AHUA Perspectives

Legal updates for the world of higher education

January 2020

Dear Colleague

Higher education: looking back, looking ahead.

In the ancient Roman religion, the god Janus is reputed to have had two faces, one looking back and one looking ahead. As we stand at the door of a new year and a new decade, what do we see for the higher education and research sector?

One perspective comes from the Office for Students (OfS) which is the new regulator for "English Higher Education Providers". OfS was established by the Higher Education and Research Act 2017 and took up its full suite of statutory powers on 1 August 2019.

OfS Annual Report

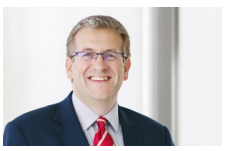
The OfS published its first annual report on 19 December 2019 as the last decade drew to a close. The higher education sector in England was recognised by OfS to be "world class", playing a significant role in driving forward economic development, social mobility and cultural enrichment, both regionally and nationally. The role of higher education in transforming lives was highlighted. Indeed, "greater equity in access and participation" by students is the area which OfS has made clear that it is looking to see the greatest improvement.

During 2019, OfS contended with the challenge of considering applications from bodies wishing to be accepted for the new public Register of English Higher Education Providers. The annual report confirms that 387 bodies had become registered providers as at the date of publication. Registration entitles students to apply for Student Loans Company funding and for providers to be able to sponsor international students. However, OfS noted that it had refused registrations where applications fell short of what was required by the OfS in respect of the 24 conditions of registration set out in the new regulatory framework, highlighting the inadequacy of students' educational outcomes and providers' financial stability. It was also noted by OfS in the annual report that only 12 bodies registered by the OfS did not receive any regulatory intervention in respect of the requirements for access and participation.

The annual report notes that this is a challenging time for higher education bodies as they seek to navigate a "complex policy, political and economic environment". Particular challenges were noted by OfS around ensuring financial sustainability, improving the quality of teaching and ensuring positive student outcomes from their higher education experience. OfS noted that it has intervened in respect of "unexplained grade inflation" and the "injudicious use of unconditional offers".

Reportable Events

In October 2019, the OfS published new Regulatory Advice documents relating to how it would monitor compliance by registered providers with the conditions of registration and setting out its expectations for institutions to inform it of "reportable events". Although the OfS is also the Principal Regulator for charity law compliance for those institutions which are exempt charities, OfS appears in our view to have taken a divergent path to the Charity Commission in respect of its requirement for registered charities to report 'serious incidents'. It remains to be seen whether these paths will diverge further or come into closer alignment as the new year/decade unfolds.



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In this issue

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OfS consultation on harassment and sexual assault

The OfS is consulting on a new set of expectations for English higher education providers relating to their management of complaints relating to harassment and sexual assault.

This follows on from the move away from the former guidance issued by the Committee of Vice Chancellors and Principals (CVCP) in 1994 on the handling of serious student disciplinary matters. In that CVCP guidance, it was suggested that universities should not investigate a student disciplinary matter themselves where the facts also gave rise to a potential concurrent jurisdiction as a matter of criminal law. Instead, universities were to encourage students to report their allegations to the police for investigation and possible prosecution through the criminal justice system.

In October 2016, Universities UK (UUK) published new guidance: "Changing the Culture: Report of the Universities UK Taskforce examining violence against women, harassment and hate crime affecting university students."

The OfS consultation document references that the 2016 UUK report took into account a number of developments which called for a new approach. This included extensive evidence on: violence against women and sexual harassment affecting students; homophobia and gender-identity based harassment and hate crime; harassment/hate crime on the basis of religion and belief; hate crime on the basis of other characteristics. The UUK report also noted legal developments, including the coming into force of the Human Rights Act 1998 and the Equality Act 2010.

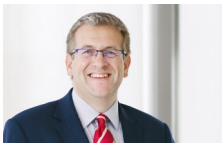
The OfS is seeking responses by 27 March 2020 to its consultation on its proposed new regulatory approach in this important area. Following the outcome of that consultation, OfS proposes that its regulatory requirements will come into force this summer and that it will then evaluate compliance after two years.

