

Perspectives

Legal updates for the world of higher education



July 2019

Dear Colleague

In this bumper summer edition of Perspectives, we have something of an international theme with a review of the Government's International Education Strategy: global potential, global growth. We are also delighted to feature guest articles from:

- Universities UK International about their 'Go International: Stand Out' campaign for increasing student mobility. This campaign has a particular focus on supporting outward mobility for students from underrepresented groups.
- Anderson Strathern, our national co-sponsors of the Association of Heads of University Administration in Scotland, about changes to places for medical school north of the border.

Closer to home, we include updates about:

- The Information Commissioner's recently announced proposed significant civil monetary penalties for two data breaches under her powers in the General Data Protection Regulation / Data Protection Act 2018;
- The Court of Appeal's recent decision concerning a university's internal fitness to practise proceedings for a student's social media postings.

This month saw the publication of the first annual report of the Office for Students, which noted that the "majority of registered providers are currently subject to some form of regulatory intervention and are now being monitored". The OfS noted that it "will be stepping up [its] work on regulatory interventions where the evidence reveals a significant risk of breach of our regulatory conditions."

At the date of publication, there were 376 providers on the Register of English Registered Providers. The OfS annual report notes its "radical reforms to the regulation of access and participation" and the introduction of "long term targets to achieve equality of opportunity within 20 years and the elimination of gaps in:

- Entry rates at the most selective providers between the most and least represented groups
- Drop-out rates between the most and least represented groups
- Degree outcome between white and black students
- Degree outcome between disabled and non-disabled students."

The OfS Regulatory Framework becomes fully operational from 1 August 2019.



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The UK's first study abroad campaign, Go International: Stand Out



Studying, working and volunteering abroad benefits students, universities and economies.

[Our research](#) has found a positive correlation between UK students studying, working and volunteering abroad (outward student mobility) and improved academic and employment outcomes. Students who go abroad are 26% less likely to be unemployed, 7% more likely to be in graduate jobs six months after graduation and are 5.5% higher wage earners when compared with students who don't study abroad.

These positive outcomes hold when looking at students from disadvantaged backgrounds and underrepresented groups, and in some instances these students see even more pronounced benefits. Black and minority ethnic students who were mobile were 10% more likely to be in a graduate job than their non-mobile peers (if working); and mature students who were mobile and working in full-time, paid employment were earning on average 12% more than their non-mobile peers.

Despite this good news, only 7% of undergraduate students in the UK study, work or volunteer abroad during their degree: very low compared with other countries. In the US 16% of students go abroad and this only accounts for those programmes that provide academic credit. Germany is currently on 28% and is working towards a target of 50%. France is well within in the 30% region. In Australia statistics show that almost a quarter of graduating domestic students study abroad. In recognition of the demand for global graduates and the growing skills deficit, in November 2017, UUKi launched a campaign to galvanise UK universities to meet a new national target.

Supporting our campaign

Our [Go International: Stand Out campaign](#) is designed to help the sector double the percentage of UK undergraduate students who have an international placement as part of their university programme to 13% by 2020. So far, 97 UK universities and 6 organisations have signed up to our campaign charter and pledged concrete actions, which will help boost and broaden outward student mobility.

Around 60% of the pledges focus on improving access, with a majority of universities committing not just to one action, but to a range of activities. These have included developing new summer school programmes, increasing scholarship funding, creating work placements in partnership with industry, including mobility activities in access and participation plans, and celebrating mobility alumni. The Stand Out campaign's [One Year On booklet](#) highlighted some of this great work.

Universities' strong engagement with the campaign is a sign of the growing commitment to outward student mobility in the UK. [Our research](#) shows that 83% of universities have now embedded outward student mobility in institutional strategies, and that 65% have introduced targets to increase participation, while across the sector there is a strategic focus on widening participation and short-term mobility.

The UK Government's International Education Strategy, published in March 2019, included, for the first time, a chapter on global mobility and exchange. In the strategy they emphasise their continued support for the Go International: Stand Out campaign and target.

