AHUA Perspectives

Legal updates for the world of higher education

November 2019

Dear Colleague

In October, we saw the publication of three important suites of documents by bodies having a regulatory, enforcement or adjudicative role in the higher education sector:

- new guidance on Fitness to Practice by the Office of the Independent Adjudicator (OIA) which is part of its Good Practice Framework;
- a report by the Equality and Human Rights Commission (EHRC) on its Inquiry into racial harassment into publicly-funded universities in England, Scotland and Wales; and
- various Regulatory Advice documents and other material by the Office for Students (OfS), including Regulatory Advice 16 on 'reportable events'.

In this edition of Perspectives, my colleagues Emma Tuck and Robert Renfree give an overview of the OIA's new guidance and the EHRC's report.

For ease of reference and given its importance, we have also included an extract from the OfS Regulatory Framework on 'reportable events' (paragraph 494).

The OfS Regulatory Framework was presented to Parliament in February 2018 under section 75 of the Higher Education and Research Act 2017. Condition F3 requires institutions which are on the Register of English Higher Education Providers to provide to OfS such information as it may specify from time to time for the purpose of assisting the OfS in performing its functions.

The OfS Regulatory Framework explicitly confirms that the OfS will use the information reported to it to review its risk assessment of the institution and consider whether any further regulatory action is necessary.

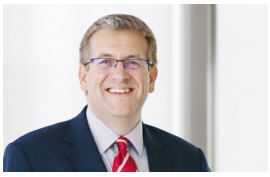
In our view, given the risk of regulatory action by the OfS, we consider that it is imperative for registered providers to have reasonable certainty about the scope and meaning of what constitutes a reportable event. However, in our view, Regulatory Advice 16 published by the OfS on 15 October 2019:

- potentially extends the scope of events which are required to be reported to the OfS to all events listed in paragraph 494 of the Regulatory Framework irrespective of whether one of the listed events is material, relevant or financially significant;
- is insufficiently clear as to the meaning of some of the events which OfS expects to be reported, for example 'legal or court action' and 'regulatory investigation and/or sanction by other regulators'.

Regulatory Advice 16 states that in all cases OfS requires an event to be reported within 5 days of the date that the event is identified.

It should be noted that the OfS has reserved to itself the decision whether any specific event is a reportable event. Regulatory Advice 16 also confirms that OfS may take regulatory action if a registered provider under-reports or over-reports to OfS.

In our view, registered providers should be given, as a matter of urgency, greater clarity by the OfS about the materiality requirement for reportable events and the meaning of certain reportable events listed in the Regulatory Framework.



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Extract from the Regulatory Framework for Higher Education in England (OfS 2018.01)

Paragraph 494: "Reportable events"

"494. A reportable event is any event or circumstance that, in the judgement of the OfS, materially affects or could materially affect the provider's legal form or business model, and/or its willingness or ability to comply with its conditions of registration. Reportable events must be reported to the OfS under condition F3 (i) and include, but are not limited to:

a. A change in the provider's circumstances, including but not limited to:

- sale of either the provider itself, a part of it, or its parent
- a merger of the provider with another entity
- an acquisition by the provider of another entity
- a material change in the provider's business model, such as a move to focus on further instead of higher education
- a change in the provider's legal status
- other, similar structural changes, such as the establishment of joint ventures, or the separation of the provider into multiple entities
- other changes resulting in a change of ownership of the provider.

b. **A change of ownership.** The OfS is principally, but not exclusively, concerned with situations where 50 per cent or more in the shareholding of the registered provider (or the closest equivalent, where the provider is not limited by shares) are, or may be, in common ownership. Common ownership includes:

- ownership by the same person or entity
- ownership by multiple entities themselves under common ownership or control
- ownership by multiple individuals or entities who, by agreement or practice, exercise their ownership rights in a co-ordinated way (and without restricting the scope of our understanding of what constitutes common ownership, we will deem people who are connected' to be exercising their ownership rights in a co-ordinated way)
- ownership by multiple individuals or entities on behalf of, or acting under the direction or in the interests of, the same third party, including a case where ownerships are held on trust for a common beneficiary, and
- any similar structure.