In summary the OfS has set out a "Statement of expectations", as follows:

1. Higher Education providers should clearly communicate, and embed across the whole organisation, their approach to preventing and responding to all forms of harassment and sexual misconduct. They should set out clearly the expectations that they have of students, staff and visitors.
2. Governing bodies should ensure that the provider's approach to harassment and sexual misconduct is adequate and effective. They should ensure that risks relating to these issues are identified and effectively mitigated.
3. Higher Education providers should engage with students to develop systems, policies and processes to address harassment and sexual misconduct.
4. Higher Education providers should implement adequate and effective staff and student training to raise awareness of, and prevent, harassment and sexual misconduct.
5. Higher education providers should have adequate and effective policies and processes in place for all students to report and disclose incidents of harassment and sexual misconduct.
6. Higher education providers should have a fair, clear and accessible approach to taking action in response to reports and disclosures.
7. Higher education providers should ensure that students involved in an investigatory process have access to appropriate and effective support.

There are additional elements to each 'expectation' and a number of important considerations. OfS notes at 6a for example that it expects "providers to investigate (for example as a disciplinary matter) complaints made in relation to any of its registered students". It goes on to confirm at 6c that an investigatory process "must be demonstrably fair, independent, and free from any reasonable perception of bias." As a matter of public law, the process must be fair to all concerned, taking into account the gravity of the allegations. The decision-making by a disciplinary panel will require the determination of the relevant facts upon which a complaint is made. Further advice is recommended on the specific circumstances of any case.

The OfS consultation document confirms that it will use its regulatory powers in line with the intervention factors set out in the OfS Regulatory Framework and that it will consider an intervention if it identifies an increased risk of a future breach of conditions of registration B2 (Quality) or C1 (Consumer protection law).



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New procurement thresholds and Brexit

For those institutions that are “contracting authorities” for procurement purposes, the European Commission recently published revised thresholds that apply from 1 January 2020 (see tables below). EU thresholds will continue to apply until at least 31 December 2020 under the draft EU Withdrawal Agreement which Boris Johnson's Government intends to implement following last month’s election.

The draft Withdrawal Agreement setting out the terms of the UK departure from the EU on 31 January 2020 provides for a transition period. In effect this maintains the current position until 31 December 2020, with the option of an extension to the transition period “for up to 1 or 2 years”. The draft agreement further provides that to be effective, any such extension must be in place before 1 July 2020. However the Government has already indicated its intention to legislate to rule out an extension, giving stronger emphasis to the statement in the 2019 Conservative party manifesto that “we will not extend the implementation period beyond December 2020”. It remains to be seen how the EU-UK negotiations and the accompanying political environment will develop during 2020.

When the transition period ends, the UK will have freedom to alter the procurement regulations, although it remains to be seen how much of a legislative priority that would be.

Predicting what might happen to the public procurement regime after the transition period is tricky, since it depends to a large extent on what ongoing trade deal is reached with the EU, which could take years to finalise. Against that backdrop, a range of scenarios exist.

At one end of the spectrum we might have a trade deal with the EU which requires us to treat the public procurement directives as binding and which therefore would preclude any significant change to the regime we currently have.

At the other end of the spectrum, we might reach a deal (or no deal) which leaves us with no such obligations and bound only by the much looser framework set out in the WTO Government Procurement Agreement, to which we will automatically become a party when we leave the EU.

One example, currently contemplated in the NHS Long Term Plan is that clinical health services could be removed from the scope of the procurement rules, once the EU directive that brought them into scope no longer has any bite in this jurisdiction. The Long Term Plan aims "*to free the NHS from wholesale inclusion in the Public Contract [sic] Regulations*”. The Conservative manifesto stated that "*Within the first three months of our new term, we will enshrine in law our fully funded, long-term NHS plan*" and it will be interesting to see whether this emerges as a reality later in 2020.

Overall then, the forecast is for business as usual in the short term with the possibility of change in the medium and longer term.

You can find a range of resources and information compiled by our team of procurement experts at Mills & Reeve’s procurement portal.

New procurement thresholds from 1 January 2020

Public Contracts Regulations 2015

The threshold value of social and other specific services listed at Schedule 3 to the PCR 2015 (the "Light Touch Regime") will be **£663,540**.