Setting the scene for continued growth

For the HE sector, our key ask to Government in support of outward student mobility is a guarantee that a national replacement mechanism for Erasmus+ would be put in place should we lose access to the programme in the event of a no-deal Brexit and be unable to negotiate access to the Erasmus+ successor programme. This ask was at the heart of UUKi's recent [#supportstudyabroad](#) campaign, launched in February, which called on government to continue to fund study abroad should we lose access to Erasmus+.

Universities and students responded en masse to the campaign, tweeting stories highlighting the benefits of international experiences. In its first week [#supportstudyabroad](#) messages were seen over 12 million times by 5 million people, with thousands of users posting about the importance of study abroad.

UUKi welcomed the announcement that the new Erasmus+ successor programme would include opportunities for short-term mobility. Short-term options of four weeks or less now account for around 1 in 5 mobilities from the UK, and many pledges to the Go International: Stand Out campaign include a focus on short term programmes, which are often more attractive and accessible to those from underrepresented or disadvantaged backgrounds. Ensuring that universities offer a diverse programme with a range of offers to suit all students is essential in ensuring equitable access to mobility.

Hope for a bright (and mobile) future

Despite political uncertainty around our future relationship with the EU and access to the Erasmus+ programme, the picture of outward student mobility in the UK remains positive. Participation is continuing to increase, universities are diversifying the destinations and durations they offer to help widen participation, and mobile graduates continue to enjoy positive outcomes.

To build on this success, and to broaden our campaign coalition, we are now [actively seeking partnerships from other organisations to support realisation of the 2020 goal](#). This includes sector bodies, charities, academic associations, commercial partners, employers, employer associations and international partners. We're asking campaign partners to pledge to deliver specific activities, big or small, which help to open up life-changing experiences to UK students for years to come.

A number of organisations have already responded to our call. For example, QS Unisolution and CRCC Asia recently joined as campaign partners: both companies have pledged new scholarships for UK students to Europe and Asia respectively. CRCC Asia's scholarships target students from underrepresented groups such as BAME students and care-leavers in particular.

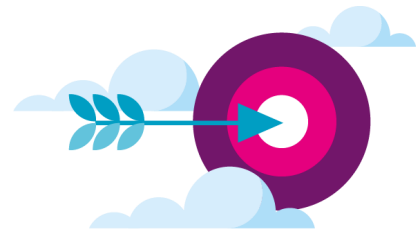
You can find out if your institution has signed up to the Go International: Stand Out campaign by viewing our [list of university partners](#). To find out more about the campaign, how to join, and to view our [campaign toolkit](#) of communications materials and resources for universities, please visit our campaign website at www.universitiesuk.ac.uk/standout or contact the team directly on outwardmobility@international.ac.uk. By joining as a Stand Out partner, you will join a growing campaign coalition to help us reach our ambitious goal.

Celia Partridge
Universities UK International Assistant Director,
Partnerships and Mobility

Catriona Hanks
Universities UK Outward Student Mobility Lead



The Scottish Government's Plans to Retain GPs by Making Medical Schools More Scottish



Faced with an ageing but ailing population and a lack of GPs in Scotland to care for them, the Scottish Government has resolved to give more places at Scottish medical schools to those from Scotland and the EU, while reducing those available to students from the rest of the UK.

The Scottish Government has recently trialed a number of initiatives with a view to retaining doctors, such as the Scottish Targeted Enhanced Recruitment Scheme, offering grants to those who train in remote locations, and bursaries available under the ScotGEM graduate entry programme for those who go on to work for NHS Scotland. The new proposal forms the next step in the SNP's plan to plug the gaps in healthcare provision, especially in rural and remote areas where jobs have proved harder to fill, and follows a £23 million investment aimed at increasing the number of medical places available at Scottish universities.