Ownership does not require beneficial ownership. A provider:

- must inform the OfS of any changes in ownership where 50 per cent or more of the ownership of the registered provider is in common ownership, and a change affects the majority ownership rights. This includes the creation of majority ownership rights for the first time, the transfer of majority ownership rights to a new holder, the introduction of a new entity to majority ownership rights and majority ownership rights coming to an end
- must inform the OfS of any change in ownership that affects 15 per cent by value or voting rights of the registered provider's shares, or closest equivalent. A provider must do so whether the change is brought about in one transaction or a series of connected transactions. A provider does not need inform the OfS of entirely unconnected transactions provided none of those transactions is individually above our notification threshold
- is not required to inform the OfS of changes in ownership where 50 per cent or more of the ownership of the registered

provider is in common ownership, and the changes only affect less than 15 per cent by value or voting rights of the minority ownership rights.

Some examples of changes that must be reported include:

- where all or any part of the majority ownership rights in the provider change:

i. Example 1: there are five shareholders, each holding 10 per cent of the shares in a provider. They are business partners and act in a co-ordinated way. One shareholder sells their shareholding to the others. This must be notified.

ii. Example 2: there are three shareholders, each holding 20 per cent of the shares in a provider. They are business partners and act in a co-ordinated way. One sells a 10 per cent shareholding to a relative who is a connected person. This must be notified.

iii. Example 3: There are three shareholders, each holding 20 per cent of the shares in a provider. They are business partners and act in a co-ordinated way. One sells their shareholding to a third party. This must be notified.

- where additional share capital is issued, or shares are bought back, or the voting rights that attach to existing shares are changed
- where a controlling proportion of a provider's shares is directly, or indirectly such as through those of its parent organisation(s), acquired by another individual(s), partnership(s) or organisation(s).

c. **A change of control.** 'Control' has the meaning given by section 1124 of the Corporation

Tax Act 2010, and 'change of control' means a change in control so defined. Where two or more entities or individuals, by agreement or practice, exercise their rights in a co-ordinated way, with the result that they together have control so defined, each will be treated as having control of the provider. A provider is required to notify the OfS of any change in the individual(s) or entity/ies who have control of the provider.

d. The provider becoming aware of suspected or actual fraud or financial irregularity.

e. The provider becoming aware of legal or court action.

f. The provider resolving to cease to provide higher education.

g. Regulatory investigation and/or sanction by other regulators, e.g. Charity Commission, Home Office.

h. Loss of accreditation by a Professional, Statutory or Regulatory Body (PSRB).

i. Any new partnerships, including validation or subcontractual arrangements.

j. Opening a new campus.

k. Intended campus, department, subject or provider closure.

l. Any other material events with possible financial viability or sustainability implications, including but not limited to:

- a material change in actual or forecast financial performance and/or position
- a material change in gearing
- a material change in student numbers that was not included in the provider's financial forecasts
- for a provider with a legally binding obligation of financial support underpinning its financial sustainability, a withdrawal of the obligation (including as a result of a change of control, even where the new owner will offer a similar obligation) or a material adverse change in the counterparty's financial position or other standing that could affect its suitability as counterparty
- the sale of significant assets
- significant redundancy programmes."

OIA launches new fitness to practise framework

Following a consultation earlier this year, October saw the Office of the Independent Adjudicator for Higher Education (OIA) launch the fitness to practise section of its Good Practice Framework. Where an institution provides courses of study that lead to accredited professional qualifications such as in medicine and teaching, it will have policies and procedures intended to ensure that any concerns about a student's fitness to practise in the profession are investigated and determined appropriately.

Background context

Obligations to implement such policies and procedures normally arise under the framework for accreditation of the institution's course and may also be underpinned by a statutory framework, such as the Medical Act 1983. This reflects the strong public interest in maintaining confidence that those entering regulated professions are fit to practise.

Since fitness to practise concerns can potentially lead to the termination of a student's studies and their inability to practise an intended profession, they are something that students, institutions and regulators treat extremely seriously.

Whilst fitness to practise procedures can in some cases interact with an institution's disciplinary procedures, the purpose of fitness to practise procedures is to ensure that the student and those around them, including members of the public, are safe and that public confidence in the professions is maintained. Against this background, the OIA is keen to emphasise that the *"process should be supportive even when the outcome is that the student can't continue with their studies"*.

Key elements in the OIA framework

Concerns about an individual's fitness to practise can arise in a wide range of situations and be of varying degrees of severity. In the OIA's words, the Framework *"is intended to help providers treat their students fairly, not to provide answers to what are often complex questions that involve professional judgment"*.

Fairness is one of the core principles of the Framework, along with accessibility, clarity, proportionality, timeliness, independence, confidentiality and "improving the student experience".

Professional regulators may issue their own guidance relating to student fitness to practise which institutions should take into account alongside the OIA Framework. The types of issue that can lead to fitness to practise concerns are varied- they might for example relate to an individual's misconduct, competence or health, or a combination of those things.

