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AHUA

Perspectives

Legal updates for the world of higher education

Dear Colleague

With the scheduled date for the UK's departure from the European Union getting ever closer (11pm, 29 March 2019), this year is likely to see more turbulence in the political and economic landscape. What will this mean for individuals and their civil and political rights?

Towards the end of December last year, the Government published its long-awaited White Paper setting out its proposals for a new immigration system post-Brexit. In this edition of Perspectives, our head of immigration, Alex Russell, considers the implications of the Government's proposals for higher education and research.

We also look ahead to what the human rights landscape will look like in the UK post-Brexit and highlight an important project getting underway by the Law Commission in 2019 which will review the adequacy of hate crime legislation in England and Wales.

While the Law Commission's project and recommendations will be relevant for the flourishing of our society generally, we also note in this introduction the new inquiry which was launched on 4 December 2018 by the Equality and Human Rights Commission to look specifically at the issue of racial harassment in universities and whether there are effective and adequate routes for redress in the event of unlawful conduct. The EHRC intends to report in the autumn of 2019.

Attention will also be focused in the coming months on the outcome of the Government's review of how post-18 education is funded, following on from the outcome of the review on 17 December 2018 by the Office of National Statistics to reclassify a portion of the Government's student loan payments from this autumn as Government spending. What impact will these reviews have on institutional sustainability and on the resources required to be provided by taxpayers, institutions, students and other stake-holders in order to ensure that the opportunities afforded by higher education are accessible to those coming from all backgrounds?

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In this issue:

"...the UK immigration system will apply consistent rules to EU and non-EU nationals alike with a focus on skills."

The impact of the Immigration White Paper on universities

The long awaited White Paper on the UK's future immigration system was published on 19 December 2018, heralding the most significant changes to the UK immigration system for around 40 years. The White Paper will be the subject of consultation throughout 2019.

Assuming the Brexit Withdrawal Agreement is ratified, there will be an implementation period until the end of 2020 (during which the current rules will continue to apply), with freedom of movement ending on 31 December 2020 and new immigration rules expected to come into force on 1 January 2021.

The key recommendation of the White Paper, building on the report of the Migration Advisory Committee in September 2018, is that the UK immigration system will apply consistent rules to EU and non-EU nationals alike with a focus on skills. On the face of it this is encouraging for the higher education sector. This message is, however, somewhat confused by a number of references to exemptions and privileges that will apply to nationals of 'low risk' countries, in line with trade deals or reciprocal arrangements that the UK may agree. As such, the more complex picture presented of the post-Brexit landscape suggests that whilst the ostensible aim will be to attract the "brightest and best", in reality a significant premium will be placed on migrants with access to significant capital, high earners, and parallel rules linked to bilateral trade or other international arrangements. There is a nebulous overarching policy aim to "reduce annual net migration to sustainable levels", with uncertainty about whether the Government's previously stated aim to reduce net immigration to the "tens of thousands" is retained.

Staff issues

The White Paper is something of a mixed bag in relation to the recruitment of workers. Some proposals will be welcomed by universities, with others giving rise to concern.

Potential workers will be required to obtain immigration permission under a revised points based system, with the key features as follows:

