OPEN UNIVERSITY STUDENTS ASSOCIATION

Central Executive Committee (C E C)
13 – 15 October 2017

INCORPORATION

The C E C is asked to:

i) **note** the background and update

ii) **comment** on the proposed areas for student consultation

iii) **comment** on the future name of the newly incorporated body

iv) **agree** the level of detail that would be usefully shared as the project progresses

1. **Background**

1.1 CEC members will recall from the regular reports from the Board of Trustees (particularly papers 10/16/6, 1/17/6 and 4/17/6) that the Trustees have approved the instigation of a project to progress the incorporation of the Students Association as a charitable company limited by guarantee. This project includes a due diligence process to consider the practicalities, advantages and disadvantages and the engagement of an external consultant to project manage the process.

1.2 The OU Students Association is currently an unincorporated association, meaning that the organisation does not exist as a legal entity in its own right. Our Trustees therefore lend themselves to serve collectively as our legal body, underpinning all contracts. This is not uncommon in charities or indeed in Student Unions. In fact, Student Unions were first registered as unincorporated bodies following a change in charity law in 2011 which meant that all Student Unions had to register fully with the Charity Commission. Gradually as the years since have gone by, Student Unions have gradually been incorporating with a few completing the process each year.

1.3 The Constitution provides the ability for the OU Students Association to incorporate at paragraph 6, whereby Conference can authorise the Trustees to transfer all assets and liabilities into a limited liability entity established for exclusively charitable purposes with the same or similar objects, and to
dissolve the unincorporated Charitable Trust any time following the transfer if it is considered appropriate to do so. In essence, a resolution must be put to the vote at Conference and passed under the same terms as apply to all other Conference resolutions (40% quorum, 75% approval to pass).

1.4 However, all of the background preparation work needs to take place to prepare for this resolution and lay the ground work to implement the decision thereafter. There are a lot of moving parts to be considered which include but are not limited to examples such as the TUPE of all staff over into the new entity, the transfer of pension commitments and payroll, the transfer of bank accounts into the new organisation’s name, the setting up of the new body and the holding of its first Board meeting to appoint all the external providers and advisors that we have, the University’s agreement of the new governing document, registration of the new body with the Charity Commission, Companies House and Office of the Scottish Charity Regulator. Ideally, the transfer over into the new body would occur to coincide with the beginning of our financial year on 1 August 2018 to keep things as neat as possible.

2. **Rationale**

2.1 There are a number of drawbacks to being unincorporated. The Trustees are personally liable for any debts or in the event of a prosecution in relation to regulatory issues such as health and safety incidents. Strictly, the legal title to all of the Association’s assets lies with the Trustees and all contracts in place for the Association are completed in their name. Owning and operating subsidiary organisations, including a trading company, is more complex. Any legal action taken by or against the Association would have to be done in the individual names of all of our Trustees.

2.2 Clearly, Student Unions operate in an inherently contentious and heavily regulated area and the additional burdens on Trustees are not insubstantial. The personal liability that comes with taking on a Trustee role in these circumstances can often act as a significant barrier to new individuals who would otherwise consider acting in this capacity. Of course, being a charity Trustee (and Director of a Company) always carries a level of personal responsibility and accountability but our current situation places our current Trustees at a greater level of personal risk than is necessarily prudent or appropriate, particularly as the organisation has doubled in size since 2012 (both in income and in staff numbers).

2.3 If the Students Association was incorporated as a company limited by guarantee or charitable incorporated organisation, this removes the personal liability for any debts (unless trading whilst insolvent or otherwise negligent), any litigation carried out against or on behalf of the Association would be carried in the organisation’s name and all of the Association’s contracts including those related to employment would be registered in the name of the organisation and not that of individual Trustees. The situation over owning a subsidiary trading company becomes slightly less complex.

2.4 There are disadvantages to going through incorporation, although these are mainly short-term ones. This is a large undertaking requiring a substantial amount of time, money and consideration. A new charity will need to be established which will require a new charity number and there is a risk that
without a methodical due diligence process we could trigger unintended consequences of the change in structure.

2.5 For this reason, the Trustees have approved the engagement of an experienced external consultant to project manage the process. We are pleased to have appointed Tim O’Brien of Optimum Support into this role and Tim brings substantial experience of charities, incorporation and other similar projects. The Trustees have set aside funds from the commission earned from sales of the NUS Extra card to support the costs of this work. We are also making use of our quality external advisors, including our lawyers Stone King who are one of the top charity firms in the UK and the services of our HR Consultants RSM UK and auditors James Cowper Kreston. In addition, we are bringing in additional external legal advice from pensions experts ARC Pensions Law to help us navigate the complexities of the transfer of our pensions into the new entity.