The justification for "indirectly disadvantaging" students from the rest of the UK lies in the hope that the plans will allow 36 more doctors to enter general practice in Scotland every year. Currently retention rates of those who come to Scotland to study have been considered to be lower than those who welcomed the recent investments in medical schools would have liked.

According to the Government's Equality Impact Assessment, 80% of Scottish students stay on for specialist training in Scotland, while for those from the "Rest of the UK" that figure is only 44%. The report further argues that the measure is not unduly discriminatory, given that it pursues the legitimate aim of retaining more doctors, and such an outcome could not be achieved through less harmful means.

In assessing the impact of its proposal on the characteristics protected under the Equality Act 2010, such as race and religion, the Scottish Government noted its potentially indirectly discriminatory effects. Under the Act, such effects are not prohibited as long as there is a legitimate aim and the least discriminatory measures to meet that aim are pursued.

The result for universities on both sides of the border is a further bout of much unwelcome uncertainty. At present, students from England, Wales and Northern Ireland make up 29% of the medical student population in Scotland. While demand for places in a highly competitive field such as medicine is unlikely to falter in Scotland, the plans could mean fewer applications from

outside the country. With the highly contrasting policies on tuition fees in place either side of Hadrian's Wall, Scottish medical education providers stand to lose part of their income from non-Scottish UK students, whose quota may be reduced under the proposal being mooted.

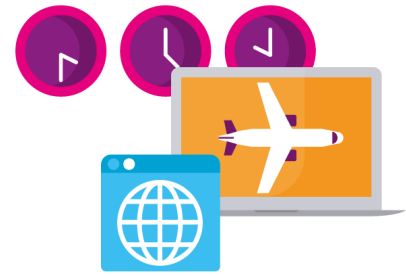
With recent trends such as junior doctors fighting back against working conditions and hours, trainees following more protracted career paths or taking more breaks during their training, as well as an increasing trend in those turning away from the NHS towards the private sector or providing locum services on a self-employed basis, it is clear that many problems face the healthcare sector in Scotland. It is not yet apparent exactly how the plans will affect higher education institutions' entry processes or what the impact will be post-Brexit when universities in Scotland may no longer be under an obligation to admit EU-students free of charge, but what is evident is that just as in so many other areas universities in Scotland are likely to see some changes to their student populations.

The Scottish Government's Equality Impact Assessment [can be found here](#).

Sophie Byrne
Anderson Strathern



The International Education Strategy



As many of you will know, in March 2019 the UK Government published its policy paper “global potential, global growth”, which sets ambitious targets for increasing the UK’s involvement in the international education market over the next ten years.

With the education market adding over £20 billion per year to the UK economy through education exports and transnational activity, the Government has made it a key priority to cement and grow Britain’s leading role in the global education market, especially in light of our awaited departure from the EU.

The higher education sector has welcomed such a target-based strategy and many hope that it marks a shift in direction from the Government, backed up by a commitment to a joined up approach across departments. However, there are concerns that the Home Office has not yet provided clear support on key immigration issues that underpin parts of the strategy. In particular, it is unclear how incoming students will be counted under Home Office immigration statistics and how this will impact the various policies which are intended to reduce yearly net migration.

In the following paragraphs we consider some of the key implications of the international strategy.

Overview of the strategy

The aim of the strategy is to accomplish two key goals:

To raise the number of international students in UK universities to 600,000 per year

To increase the amount of income generated by education exports to £35 billion (a rise of 75%)

Both targets are highly ambitious and will require a significant increase in the current yearly growth rates to be met. With this in mind, the strategy includes a number of measures to help the sector maximise the potential of UK education exports abroad, including:

- Appointing a new International Education Champion to boost overseas activity by developing strong partnerships and tackling challenges to growth.
- Encouraging sector groups to bid into the £5 million GREAT Challenge Fund to promote the entire UK education offer internationally.
- Extending the period of post-study leave for

international student visas, considering how the visa process could be improved for applicants and supporting student employment.

