Optimum Support

OUSA

Incorporation Summer 2018 Project

DRAFT of Issues to cover in Memorandum of Understanding (MoU)

Prepared by Tim O’Brien for consideration by the OUSA Trustees and the CEC to be used:

- as the framework for the incorporation process;
- as a tool/backdrop for student consultation;
- as a basis for advising/informing the OU of the objectives of the project.

The MoU will not be a legally binding document. The ratification of incorporation will be made by the Association’s membership at the 2018 Conference.

Background & Rationale

- OUSA is a Charity registered with the Charity Commission for England & Wales and with the Scottish Charity Regulator (OSCR). It is an unincorporated association whose legal governance is through a charitable trust. It is also a student union within the meaning of the 1994 Education Act. It receives its operating funds in the form of a subvention from the Open University (OU).

- The association does not exist as a legal entity in its own right but, as a charitable trust, has a Board of Trustees who are legally responsible for the governance of the membership association.

- The Trustees are personally liable for the debts of OUSA (to the extent that any such debts exceed the assets of OUSA).

- The Trustees are personally liable in the event of a prosecution in relation to regulatory issues such as health and safety incidents.

- In the event of any litigation, OUSA would be required to sue (or be sued) in the name of the individual Trustees.

- The legal title to OUSA’s assets (including any investments or property interests, for example), strictly speaking, lies with the individual charity Trustees.

- It is also strictly the case that contractual documentation (including employment contracts or other contracts for services) are in the names of Charity Trustees on behalf of OUSA.
• It is considered that this structure in an increasingly regulatory and litigious environment is unsustainable as significant personal liability may be attached to Trustees.

Proposed new Legal Structure & its Advantages

• It is proposed that OUSA incorporates (becomes a company). It would be a Company Limited by Guarantee (CLG). It would still be a charity and would register with the Charity Commission as a CLG.

• As a company, a CLG has formal legal members. It is envisaged that the current Trustees would become the legal members of the CLG. These legal members differ from membership of the student association whose membership's rights will be retained as determined by the Constitution and Bye-Laws.

• The charitable objectives and legal Governance of the Charity will be enshrined in a document called the Articles of Association. This will replace the current Trust Deed of the Charity as the principal legal governance document.

• By structuring in this way, the Trustees would no longer be personally liable for the debts of OUSA. This is due to the limited liability nature of the corporate structure of the CLG, although it should be noted that the Trustees (as Company Members/Directors) would potentially remain personally liable in the unlikely event that OUSA were to be involved in insolvent trading.

• The CLG, rather than the Trustees, would be the primary defendant in any regulatory or criminal prosecution, although some of the Trustees could still be personally liable if they were considered to be responsible for any significant health and safety failing.

• Any litigation entered into or defended by OUSA would be carried out in the name of the CLG, not individual Trustees.

• All of OUSA’s employment and other contracts would be registered in the name of the legal entity (the CLG).

• The CLG will be the parent (sole shareholder) of the trading subsidiary, OSL, without the need for individuals to be holding shares on behalf of OUSA.
[Assets, Employees & Contracts

- Some brief detail to be inserted]

[Process & Timetable

- Some brief description here cross-referencing to the Route Map]