

Protecting free debate

SU policy making structures and the law

NUS has obtained legal advice to clarify the right of students to debate controversial issues students'

Scope

This briefing note concerns formal policy making structures and debating structures operated by students' unions -for example those that can result in the union adopting a formal stance or policy such as General Meeting Policy Debates, Union Council structures or Referendums. It should be read alongside wider advice on keeping activity (particularly political and campaigning activity) within the charitable objects of students' unions as well as the law on charity campaigning.

Policy Debates and Charity Law

Students' unions are educational charities. This presents some particular issues in relation to charity law and the democratic structures of students' unions.

As educational charities, students unions generally will not be able to engage in any activity or incur any expenditure which is not intended to advance the educational experience of their student members in a charitable manner. To do so would result in the trustees acting outside of the union's charitable objects, otherwise known as being in breach of trust. This concept is also sometimes referred to within the students' union movement as "ultra vires".

Where students' unions use democratic structures and processes to facilitate the debate of issues which do not affect "students as students", the use of those structures and processes must be capable of providing educational value and must not be politically biased. This is particularly relevant where referendums and other motions processes result in the pronouncement of a corporate position on a matter of political controversy.

For example, it is clear that a students' union adopting a general moral position and then campaigning on it with union funds would be in breach of trust; yet it is also clear that the act of debating the same position at a union council or

through referendum could be potentially educational in a participative sense.

The question then arises as to how to ensure that students' union democratic structures can provide opportunities for valuable educational debating activity without causing the union and its trustees to be in breach of trust. Where there are risks it is important to consider how these might be minimized by the use of appropriate governance structures, governing documents and processes of the trustees themselves.

Controversy and Contentiousness

Students' unions exist to advance the education of students at the relevant higher or further education institution and in the case of most unions their charitable objects include providing: "forums for discussions and debate for the personal development of students".

Within the educational and democratic structure of Students' unions, referendums, general meetings and council policy debates can be a forum for discussion and debate. Charitable students' unions often pass policy pronouncements which deal with controversial and contentious issues including:

- Human rights
- The situation in the Middle East
- Abortions/pro-life debates
- Environmental issues
- Welfare Reform

In the majority of these cases as well as being controversial and contentious, the issues concerned are not those that affect students as students and it would be difficult for trustees to justify taking a formal public position on the issues or expending resources on trying to secure whatever outcome a policy position demanded. Such expenditure may be in breach of trust as it would be unlikely to advance the Union's educational objects and may also contravene legal restrictions on campaigning by charities.

The legal position

The legal position is that students can debate any issue and this is reflected in the case law concerning students' unions. For example, in *Baldry v Feintuck and others* [1972] 2 All ER 81, the Court held that it was permissible for the students' union to reach 'a corporate conclusion' on social and economic problems. It also held that students' unions can make "reasonable expenditure on debating matters of common concern". However, this is different to expenditure on the outcome.

Generally, if a balanced process of debate results in the corporate expression of a factually accurate, non defamatory and otherwise lawful statement, then expenditure on that process should be within the charitable objects of most students' unions on the basis of its educational value. An open and balanced approach to the holding of referendums and the passing of options following a free, open and balanced debating process could be examples of this kind of educational debating activity.

However, if resources are to be spent on campaigning as a result of the debate outcome, then this must be one which affects students as students – for example tuition fees. This is supported by Charity Commission Operational Guidance OG 48 B3 which specifically says that: "A charitable Students' Union may not support a particular political party but it may:

- encourage Students to develop their political awareness and acquire knowledge of or debate political issues.

So, for example, students' unions can debate and vote on a referendum or other motion on any issue (eg. abortion or the Middle East) as long as the process of debating the motion and reaching a conclusion is educational.

However, if a fair and balanced process results in the passing of a motion which expresses a particular position on an issue of political controversy which did not affect students as students, a resolution to expend resources on a campaign in support of that position would be in breach of trust. This means that whilst it is not necessary for rules to censor or prevent discussion and debate of motions on issues affecting wider society (as opposed to students as students) it is critical to ensure that trustees are able to refuse mandates for action or expenditure in support of such motions.

It is also important to bear in mind that it is generally permissible for a students' union to make grants to student clubs and societies – which may in themselves be political for the purposes of education, provided this is done in a balanced and non-discriminatory way. For example, a grant could be made to the Conservative Students Club or Labour Students club provided grants are awarded in an even-handed manner. Again, this is recognised by Charity Commission guidance OG 48 B(3).

Counter Views and "Balance"

The Charity Commission, especially in relation to education charities, has long argued that "balance" should be a feature of debate where educational objects are involved. Thus where a student submits a motion for consideration to one of the union's debating structures, the question arises as to whether it is for the Union to provide the opportunity for balance or actually to ensure a balanced debate.

NUS has previously argued that upon the submission of a controversial motion, most unions would then allow the submission of counter-motion or amendments which, if lodged correctly and following appropriate processes could themselves be put to a vote. Most would offer to assist in drafting counter-motions and amendments. Most also have procedures intended to drawing out a counter view during the debate if one was prevalent. Certainly most allow for the public display of motions in order for public critique as well as the opportunity for complaint.