- Improving data on education exports to enhance and drive performance while also mapping out where the best opportunities lie globally.
- Closer working across government departments on international education policy and opportunities.
- Extending the post-study leave period to six months for undergraduate and masters students attending institutions with degree awarding powers, and a year for all doctoral students. The strategy also looks at ways of supporting international students into employment.

Picking up on a couple of these measures:

Extension of the available post-study work visa - to six months for those on bachelors and masters programs and a year for those doing a PhD. This should make it easier for students to arrange work in the UK as they will be permitted to apply for opportunities in the final three months of their study.

This will likely be attractive to many students, however it is not entirely clear whether it will be enough to fuel the level of growth in student numbers that the strategy envisions. Professor Dame Janet Beer, president of Universities UK, welcomed this proposal but emphasised that the government should go further by “extending the opportunity to at least two years”.

However, the commitment to consider how to improve the visa process for applicants is welcomed by the sector, especially if EU nationals are to fall within this system.

Appointing an International Education Champion - In a major step, a new International Education Champion will be appointed to co-ordinate government departments and to spearhead new partnerships – particularly in relation to four high value regions outside of Europe.

These are:

1. China and Hong Kong
2. The Middle East and North Africa
3. Latin America
4. The ASEAN group of nations

Various examples of government to government exchange are highlighted throughout the report as examples of how growth in these four regions can be fuelled. The notable example of the Thai government officially endorsing BTEC qualifications to be delivered in every vocational and higher institution in Thailand represents the kind of opportunity that this strategy intends to develop, with this large market becoming available to a specific UK education provider at the stroke of a pen.

Commentary

The measures set out in the strategy provide a good starting point for the Government and the university sector to start talking about how to deliver these ambitious goals, but there is much work to do. Simplifying the fundamental architecture and complexity of the Tier 4 system and introducing a realistic post-work study scheme are likely to be top of the action list.

The changing demographics and increasing investment by the countries that used to send us students in their domestic education capacity is likely to force many UK universities to offer significant incentives that go beyond those offered by competitors internationally. For example, they may need to adopt sophisticated business tools, as well as continuing to provide partnerships of high academic standing in areas attractive to potential students and research collaborators.

One thing we are sure of is that the goals set out in the International Education Strategy will lead to many UK universities placing an increased emphasis on expanding their international partnerships both to attract international students to the UK and to support international students being taught in part or, increasingly, wholly in their home country. With this in mind, we have listed below a few top tips to consider when contemplating such collaborations.

Six top tips –collaborating with international partners

1. Carry out a due diligence exercise as early as possible in the overseas collaboration process. The results may have an impact on the feasibility, structure and format of your partnership.
2. Consider using legal agreements that prevent a partner breaching confidentiality, entering into similar collaborations with your competitors and poaching your staff. Seek advice on which law and jurisdiction should govern the agreements.
3. Be careful who you contract with. If an international partner is using a weak subsidiary company you may require guarantees from the parent entity to make it easier to enforce the

contracts if needs be.

4. Be clear at the outset as to the various grounds for termination and make sure these are clearly set out in the legal agreements. Shorter termination notice periods are recommended for more risky collaborations.
5. Identify precisely at the outset what legal and regulatory obligations each party will owe to which institution's students under which state's laws and which parties will contract with the students.
6. Adopt a proactive and holistic approach to monitoring the operation of international partnerships and put in place a systematic process for regular review of the operation of the partnership.

Case Study - Setting up an International Branch in Egypt (Al Tamimi & Company)

Mills & Reeve has longstanding reciprocal "best friend" arrangements with Al Tamimi & Company, a leading law firm in Egypt, and has recently advised several UK universities on establishing international branch campuses (IBC) in Egypt.

Law No. 162 of 2018 and Ministerial Decree No. 4200 of 2018 provides for the establishment of IBCs of foreign universities in Egypt in two ways:

- By applying directly to the Ministry of Higher Education.
- By applying through an Educational Institution, which is a special purpose vehicle, established by virtue of a Presidential Decree, with a mandate to set up IBCs and handle all administrative issues relating to them.

