

Richard Sykes, Head of the Birmingham Education Team at Mills & Reeve LLP, tells us his 10 legal issues of 2008 that are likely to resonate during 2009

# TOP 10 **LEGAL** ISSUES OF 2008

## 1. CHARITY LAW

During 2008 the fuller implications of the Charities Act 2006 came into sharper focus. Students' unions sought to identify formally their trustees and reconsider their legal structure, reviewing the pros and cons of company limited by guarantee and the new charitable incorporated organisations. A raft of consultation and guidance hit the education sector, particularly on public benefit, with the guidance on fee-charging charities proving particularly controversial.

## 2. DISABILITY DISCRIMINATION

A quiet year in terms of new disability discrimination legislation (with two statutory instruments and no acts). However, the amendments to the

application of discrimination legislation to general qualifications (e.g. GCSE and A-level) show the significance of 'competence standards' and 'reasonable adjustments' to those involved in education and assessment, issues likely to give rise to further dispute in the coming year. There were two significant cases on disability discrimination during the year. Mrs Coleman's win at the European Court of Justice has the effect of requiring UK law to protect workers (and university students) from direct discrimination or harassment on grounds of their association with a disabled person. Ms Coleman's claim was that she was forced to resign from her job as a legal secretary after being harassed and discriminated against by her employers because she was the carer of a disabled child. The court ruled that disability discrimination by association is unlawful in the workplace (Coleman

v Attridge Law).

Meanwhile, the House of Lords held that Lewisham Council had not discriminated against a tenant whose conduct (which arose because of his disability) led to the termination of his tenancy. Their Lordships changed the law about with whom a disabled person should be compared and stated that the Council would have to have known about Mr Malcolm's disability (London Borough of Lewisham v Malcom).

Both cases will have implications for universities' relationships with their employees and students and are likely to be subject to further development over 2009.

## 3. HER MAJESTY'S REVENUE & CUSTOMS

Also in the House of Lords, Newnham College, Cambridge defeated HMRC's challenge to the college's "skilfully prepared and carefully executed" VAT arrangement for its new library building. The £1.3million saving made by the college is significant, as is HMRC's willingness to pursue the case to the highest court in the land: this

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persistence has become a feature of the approach of HMRC.

More recently, HMRC has changed its view on the treatment to be applied to Stamp Duty Land Tax on shared equity schemes (under which an employer assists its employee buy a house). As this change greatly affects the cost of such schemes, we anticipate a challenge to it.

#### 4. INTERNATIONAL

Universities continued to develop their strategies for overseas operations, particularly in the Middle and Far East. A range of different and creative approaches has been taken, from collaborations and alliances with local institutions to the creation of campuses.

The context for the internationalisation of higher education is changing as various jurisdictions, such as China, India and Malaysia, develop local expertise and consequently look to interact with UK institutions (amongst others) in ways which present new challenges.

However, long heralded plans that the Indian Government would introduce a Bill to open India's higher education sector to foreign entities and regulate their entry and operation appear to have been again put on hold. The bill was approved by the cabinet in February 2007, but is delayed by the formulation of policy and regulation.

#### 5. IMMIGRATION

The introduction of the points-based system for immigration has presented universities with many challenges. At the time of writing, most have obtained a sponsor licence for staff (required since 27 November 2008 if recruiting from outside the European Economic Area (EEA)) and have obtained or are seeking a sponsor licence for students (required by March 2009 if recruiting

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from outside the EEA). From autumn 2009, universities will be obliged to report to the UK Border Agency if an overseas student fails to enrol or, having enrolled, fails to attend sufficient “expected contact” points of his or her course.

The precise meaning of “expected contact point” and practical implications of compliance will be a major issue for those who are concerned with the issue of compliance within universities.

#### 6. EQUALITY

Like other public bodies, universities are under general statutory duties to have due regard to the need to eliminate

unlawful discrimination and promote equality of opportunity on grounds of, race, disability and sex. The time is ripe for universities to review their disability and race equality schemes.

Plans for a Single Equality Bill announced during 2008 included the introduction of a revised general equality duty; the simplification of the language of the anti-discrimination laws; provisions requiring public