- The resident labour market test, which is one of the main compliance hurdles and recognised by the MAC as having limited value, will be scrapped. The 20,700 annual cap on visas for entry clearance applications will also be removed. This is likely to reduce the administrative burden and risks faced by universities and speed-up the process for obtaining work visas. This is consistent with the aim to process skilled migrant applications within a "two to three week" period, although it seems likely this ambitious aim will require a significant recruitment drive for case -workers.
- There will be a skilled route to include workers with intermediate skill levels as well as graduate and post-graduate roles . Interestingly, the MAC's recommendation of retaining the minimum salary threshold at £30,000 (without regional variation) will be the subject of further consultation and the shortage occupation list (SOL) will be reviewed. Operating a £30,000 salary threshold (or the 25% earnings threshold of that occupation, whichever is higher) would cause difficulties for universities when recruiting into some roles (e.g., some post-doctorate research roles). But it seems likely that various exceptions will be made, including possibly retaining a lower 'new entrant' rate for recent graduates and younger workers, using the SOL to fill key roles which typically attract a lower salary, and to account for variations across the different nations of the UK. Some of these measures have been hinted at by the Home Secretary during media interviews following the publishing of the White Paper.
- Hints at parallel rules from certain low risk countries such as the USA, New Zealand and Canada may make it more straightforward (and / or less costly) for universities to recruit academic and research staff who are nationals of these countries. The Tier 1 (Exceptional) talent category, a potential options when recruiting senior academics, will be retained.
- Universities which have typically used EU nationals to fill lower skilled and lower paid roles (e.g., in business support functions) will be concerned about the lack of a route specifically for low skilled workers, particularly against the backdrop of a default £30,000 minimum

salary requirement. There appears to be a clear policy imperative to reduce what the Government perceives as a reliance by employers on lower skilled workers from the EU. Whilst there is provision, as a transitional measure until 2025, to institute a time-limited route for temporary short-term workers for a maximum of 12 months (with cooling off period of a further 12 months to prevent long-term work), it seems likely that this will be limited to certain sectors such as construction and social care and will not benefit the higher education sector. Furthermore, the route will be open only to nationals of specified countries, will not carry entitlement to access public funds or to bring dependants, and will not lead to permanent settlement. As such, it is likely to be of limited attraction to many lower skilled workers, particularly when set against the back-drop of the recent decline in value of the sterling which effectively reduces the value of UK earnings for many migrants.

- Of more significant concern is the apparent aim to adapt the current sponsor licence / points based system to cover EU nationals. Tier 2 would effectively become the main immigration route which universities would be required to use to recruit EU (as well as non-EU) nationals. The sponsor licence system is recognised as a significant administrative burden for universities, many of which already have sizeable (and costly) immigration compliance teams. It is difficult to see how it will be practicable for universities to administer even a streamlined version of the sponsor based system and manage dynamic compliance obligations without deploying significant additional resources. How the Home Office, which struggles to meet existing service standards, will be able to administer such a system and subject sponsors to current levels of compliance scrutiny without substantially increasing funding and staffing remains to be seen. The Home Office HEAT team, which undertakes compliance audits in the higher education sector, has been reduced in size in recent times.

- Whilst some of the current compliance hurdles may be removed, it appears that a financial 'stick' may be used to indirectly reduce reliance by employers on workers who require visas. The White Paper refers to the immigration system being self-funding and that increasing the amount of the Immigration Skills Charge (currently set at £1,000 per annum per worker, albeit with an exemption for academic and research roles, and widely anticipated to be increased), may regulate the number of immigration applications. The Immigration Health Surcharge, which doubled this month to £400 per annum for workers (and to £300 for students), will continue to apply.

There will be provision for EU nationals to visit the UK to undertake limited activities (e.g., attend meetings and conferences, discuss matters relating to their overseas employment, and holiday) without having to obtain a visa in advance. EU nationals will welcome the proposal to continue to use e-gates to facilitate swift entry, and there is a suggestion that use of e-gates may be expanded to other "low risk" nationalities such as Australia, Canada, Japan, the USA and New Zealand.

Student concerns

Proposals in relation to student visa rules and the potential impact on student numbers are, perhaps, less encouraging.

As is the case with workers, the White Paper proposes a single system to cover all international students, whilst obliquely referring to "differentiation" to benefit students from certain countries with a "strong track record of immigration compliance". Given that current exit checks show a high level of compliance with immigration requirements (approximately 97%), it is difficult to see what this can mean. In practice, such favoured countries are likely to be those where political and national expediency supports a parallel body of rules.