Ever since the issuance of the law and the decree, many well-renowned universities across the globe and Egyptian investors have expressed their interest in setting up IBCs. The timing of this aligns with the Egyptian Government's development of new cities, namely the New Administrative Capital.

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Information Commissioner notifies multi-million pound fines for data breaches



The Information Commissioner's Office has started issuing notices of intention to fine data controllers under the GDPR for data breaches.

The maximum fine the Commissioner can impose for a breach of data protection laws increased from £500k under the Data Protection Act 1998 to €20 million or 4% of global annual turnover, whichever is greater, under GDPR. GDPR also introduced stronger data breach reporting and notification requirements.

The Commissioner has this month issued two notices of intention to fine in respect of some high profile data breaches that were notified after GDPR came into effect. The data controllers receiving these notices have been given time to make representations to the Commissioner, who will consider these before making a final decision.

The first notice, proposing a fine of £183.39 million relates to a cyber incident that British Airways notified to the Commissioner in September 2018. User traffic to the British Airways website had been diverted to a fraudulent site, which allowed the attackers to harvest details of around 500,000 BA customers, including log in, payment card and travel information along with names and addresses. The Commissioner has said that "a variety of information was compromised by poor security arrangements at the company".

The second proposed fine of just over £99 million relates to a cyber incident notified to the Commissioner by hotels group Marriott in November 2018. A range of personal data in around 339 million guest records were exposed, about 30 million of whom were resident in the European Economic Area, including 7 million UK residents. The ICO says the vulnerability is believed to stem from systems of the Starwood hotels group, which Marriott acquired in 2016, with the exposure remaining undiscovered until 2018. According to the Commissioner: "The ICO's investigation found that Marriott failed to undertake sufficient due diligence when it bought Starwood and should also have done more to secure its systems."

Both BA and Marriott have cooperated with the Commissioner and made improvements to their security arrangements since the incidents. In both cases the Commissioner acted as "lead supervisory authority" under GDPR for other EU Member States' data protection authorities.

The proposed fines are a marker in the sand, showing the ICO intends to exercise its powers. Organisations should not be complacent about their data responsibilities, and if they have not yet done so they should ensure that cyber security and information governance is an issue considered by the highest levels of management. Operational risk in the event of a data breach comes not only from the ICO, but also from data subjects themselves. We are handling an increasing amount of data-related litigation against businesses and other organisations.

The Commissioner is not alone in imposing substantial fines post-GDPR, nor are they confined to data breaches. In January 2019 the French data protection authority fined Google €50 million for lack of transparency, inadequate information and lack of valid consent regarding Google's "ads personalisation".

It remains to be seen whether any of these fines will be revised following representations, or as a result of formal challenges.

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Court of Appeal allows appeal to student who expressed his religious views on social media



Felix Ngole (Mr Ngole) won his appeal this month against the University of Sheffield (the University) after the High Court had previously upheld the University's decision to exclude him from his postgraduate course.

Background

Mr Ngole was a mature student enrolled on a two-year MA in social work. This was an accredited course which, on successful completion, would lead to registration with the Health and Care Professions Council (HCPC), a regulatory body for various professions in the social work sector. On admission, Mr Ngole was required to sign a "Student Entry Agreement" (Agreement) confirming that he accepted the HCPC code of conduct. Crucially, the Agreement contained the following term:

"My conduct will reflect the standards expected of me, both as a student at the University of Sheffield and a prospective member of the social work profession and I will be mindful of the fact that my conduct outside the programme of study may compromise my entitlement to complete the programme or to register with the HCPC."