However recent correspondence seen by NUS between a union and the Charity Commission implies that even where these safeguards are in place, if the counter view(s) do not manifest strongly there is a material risk that a charitable students' union may be criticised or investigated for not handling the issues in a balanced way.



So, just as it is important for trustees to be able to explain a decision to engage in a referendum on a controversial issue, it would be equally important to set objectives to ensure balance in the referendum (or other motion) process. As part of the engagement with controversial motions tabled and voted upon, the Commission argues that their collective minds should address the overall risks and benefits of permitting such activity because there is a risk that the activity of debate may not be effective (in educational terms), or that the union will be drawn into activities that are outside its purposes.

Trustee Boards should consider steps they might take to ensure that a debate meets the activity's purpose of being educational and takes reasonable steps to secure real debate and balance. This may include writing into by-laws procedures for assessment of issues of this sort, support that can be offered to develop clear counter positions and duties on staff or officers to secure counter views within controversial debates.

The Charity Commission also emphasises consideration of the public's perception of the charity's independence. Again, to protect that perception Trustee Boards should consider taking steps to ensure that where a union is publicly proclaiming its view on an issue it does so in a way that stresses the educational debate that led to the position and the procedures for revisiting it.

Even where a debating process is expected to provide educational benefit, the trustees should consider whether that benefit is worthwhile taking account of any risk that the Students' Union might suffer reputational damage from a perception of political bias, irrespective of whether that perception is unfounded.

Defamation and "free debate"

Following some internal casework and some issues faced by students' unions, earlier this year we sought advice on ways in which unions might defend themselves where they were attacked on the basis of a motion for debate being identified as defamatory. We sought advice on how NUS and students' unions might prevent problems of this nature. In addition we sought advice from a

barrister on whether common law "qualified privilege" might attach to statements made orally or in writing as part of the process of formulation and adoption of policies by students that a students' union holds.

Depending on the provisions in a constitution, this might happen at a students' union General Meeting, a Union Council, an Executive Committee or by means of Referendum.

Traditionally, the view that has been taken has assumed that NUS or students' unions only face a risk in relation to agreed policy at the point that they **formally adopt** a policy. Both cultural processes and formal constitutional positions tend to reflect this working assumption – indeed, the NUS Trustee Board is empowered to veto a decision on the basis of legal risk, but not the **publication** of a **proposal** from a union. In the past decisions have been taken not to publish resolutions of a meeting or conference, or at least to downplay public disclosure on the basis of such risks. Thus both NUS and students' unions tend to look carefully at minutes and resolutions of meetings rather than proposals that come to meetings for debate.

The problem with this approach is twofold. Firstly it is clear that in the age of social media and instant publishing, motions or proposals to meetings that might previously have avoided scrutiny by the outside world are now distributed freely and can quickly be picked up nationally. The difference between a **proposal** to a meeting from a member and a **resolution** of a meeting is likely to be lost on journalists or the general public that read reports of motions being debated.

In addition, unions have traditionally argued that their structures are merely "conduits" for student opinion and as such they cannot be held responsible for all of the opinions of their members, even when expressed formally in the form of a published proposal or motion. However it is clear that the act of publication of a defamatory view is in and of itself problematic, and our previous assumption of a "conduit defence", particularly in light of the social media and instant publication of content referred to above, is not at all sound.

Precautions-defamation and “free debate”

As a precautionary measure, Trustee Boards should ensure that there are procedures for reviewing the text of any motion or proposal being presented to any democratic body before it is published. This can be required without a motive of censorship but to ensure that unions are able to allow student representatives to debate issues and the actions of individuals free from the risk of legal threat.

As a result, anything presented to a democratic body that

- a) makes a judgment about or includes a view on an individual; or
- b) makes a judgment about or includes a view on an external organisation or company

...should be reviewed centrally before it is formally published. This is so that unions can determine whether it includes defamatory allegations of fact in respect of an individual or an organisation or company and refuse publication or debate of the motion until appropriate amendments are made.

Constitutions

When the existing model constitution for students’ unions was drafted it afforded considerable political autonomy to democratic bodies on the basis that a Trustee Board could step in to mitigate or prevent risk by the veto or overruling of a decision. Clearly, because taking steps to address the issues above requires stepping in at the publication-of-proposal stage, this mechanism is unsuitable.

Thus unions’ by-laws should include a power for an officer or body to review, cause the revision of or require the ruling out of order of any

motion prior to publication on the basis of defamation or other legal risk. Accusations within motions should be subject to a basic standard of proof before being allowed to be published.

