accommodation (including unfair terms in the licence or tenancy, discipline, debt recovery, eviction, and ‘quiet enjoyment’: all *landlord and tenant law*). And chapter 26 considers lost property, abandoned cars, items left in student bedrooms: all *the law of bailment* (very exciting for sad ‘personal property’ as opposed to ‘real property’ academic lawyers).

12. **THE IMPACT OF EU LAW:** chapter 28 explores the increasingly significant impact of EU (or is it ‘EC’?) Law on our little HE world. This is a ragbag of legal issues: the public procurement regulations (yawn!- see the two *Cambridge* cases); eligibility for ‘home’/ ‘EU’ or ‘overseas’ fees and for LEA/SLC support (several HEI cases); free movement of HEI staff and students within, and mutual recognition of degrees across, the emerging ‘Europe Higher Education Area’ (all those worthy declarations agreed at Bologna, Paris, Prague... next stop for the ‘EU (HE Harmonisation)’ gravy-train is Berlin in 2003; do the Eurocrats ever go to the Scunthorpes of Euroland?); the Competition Act 1998 (extra yawns!...but potentially of application if ever UK HEIs are set free to charge realistic u/g tuition fees and we are called upon to explain why, say, all History degree courses at Russell group ‘elites’ seem to cost the student-punter £4250 pa plus/minus 5%).
13. **TORT LAW:** the law of torts comes into play for HEIs in relation to health & safety on HEI premises (as already discussed), the playing of campus/student sport, going on field-trips and away for a year-abroad (paras \$6.20-6.22, and 6.27 with 20.2-20.8; note the Edinburgh field-study *Tuttle* case, and await the St Andrew’s language year-abroad case). It also, in theory (but hardly at all in practice, so far...), applies to the HEI’s (and to the individual academic’s, as ‘professionals’) ‘duty of care’ in supplying an educational experience to a ‘reasonable’ standard: hence the theoretical possibility, post- *Phelps* (House of Lords, 2000), of an action by an aggrieved student against the HEI (and its academic, or even its administrative, staff as individuals) for ‘academic negligence’/ ‘educational malpractice’/ ‘failure to teach’ (see *HEL* paras \$6.24-6.28 and 6.27, plus the relevant on-line updates and especially the tort section within the case-book). Tort Law, of course, includes defamation, as covered above. Apart from H & S and e-mail/references libel, as

previously emphasised, the average HE administrator really need not be too bothered about torts.

14. **LITIGATION:** finally, if the enhanced legal-awareness amongst the HEI's administrators fails to protect the HEI from litigation, then chapter 24 discusses legal risk insurance (in conjunction with legal risk assessment/management), while chapter 27 contemplates the handling of litigation/arbitration/alternative dispute resolution (mediation, 'med-arb', etc). The emphasis in the latter chapter is on the HEI being an informed purchaser of legal services (even in the heat of litigation) and remaining firmly in the decision-making driving-seat. HEIs can cost themselves vast sums of money employing lawyers to pursue unwise litigation (and risking the legal expenses of the other side being awarded against the HEI), instead of somebody within the HEI taking control and ordering that a settlement be reached: one university has squandered probably the best part of £1m over a decade on three unsuccessful and unrelated chunks of litigation, seemingly without there being anybody within the management bunker actually in charge of 'the legal fighting fund' and able to call a halt or at least ensure vfm.

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