The Facebook Posts

In September 2015, Mr Ngole contributed to a discussion on Facebook. The topic was the imprisonment of Kim Davis, following her refusal to issue marriage licences to same-sex couples because of her Christian beliefs. Mr Ngole quoted the Bible and made around twenty posts, including the following:

"... [S]ame sex marriage is a sin whether we accept it or not"

"...Homosexuality is a sin, no matter how you want to dress it up"

"...[Homosexuality] is a wicked act and God hates the act"

Disciplinary Action and the University's decision

After a fellow student anonymously reported these posts, the University investigated the matter and initiated their disciplinary process. Following an initial interview, the matter was referred to the Fitness to

Practise (FTP) Committee. A hearing with the FTP Committee took place on 26 January 2016 and the decision taken was to exclude Mr Ngole from the course (but not to exclude the possibility of applying for a different course).

The FTP Committee found that Mr Ngole was in breach of two professional requirements:

- Keeping high standards of professional conduct
- Making sure that his behaviour does not damage public confidence in the profession

On 23 February 2017 Mr Ngole appealed this decision to the University Senate, asserting that he had been discriminated against on the basis of his religion. The Senate Appeal Committee upheld the FTP Committee's decision. One of their primary considerations was Mr Ngole's failure to acknowledge or respect the relevance of the HCPC Code of Conduct.

Consequently, Mr Ngole complained to the Office of the Independent Adjudicator, which determined that the University's decision was reasonable. Mr Ngole then issued judicial review proceedings against the University. After an unsuccessful application to the High Court, he appealed to the Court of Appeal.

The Appeal

The Court of Appeal in its judgment dated 3 July 2019 found that the University had erred in its decision and ordered the matter to be remitted to a fresh FTP Committee. In reaching this decision, the Court of Appeal made the following points:

- Throughout the process, the University held the position that **any** expression of disapproval of same-sex relations on social media was a breach of the professional guidelines. This stance was not in accordance with the HCPC code.

- The HCPC professional code did not prohibit the use of social media to share personal views but simply said that the University might have to take action “if the comments posted were offensive, for example if they were racist or sexually explicit”.
- The right to freedom of expression is not an unqualified right: professional bodies and organisations are entitled to place reasonable and proportionate restrictions.
- Both sides adopted extreme and polarised positions from the outset, which meant that the disciplinary proceedings got off on the wrong track.
- The University did not make it clear that it was the manner and language in which he had expressed his views that was the real problem, and in particular that his use of Biblical terms such as “wicked” and “abomination” was liable to be understood by many users of social services as extreme and offensive.
- The University quickly formed the view that Mr Ngole had become “extremely entrenched” and that he lacked “insight” into the effect that the Facebook posts would have. This led the University rapidly to conclude that a mere warning was insufficient.
- The University however failed to explore the possibility of finding a middle ground and they unfairly put the onus on Mr Ngole to demonstrate that he did have “insight” and could mend his ways.
- The University wrongly confused the expression of religious views with the notion of discrimination.
- The University gave different and confusing reasons for the suspension.
- The University’s approach to sanction was disproportionate; they should have explored imposing a lesser penalty.

Conclusion

This Court of Appeal’s judgment highlights the complexities of fitness to practise cases and the relevant rules (in this case the HCPC code) before making any determination. In this case, the premise on which the FTP Committee based its decision impacted the decision made by the Appeal Committee and meant the whole process was flawed. Sanctions should also be carefully considered and proportionate; in this case, the University imposed the most grave penalty without due consideration of whether a lesser sanction would have been appropriate. In addition, in cases that involve conflicting human rights, universities should tread carefully.

In this case, the Court of Appeal rejected the implication of the University’s submission that certain religious views can never be expressed in public by those subject to professional rules – such a “blanket ban” on freedom of expression would not be proportionate.

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About Mills & Reeve



Mills & Reeve offers a deep knowledge of the higher education sector and the commercial strength of one of the UK's leading national law firms.

Our multi-disciplinary team is ranked in tier 1 in the UK legal directories for advising the higher education sector.

We have supported our clients in over 75 jurisdictions through our international network of law firms around the world.

The Sunday Times has recognised us as a Top 100 Best Employer for the last 16 consecutive years; the only UK law firm to have achieved this. We work hard to create a culture where everyone feels that they contribute and can make a difference, delivering outstanding service to our clients.