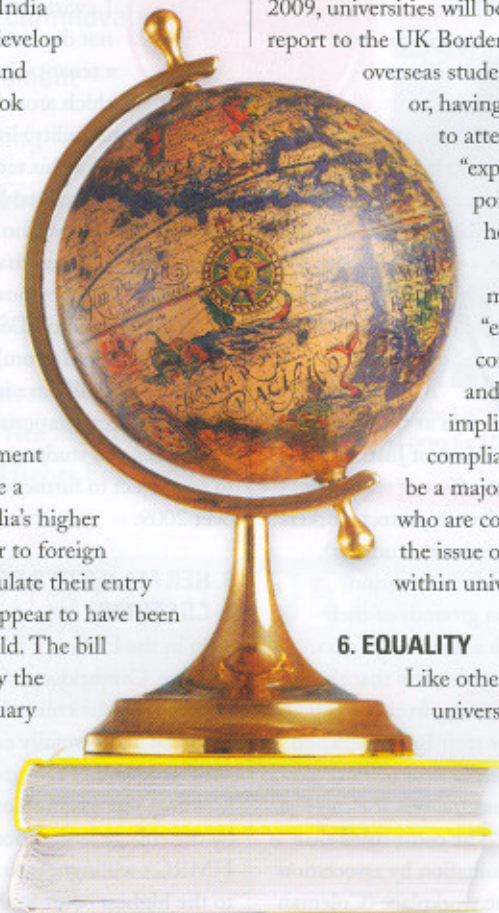
bodies to become more transparent in their promotion of equality through publication of equality statistics; and the use of public sector procurement to promote equality in the private sector.

The Queen's speech, which was broadcast on 3 December 2008, indicated that the bill is expected in the next parliamentary session.

#### 7. FREEDOM OF INFORMATION

In September, *Times Higher Education* carried an article by Jon Baldwin, Registrar of Warwick University, in which he described the burden imposed on a university by the Freedom of Information Act 2000. During the year there were a number of decision notices published by the Information Commissioner on its website, which involved involving universities, most notable of which were:

- Southampton University - in which the university was found not to have complied with the duty to provide advice and assistance by not identifying how the requester could reduce its request to one that would fall within the costs threshold



- Kings College, London - in which the college was not required to disclose its standard (WADA and UK Athletics approved) techniques for testing for performance enhancing drugs in athletes on the basis that doing so would endanger the health and welfare of athletes, and
- University College London - in which the college was required to disclose certain information relating to high profile staff research

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All public bodies that are covered by FOIA must have adopted a revised FOIA Publication Scheme by 1 January 2009. Under the FOIA, the Information Commissioner's Office, (ICO) must approve all publication schemes. To reduce bureaucracy, the ICO has approved one Model Publication Scheme for all public

authorities. If a public authority adopts the Model Scheme unamended the ICO's approval will not be required, but the ICO will carry out spot checks in February 2009 to check that the Model Publication Scheme is in place.

### 8. FINANCE

Aston University's novel charitable body for optimising the benefit to the university and its students from its £215 million student



apprenticeships and training of the companies which they appoint in their building programmes may make their way into the HE sector. The focus, announced last year, on sustainability (Higher Education Funding Council for England circular 2008/04) will increase the importance of obtaining at least a 'Good' BREEAM rating for construction work.

accommodation project set new standards in big HE projects.

Changes to the rules surrounding the gains from PFI re-financing announced in October 2008 seek to protect the investment by taxpayers by increasing the proportion of gain enjoyed by the taxpayer. Whether these changes will be reversed in light of the more difficult economic circumstances over the next year remains to be seen.

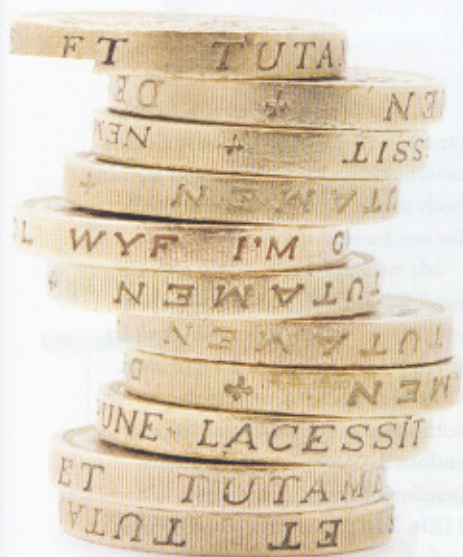
### 9. CONSTRUCTION

Clear statements by the Department for Innovation, Universities and Skills requiring FE colleges to take into account the commitment to

### 10. HEALTH

For institutions with a medical school, there is the opportunity to partner with the National Health Service and bid to become one of the UK's first Academic Health Science Centres (AHSCs, such as Imperial College Healthcare), to rival the likes of John Hopkins in the United States. The Department of Health has declined to put an upper limit on the number of AHSCs it will recognise, but there will be a tough vetting process which not all applications will survive.

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### JUST OUTSIDE THE 10...

- **Directors' duties** During the year, more of the obligations and provisions of the Companies Act 2006 came into force, changing the obligations of directors of university owned companies.
- **Academies** During 2009 it is likely that more universities will take up the July 2007 challenge for higher-performing education

institutions to sponsor academies. The government is prepared to waive £20million required from private sector, non-education institution sponsors.

- **Creditors and debtors** Ensuring projects remain on schedule will be an issue as commercial partners and contractors face a tougher economic climate in 2009.