	Supplies	Services	Works
Central government authorities	EUR 139,000 **£122,976**	EUR 139,000 **£122,976**	EUR 5,350,000 **£4,733,252**
Other public sector contracting authorities	EUR 214,000 **£189,330**	EUR 214,000 **£189,330**	EUR 5,350,000 **£4,733,252**

Utilities Contracts Regulations 2016

Type of contract	
Supply and service contracts	EUR 428,000 (**£378,660**)
Works contracts	EUR 5,350,000 (**£4,733,252**)

The threshold value of social and other specific services listed at Schedule 2 to the UCR 2016 (the "Light Touch Regime") will be **£884,720**.

Concession Contracts Regulations 2016

Type of contract	
Concession contracts	EUR 5,350,000 (**£4,733,252**)

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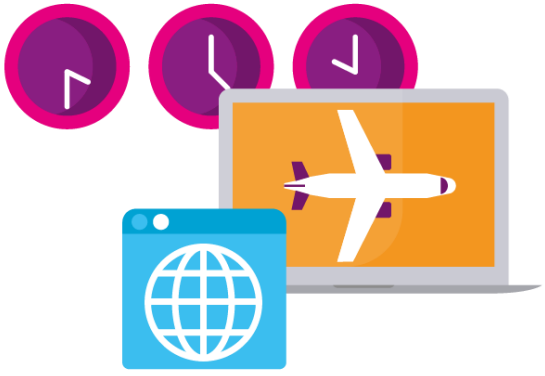


Some data compliance tips for 2020

Data compliance can be challenging for many organisations but a failure to comply with data law can have significant adverse consequences. With this in mind, the following guidance may help institutions avoid some common pitfalls.

1. Data and information requests: Getting the right legal framework

There are three distinct pieces of legislation that organisations sometimes conflate when they receive a request for information and/or data.

GDPR and FOIA

The General Data Protection Regulation 2016 (GDPR) is an EU regulation covering data protection for individuals within the EU and EEA. Its primary aim is to ensure that individuals have control over their personal data. The Data Protection Act 2018 (DPA) is the U.K. law which complements the GDPR and together with GDPR replaces the Data Protection Act 1998. Amongst the various rights and obligations in GDPR, broadly speaking Article 15 enables an individual (the requestor) to obtain a copy of their **personal data** from any organisation, company or individual (the data controller), subject to certain exceptions and qualifications. This is known as a Subject Access Request (SAR).

The Freedom of Information Act 2000 (FOIA) creates a right of access to **information** (not personal data) held by public authorities. Under section 1 FOIA an individual (the requestor) can ask a public authority to confirm whether they hold certain information and to provide a copy of that information, subject to a number of exceptions and qualifications. This is known as a Freedom of Information Act Request (FOIA request).

Although similar in their processes, a FOIA request and a SAR are distinct from one another and operate differently. It is often not clear from the content of the request whether the requestor is making a SAR or a FOIA request as the requestor is not obliged to cite the relevant legislation. In some cases the requestor may be making both a FOIA request and a SAR and the organisation will have to address these components separately. If this occurs, it is important that the organisation makes it clear to the requestor how they intend to treat the different parts of the request and to seek legal advice if unsure.

FOIA and the EIRs

Another potential legislative pitfall for organisations is the distinction between requests for information under FOIA and requests under the Environmental Information Regulations 2004 ("EIRs"). Requests for "environmental information" as widely defined in EIR regulation 2(1) fall outside the scope of FOIA and must be considered under the EIRs.

Although the EIRs and FOIA are similar regimes, there are a number of differences. For example the EIRs contain a presumption in favour of disclosure of environmental information, particularly when the request relates to emissions.

Sanctions and compliance

Failure to comply with a SAR can result in a fine from the Information Commissioner's Office (ICO); failure to comply with any of the regimes can result in other regulatory action. There are also some associated criminal offences, for example offences of altering records or personal data with intent to prevent disclosure.

Entities that are subject to GDPR as well as FOIA and the EIRs therefore need to be aware of the different regimes and have appropriate systems, policies and procedures in place to enable requests to be responded to appropriately within the applicable timeframes.