2.6 Our current Constitution was based on model documents provided by the NUS and we are again making use of their model documentation for the Company Limited by Guarantee structure which we will then adapt to our own specific context and needs.

2.7 This year is a challenging one with having Rules Revision and a Remits Review ongoing at the same time as this process. However, we intend to be able to take on board the outcomes of the Rules Revision into the new governing document (Memorandum and Articles) if the resolution to support incorporation is passed at Conference 2018. The documents will be drafted accordingly.

2.8 The Trustees, having considered appropriate legal advice from Stone King, have agreed that the charitable Company Limited by Guarantee (CLG) structure likely offers the best fit for the Students Association, rather than the newer Charitable Incorporated Organisation structure. This is because the CLG is a tried and tested structure and is one which is more familiar to third parties including banks. The CLG model also offers greater flexibility than the current CIO model when dealing with matters such as conflicts of interest which is important when we have subsidiary organisations such as OUSET and OSL which share some Directors/Trustees/staff and due to our relationship with the University’s own governing body in having our President serving as Council member whilst also serving as one of our Trustees. In addition, we have also linked up with other Student Unions who have recently incorporated and the vast majority have followed the CLG route.

3. Progress so far

3.1 Since the appointment of Tim as Project Manager, we have been working through the planning and preparation for the process. A detailed route map is attached at Appendix 1 which provides an overview of the major actions to be completed along the route to completing the project. We are adding to this as our due diligence process proceeds.

3.2 We wrote to the University Secretary in August to formally ask the University to allocate to us a key liaison person for the project who will be able to assist us with navigating any internal issues within the University, including aspects
where we share their services (e.g. pensions, finance, payroll, estates) and to review with us the possibility of agreeing a joint Memorandum of Understanding (MoU) about what we’re trying to achieve and what each of our roles will be in achieving the intended outcomes. The Acting University Secretary identified Jerard Bretts as the key liaison point and a first meeting has been arranged where we can brief Jerard and colleagues from the University’s Finance and Legal teams.

3.3 We are exploring the implications relating to our bank accounts and pensions and will be looking to advice from ARC Pensions Law to help us navigate through pension transfers and to RSM UK to assist us with progressing the TUPE of staff.

3.4 We have been in touch with the NUS to obtain model documents and flag our intention to incorporate in 2018 in case of any changes in their relationship/dialogue with the Charity Commission.

4. **Next steps and areas for comment/feedback**

4.1 We will be giving regular updates to the Board of Trustees on progress with the project, including at their next meeting on 2 November 2017. We would welcome comments on the appropriate level of detail to provide to CEC members as the work progresses.

4.2 One of the major areas that we are considering is how best to communicate to students and next year’s Conference delegates the particular issue of how membership could potentially be dealt with as a Company Limited by Guarantee.

4.3 It is possible to specify the rights and responsibilities of a wider membership so that the current rights and responsibilities of Students Association members can be maintained in the new incorporated body. The Articles of Association would draw a distinction between a wide public membership (like that of all current members of the Students Association as prescribed at present) and that of the prescribed company-law/charity-law role which is taken on by the formal legal members of the CLG (in our case, likely the Trustees). This model is common both in Student Unions and in other forms of membership charities. In essence, all Students Association members would enjoy the same rights and responsibilities as they have at present and the charity would remain accountable to members through Conference and elections. However, the formal legal role would be reserved to a much smaller group. This is because the legal members of a CLG are required to act in the interests of the charity (which is a responsibility that not all students will be able or willing to take on) and a CLG is required to maintain a register of its members and update Companies House accordingly. This is quite an administrative burden should every member be a company member at circa 170,000 students.

4.4 Clearly, we will need to be able to articulate this to members and to delegates at Conference if this is the chosen method of best fit.

4.5 We intend to run a student consultation in November 2017, subject to approval from the consultation management group and schedule allowing, using the University’s student consultative online forum and are working on an outline
Memorandum of Understanding document [1st draft attached at Appendix 2] aligned to some form of Q&A document. We would appreciate the CEC’s views on what they see as being the likely key areas of enquiry for students to help us in seeking a smooth incorporation process. The MoU is intended to ensure mutual understanding across the organisation and with the University about our intended direction of travel, the rationale for proceeding and our agreement on specific matters as they emerge.

4.6 Finally, we would also appreciate any early comments or thoughts on potential names for the new body or support for sticking with Open University Students Association.

Rob Avann, General Manager
Tim O’Brien, External Project Manager