On a positive note, undergraduates who have studied at institutions with degree awarding powers and full time postgraduates will be offered six months' post study leave, providing additional time to find permanent skilled work in the

UK. This period will be extended to 12 months for students who have completed a PhD (replacing the current Doctoral Extension Scheme). The switching rules will also be tweaked, enabling students to switch into the skilled workers category up to three months before the end of their course, and from outside of the UK for two years after graduation. The latter proposal, in particular, may be an attractive feature for international students when assessing the country where they wish to study.

Of concern to the higher education sector will be what the White Paper acknowledges as "additional processes, requirements and costs that could deter some applications" from EU students, notwithstanding that the Government intends to work with the sector to develop "a new digital system". Institutions will be faced with having to sponsor EU as well as non-EU students. Given non-UK EU students studying in the UK currently number around 135,000, there will be concerns about the administrative burden and potential implications of compliance failures associated with this, particularly as the White Paper makes clear that the Home Office will continue to take robust action where failures are identified. Furthermore, although a matter for Parliament and devolved administrations to determine, there is a significant risk that EU students not covered by the Withdrawal Agreement may face increased tuition fees and reduced entitlement to student finance. One assessment conducted in January 2017 estimated that the impact of harmonising the rules for EU and non-EU students could result in a 57% reduction in enrolments from EU students.

A revised White Paper?

It seems likely that a revised White Paper will be issued at some point in late 2019 or early 2020, taking into account the terms of any ratified withdrawal agreement with the EU and the views expressed by employers, sector bodies and others. Historically, the higher education sector has been very effective at participating in consultation exercises on future changes to the immigration rules. Engaging in the coming months with the proposals set out in the White Paper and providing evidence based representations may prove to be of great importance in preserving higher education as one of the UK's most significant national assets.

Any questions?

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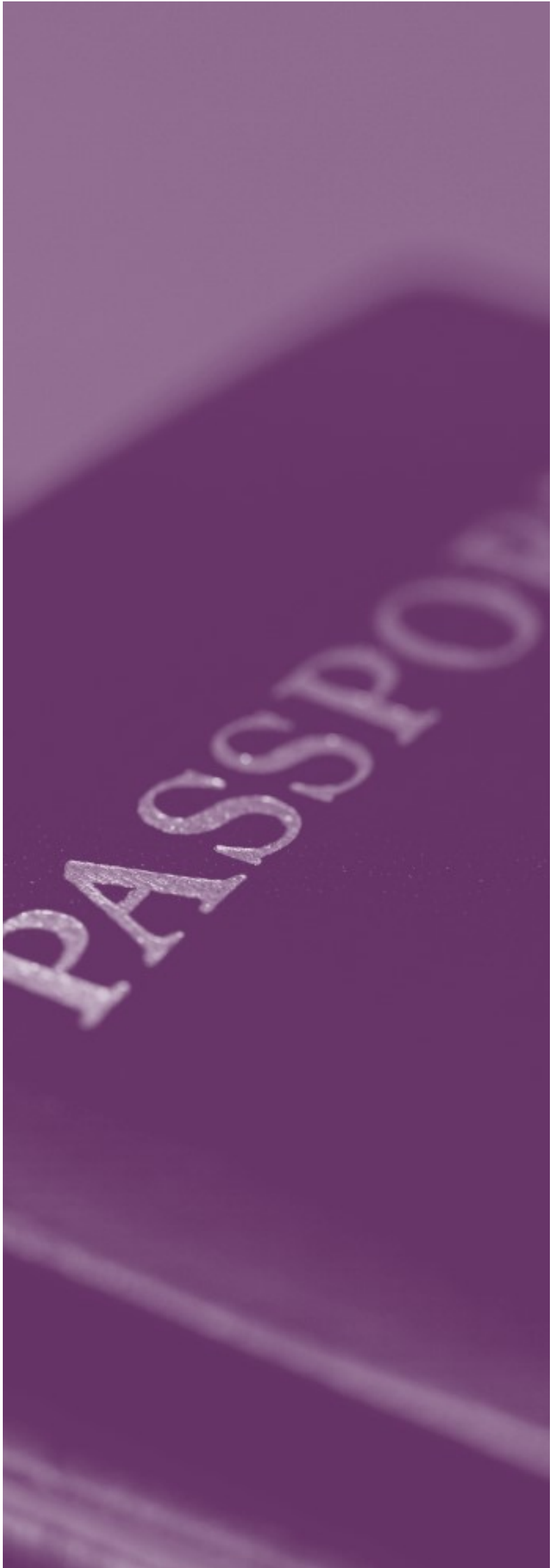

"Statutes like the Human Rights Act can be amended or repealed by Parliament, if there is political support to do so."