The standard of proof ought to require robust evidence for any allegation being made

The standard of proof ought to require robust evidence for any allegation being made. For example, where the basis for an allegation is the reported comments of an individual, the proposer of the motion ought to go to the horse’s mouth to verify that the individual (or indeed, spokesman of a corporate entity or group) really made those comments. Proposers should be required to take care to avoid being fooled by misreporting, comments taken out of context or even by third parties impersonating that individual/spokesman, for instance on fake Facebook profiles. Defamatory facts ought to be sourced (reliably) from the person/organisation being criticised and/or from robust, reliable third-party sources (ideally multiple sources).

Qualified privilege for defamatory statements

Common law qualified privilege is a public policy defence designed to give protection from suit for defamatory statements where it is recognised that in the particular circumstances the public interest in ensuring freedom of communication outweighs the competing public interest in protecting the individual’s reputation. It is qualified because if the publisher is malicious (i.e. they have a dominant improper motive in making the statement, usually best illustrated by their knowledge that what they were saying was not true or their recklessness as to whether or not it was true) then the privilege will be lost. A classic example of a privileged occasion is an employer’s reference about an employee, but there are many different occasions that may be protected for policy reasons.

The key ingredient is that there be reciprocity between the publisher (the person who speaks, adopts or authorises the words) and the person(s) to whom they are spoken or disseminated. It is established, for example, that privilege applies where the publisher has a duty to publish to a person with a corresponding interest in what is said, or the words are published in protection or furtherance of a legitimate interest to someone with a similar or common interest.

Before analysing the application of privilege, it is necessary to identify the acts which could give rise to a cause of action in defamation. Anyone who participates in a publication may be liable; it is not necessary to be the author or speaker. In the case of students' unions process of formulation and adoption of policies (as provided for in a constitution) the acts which could create liability include one or more of the following (relevant to what happens in preparation for and during the processes or meetings):

- (i) the author of the motion (in writing it);
- (ii) the proposer or seconder of the motion (giving it their authority or approval);
- (iii) those who vote for the motion (giving it their authority or approval);
- (iv) those who speak in favour of it during a debate (who, depending on what they say, could also be separately liable for any additional defamatory allegations they make); and
- (v) the students' union (i.e. the Trustee Board, Executive or Council on its behalf) making the motion and any minutes of the meeting containing the motion available to all members outside of the meeting where it was debated and adopted (assuming the motion contains the defamatory words).

Each of the persons in (i) to (iv) above would in theory be exposed as individuals to a claim in libel or slander for the defamatory words published by him or her. However, the proposed claimant potentially could sue the students' union as a legal entity for its liability for the statements complained of by others. This could be on two bases: (1) as a primary publisher, for example because the adoption of the policy containing the offending words makes the students' union a publisher in its own right (and as in (v) above); or (2) possibly as vicariously liable for statements made by its officers (where applicable).

Central to any defence is the constitutional and governance structure and procedures by which policy may be formulated and adopted. This should include an in-built arrangement and procedure designed to ensure that when policy is proposed or adopted there is accountability to the student constituency whose interests are specifically affected by the policy.

Grounds for qualified privilege

In the barrister's view the publication of a defamatory statement during the course of such a process (assuming full compliance with the relevant constitutional provisions) would in principle be likely to be **protected** by qualified privilege for the following reasons:

- The role of the students' union is to carry out its mission and fulfil its objects; this is done by debating and then implementing policy.
- The policy has to be formulated. This is done under the constitution by giving power to various bodies which are empowered to formulate and carry out policy relevant to the interests of students and thereby to achieve the mission and objects of the students' union.
- Where unions use online means to publish motions and amendments only to their members, the barrister argues that they should also be protected by qualified privilege. The web is now the accepted means of disseminating information to a large number of persons and members would have a legitimate interest in reading these materials so as to follow and understand how policies made in promotion of their interests or in their defence were made. However, where materials are available to the whole world on an openly accessible union website (as opposed to say protected behind a members-only password) in that respect the privilege is not clearly available.
- It may be that defamatory statements are made during the course of the procedure for formulating and adopting policy -within a meeting, for example. This could be in the original motion or the resolution if different, or in the course of debate being streamed online (depending on details of the debate arrangements, such as how it is streamed and who has access to the stream). The danger of there not being a qualified privilege defence available is that those participating in the procedure, whether as original proposer of the policy, debater or in voting for it, may well feel inhibited from contributing due to the threat of a theoretical defamation suit hanging over them.



- Local politicians have long enjoyed a qualified immunity so that they may speak freely (but honestly) in the relevant democratic forum on any matter which they believe affects the interests or welfare of their constituents, and it is difficult to see why that principle should not extend to elected students union representatives.

Even where qualified privilege may apply, it will not protect a “free for all” where anything can be said with impunity. It would NOT be available:

1. Where a defamatory statement is gratuitous or irrelevant to the occasion where it is published (and it turns out to be factually wrong). The risk of such statements being made will be strongest during oral debate, so those chairing democratic students union debates must exercise particular care.
2. Where the persons claiming qualified privilege are malicious. If the originator of a statement is malicious, liability for the malice passes up to all other parties participating in the publication.
3. Where any published record of a motion or debate is not fair and accurate, e.g. failing to reflect any denials of defamatory factual allegations.

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