A number of themes are highlighted in the OIA Framework, which looks at how fitness to practise can feature throughout a student's contact with their institution, from the application stage to completion of their studies.

Information and support for staff, students and applicants

The OIA draws out a number of ways that it considers institutions should be supporting staff, students and applicants. For example:

- Ensuring that students are given clear information about the professional requirements of the course at the application and induction stages and potential consequences of breach, and are pointed to sources of advice;
- Ensuring that the institution considers relevant information disclosed during the application process and decides whether it will affect the student's fitness to practise and any support required well before studies commence;
- Ensuring that relevant staff are aware of the possibility of fitness to practise implications;
- Asking institutions to use clear language in their fitness to practise procedures;

- Asking that institutions consider relevant guidance from the appropriate regulator, for example on how to support students with disabilities;
- Ensuring that students are adequately supported, for example with course structures incorporating opportunities to learn and understand about fitness to practise;
- Encouraging institutions to support students to obtain appropriate information such as medical evidence and/or occupational health referrals;
- Providing guidance on what support and representation should be available for students before and at fitness to practise meetings and hearings.

Institutions will note that some of these areas are likely to align with consumer law obligations highlighted to the sector through the work done by the Competition and Markets Authority.

Students and applicants with disabilities

The OIA acknowledges that sometimes fitness to practise issues can arise in relation to a student with a disability. Any fitness to practise concern should be considered alongside the framework of the Equality Act 2010. The OIA Framework:

- Provides guidance on how to approach reasonable adjustments for students with disabilities, both during the course and also during any fitness to practise proceedings.
- Recommends that in cases where an institution is able to support a student with a disability adequately during the course, but where a workplace will not be able to, the institution should give clear information to disabled applicants about whether they will be able to practise their profession.

Fair procedures

A further area of focus concerns the procedures at institutions. The OIA's recommendations include:

- Ensuring that procedures follow the principles of "natural justice", as well as maintaining appropriate protections for personal data;
- How to approach anonymous complaints against students;
- How to investigate concerns relating to placements, for example how to collect evidence from service users at a medical placement whilst maintaining their confidentiality;
- Ensuring that proceedings are dealt with in a timely way. For example the OIA recommends that institutions should normally complete the process within 90 days of notifying the student, or within 45 days if the student has already been through related disciplinary procedures;
- Being clear about how fitness to practise procedures relate to other procedures including, in particular:
  - ◊ student disciplinary procedures
  - ◊ fitness to study / support for study procedures
  - ◊ student complaints procedures
  - ◊ criminal investigations and proceedings
- Recommendations for keeping records;
- Deciding when to undertake preliminary investigations into concerns of varying degrees of seriousness and when a formal investigation is required;
- How to conduct investigations and hearings, including matters such as considering the cultural mix or diversity of panels;
- Issuing decision letters and operating appeals, as well as how institutions' procedures interact with OIA procedures.

Institutions need to be mindful that a range of other legal frameworks can also come into play when considering fitness to practise matters, such as consumer law, data protection, human rights and Equality Act obligations. Navigating these frameworks alongside procedural and regulatory requirements can be a complex task for both students and institutions.

That said, the OIA Framework provides a helpful reference point to assist institutions, whether with designing or updating their procedures or when considering fitness to practise concerns.

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Equality and Human Rights Commission challenges universities on racial harassment

Whilst much of the recent focus on harassment in the higher education sector has been on preventing and tackling sexual harassment, racial harassment is also under the spotlight. A recent inquiry and report from the Equality and Human Rights Commission encourages institutions to look more closely at incidents of racial harassment and their responses. It also recommends that senior management should take a lead to embed a culture where racial harassment is not tolerated.

Alongside this, the Office for Students (OfS) recognises in its 'Regulatory Advice 6' (guidance on preparing access and participation plans) that harassment related to identity, including ethnicity and sexual orientation is a factor that is likely to adversely affect the success and progression of affected students.

Evidence collected by the EHRC

The EHRC inquiry looked at the experience of both staff and students, and took in evidence from a public call for evidence along with staff and student surveys, roundtable discussions and interviews.

The report uses the term "ethnic minority" to describe any ethnic background other than white British.