The UK human rights landscape

This article considers the current UK human rights landscape, including the potential impact of Brexit. Human rights law affects the activities of individuals, private organisations and public sector bodies in a huge range of situations.

In short, the vast majority of the UK's human rights law will remain unchanged at the point when 'Exit Day' is scheduled to arrive - 11pm on 29 March 2019. But UK law will undoubtedly continue to evolve, both through decisions of the courts and as Parliament passes further laws that have human rights significance.

The UK's current human rights law framework consists of a mixture of:

- Common law;
- UK statutes;
- EU laws that are "directly effective" in the UK;
- Treaties and international agreements including:
  - ◊ the EU treaties;
  - ◊ the EU Charter of Fundamental Rights;
  - ◊ the European Convention on Human Rights.

Common law

The principles of common law have been developed over centuries by the UK courts, encompassing principles such as:

- the right to a fair hearing;
- the right to ask a court to decide whether someone's detention is lawful ("habeas corpus");
- the requirement that bodies exercising public functions act lawfully and reasonably;
- support for freedom of speech and freedom of assembly;
- protecting individuals from harm, through common law criminal offences.

These common law principles will remain in place after Brexit.

UK statutes

The Human Rights Act 1998 is an important foundation of UK human rights law, incorporating much of the European Convention on Human Rights into domestic legislation. It includes a range of rights such as the right to life, right to a fair trial, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, and the freedom of assembly and association.

There are many other statutes with human rights aspects such as:

- the Police and Criminal Evidence Act 1984;
- the Equality Act 2010;
- the Employment Rights Act 1996;
- the Children Act 1989;
- the Nationality, Immigration and Asylum Act 2002;
- the Modern Slavery Act 2015;
- the Data Protection Act 2018 and the Freedom of Information Act 2000;
- the Civil Partnership Act 2004 and the Marriage (Same Sex Couples) Act 2013;
- the Gender Recognition Act 2004;
- the Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998;
- the Education (No 2) Act 1986.

Some of this legislation was passed to meet UK obligations as a member state of the European Union, but it will continue to be effective after Brexit until amendment or repeal. The UK constitution does not have a mechanism for human rights legislation to be specially protected from repeal or "entrenched". Statutes like the Human Rights Act can be amended or repealed by Parliament, if there is political support to do so.

EU laws that are "directly effective" in the UK

EU laws that are "directly effective" in the UK are enforceable in UK courts, for example the General Data Protection Regulation. Broadly speaking, after "Exit Day" on 29 March 2019, the European Union (Withdrawal) Act 2018 provides that such laws will be incorporated into UK law. A future parliament could amend these laws (subject to the terms of any withdrawal agreement/future partnership arrangements negotiated with the EU).

Treaties and international agreements: the EU treaties

After Exit Day the UK will no longer be a party to the EU treaties. Subject to the terms of any withdrawal agreement and future UK and EU immigration laws, this will have a knock on consequence for some human rights of UK nationals. Examples potentially include the rights of UK workers to seek work in the EU and vice versa. The residence status of UK citizens returning to the UK may also affect their entitlement to claim certain UK state benefits.

Treaties and international agreements: The EU Charter of Fundamental Rights

The European Union (Withdrawal) Act 2018 ("EUWA"; summarised here) expressly provides that *"The Charter of Fundamental Rights is not part of domestic law on or after exit day".*

The EU Charter is often confused with the European Convention (see below); both instruments are concerned with the protection of human rights and contain many overlapping provisions, but they are separate legal frameworks. The Charter consolidates a number of rights derived from EU Treaties, EU legislation and case law of the Court of Justice of the European Union.

The Charter is part of EU law and its interpretation is a matter for the Court of Justice of the European Union. The Charter *"reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles"* ('Protocol 30' of the Charter).

There was much discussion during the passage through Parliament of the European Union (Withdrawal) Act 2018 about the effect of this provision. The UK Government's position is that many of the rights and principles in the Charter are protected under other laws, such as the Human Rights Act.

There are some Charter rights which will not be incorporated or retained post-Brexit, for example the right to vote and participate in elections to the European Parliament.

Treaties and international agreements: the European Convention on Human Rights (ECHR)

The ECHR is an international treaty separate to the EU, developed by the Council of Europe and interpreted by the European Court of Human Rights. The UK ratified the ECHR in 1951 and the Human Rights Act incorporates much of the ECHR into domestic law. There have been proposals to replace the ECHR with a "British Bill of Rights", but the Government at present is not taking these forward. The ECHR will remain part of the UK's human rights framework after Brexit.

Treaties and international agreements: the outline of the proposed future partnership with the EU

The draft political declaration setting out the framework for the future relationship between the EU and the UK includes states that the "*future relationship should incorporate the United Kingdom's commitment to respect the framework of the European Convention on Human Rights".*

Future trade and partnership arrangements with the EU, or with other countries may contain human rights provisions, and if they do will form part of the UK's evolving human rights framework. For the moment, the message is that the vast majority of the UK's human rights protections remain unaffected by Brexit. It remains to be seen how future parliaments will develop human rights law.

Any questions?

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"This project will consider the current range of specific offences and aggravating factors in sentencing decisions."

Law Commission review of hate crime legislation in 2019

The Law Commission is conducting an extensive review of the adequacy of hate crime legislation during 2019. This project will consider the current range of specific offences and aggravating factors in sentencing decisions. It will also review the current range of protected characteristics covered by the legislation, identify gaps in the scope of protection in the criminal justice system in England and Wales and make recommendations for reform to promote a consistent approach.

The Law Commission project defines hate crimes as "acts of violence directed at people because of who they are" and will review whether the criminal law should provide protection for a broader range of characteristics (currently disability, transgender status, race, religion and sexual orientation). The project asks, by way of illustration, whether the legislation should provide protection in the criminal law for "sex or gender characteristics (with misogyny being a particular concern), age, physical characteristics, or membership of specific sub-cultures."

Currently the legislative framework for hate crimes is described by the Law Commission as follows:

- The Public Order Act 1986 – specific offences for conduct that is likely to stir up hatred on grounds of race, or is intended to do so on grounds of religion or sexual orientation;
- The Crime and Disorder Act 1998 – 'aggravated' offences with longer sentences if someone commits one of a number of other criminal offences (e.g. assault or damage to property) and has demonstrated hostility or was motivated by hostility based on race or religion;
- The Criminal Justice Act 2003 – enhanced sentencing if an offence involves hostility that is motivated by any of the five protected characteristics;
- The Coroners and Justice Act 2009 – sentencing guidelines which a judge must follow, including whether an offence was motivated by or demonstrated hostility towards the victim based on their age, sex, gender identity (or presumed gender identity), disability (or presumed disability) or sexual orientation.

The terms of reference confirm that the Law Commission should ensure that "any recommendations comply with, and are conceptually informed by, human rights obligations, including under articles 10 (freedom of expression) and 14 (prohibition of discrimination) of the European Convention on Human Rights. An earlier Law Commission report in 2014 on hate crime noted, for example, that any "new stirring up offences that might be created would need to respect article 10(2) and article 9" (freedom of religion and belief) of the ECHR.

The Law Commission expects to report in 2020 and it will then be for the Government to decide whether to implement any proposed legislative changes.

Any questions?

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About Mills & Reeve

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