The EHRC report highlights a number of statistics from the evidence collected, for example:

- 24% of students from an ethnic minority background and 9% of white students said they had experienced racial harassment since starting their course. Overall this equates to 13% of all student respondents.
- 20% of student respondents had been physically attacked.
- 56% of students who had been racially harassed had experienced racist name-calling, insults and jokes.
- 1 in 20 students said they had left their studies due to racial harassment.
- Over 50% of staff from an ethnic minority described incidents of being ignored or excluded because of their race.
- Over 25% of staff reported having experienced racist name-calling, insults and jokes.
- 3 in 20 staff said racial harassment had caused them to leave their jobs.

Issues identified in the report

The EHRC expresses concern that the Equality Act 2010 is limited in the protection that it provides for harassment of staff or students by third parties, including for student-on-student and student-on-staff harassment. As well as pressing for changes to the harassment protections in the Act, it also recommends the public sector equality duty (PSED) should be strengthened to enable action on sector-wide inequalities to be tackled more quickly and consistently.

The EHRC also comments that university staff frequently "lack the understanding, skills and confidence to manage conversations about race effectively". This in turn leads to anxiety in managing incidents of racial harassment, undermining fair treatment and the likelihood of early resolution.

Under-reporting was also a concern, with significant proportions of staff and students not reporting incidents of harassment. Examples of reasons given for not reporting included individuals lacking confidence that the complaint would be addressed, or because they might be perceived as a troublemaker. The EHRC considers that due to this under-reporting universities have an incomplete picture of the incidence of racial harassment; it questions whether universities are meeting their PSED obligations as a result.

Whilst universities' own perception was that they handle complaints of racial harassment well, the EHRC reports that the majority do not seek feedback on the process and that many staff and students said they had not

been informed about the support available, or had received inadequate information.

Similarly, complainants reported feeling unsupported and not kept informed of progress or the outcome of complaints, potentially linked to universities' concerns not to inadvertently breach the data protection rights of perpetrators and alleged perpetrators.

The EHRC encourages university leaders to *"create and maintain environments where racial harassment is not tolerated and where race, and racial inequality, is discussed competently, confidently and constructively. This will create a culture where individuals across the whole institution – both students and staff – are able to work and study in a safe environment, be themselves and fulfil their potential."*

EHRC's recommendations

The recommendations from the report include:

- proposed amendments to the Equality Act to better support staff who experience harassment from third parties, alongside a workplace statutory code of practice;
- that all public bodies should set equality objectives or outcomes, and publish evidence of action and progress;
- that the public sector equality duty in the Equality Act should be reviewed with a view to better focusing public bodies' activities;
- a consultation to better inform the regulatory approach of the OfS, HEFCW and SFC;
- a review of how the court and tribunal system hears non-employment discrimination claims, such as claims by students, to ensure that complainants have access to an affordable and prompt hearing;
- that further regulatory and sector guidance be issued to help support universities to prevent and tackle harassment;
- that providers should better support reporting of racial harassment and ensure their procedures are fit for purpose, supported by better data collection;
- a recommendation that Universities UK, the Information Commissioner's Office and the sector work together on data sharing to better understand when the outcome of complaints can be shared and to implement changes;
- a linking up with mental health initiatives, given the impact of harassment on mental health and wellbeing;
- that heads and senior leaders demonstrate leadership and accountability for embedding an inclusive culture across their institution.

Many institutions will be considering their own culture, policies and procedures in light of the EHRC report. A further factor for English institutions to be aware of is that alongside these recommendations, the OfS has announced that it will be publishing a consultation document on 6 November 2019 which will set out its expectations on what registered providers should be doing to prevent harassment, hate crime and sexual misconduct. Evidence from the EHRC will be used to inform that process, along with a range of other sources.

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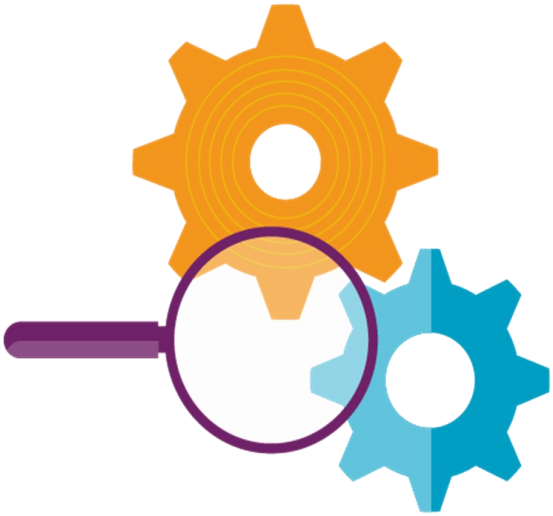

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