2. Reporting a data breach

It is commonly known that organisations should report a personal data breach to the ICO within 72 hours, although there are typically some nuanced questions

about what constitutes a reportable data breach and how information should be presented to the ICO.

In the aftermath of a data breach, organisations often forget that they may also be obliged to report a breach to other regulators such as the Office for Students (OfS) or, in the case of entities that are registered charities, the Charity Commission, or face regulatory sanction.

In the OfS's case, for example, registered English higher education providers would need to consider whether the data breach is a "reportable event" under the OfS Regulatory Framework, and if so would normally have to report it within five days of the event. It may therefore be necessary to seek legal advice on whether and how to report to the ICO and OfS (or other appropriate regulator) as soon as a breach occurs.

3. Accountability, Policies and Notices

Amongst the various obligations imposed by the GDPR are obligations to ensure that personal data are processed "lawfully, fairly and in a transparent manner" and in a manner that "ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures". Data controllers are also required to implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with GDPR, and to review and update those measures where necessary. Where proportionate such measures shall also include implementation of "appropriate data protection policies".

A key principle of GDPR is the "accountability principle" which requires data controllers to be responsible for and able to demonstrate compliance with the various other principles in GDPR.

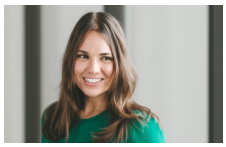
Against this background, the importance of maintaining policies, systems and documentation is illustrated by the recent case of Doorstep Dispensaree.

Doorstep Dispensaree is a pharmaceutical dispensary supplying care homes in London. In summary, it transpired that Doorstep Dispensaree had left around half a million documents in unlocked crates, disposal bags and a cardboard box in the rear courtyard of its premises. The documents contained sensitive information such as names of vulnerable patients, their contact details and medical information.

After learning of this fact, the ICO launched an investigation into the company's data compliance. The ICO found that the majority of the company's policies had not been updated since April 2015 (pre GDPR). The ICO imposed a penalty of £275,000 for what it felt was a "cavalier attitude to data protection". In issuing its Penalty Notice, the ICO considered the fact that "its policies and procedures are outdated and inadequate" and that "in particular, its privacy notice falls short of the requirements of Article 13 and 14 GDPR".

This case highlights the importance of preparing and updating data policies and procedures. These policies should be tailored to the organisation's needs rather than borrowed templates and they should be reviewed regularly and updated as appropriate to reflect any changes in operations.

The accountability principle and the principle of "data protection by design and by default" also mean that an annual policy review alone will not suffice - in the words of the ICO "In essence […] you have to integrate or 'bake in' data protection into your processing activities and business practices, from the design stage right through the lifecycle".



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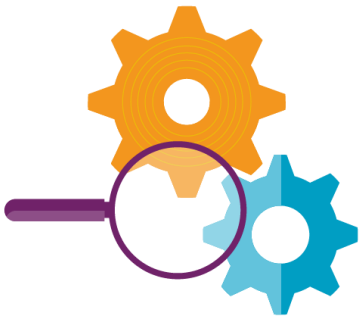
Accommodating delay: Dealing with delays to purpose built student accommodation



A recent BBC report identified at least 22 private student blocks in the UK (almost a third of those being built) were delayed at the start of the 2019/20 academic year, resulting in the universities minister calling for a summit on the issue.

It is important to know what steps may be available to mitigate the effect of such delays, and we have summarised a few of the options below:

1. **Liquidated Damages** – One option is to include a liquidated damages (LD) clause as an alternative to relying on a general damages claim. In a general damages claim the precise loss to the University (rather than, for example, its students) has to be proven. An LD clause allows a claim for a pre-agreed amount from the contractor for each day (or week) that the project is delayed beyond the planned completion date. A benefit of LD clauses is that they provide certainty to both parties about the financial impact of a delay. However, the amount which can be claimed will be a point of negotiation and a higher amount may lead to a higher construction price.

2. **Alternative Accommodation** – A provision can be included which requires the contractor to provide alternative accommodation if the accommodation is not ready on time. The provision should specify the requirements that the accommodation must have in order to be deemed "suitable" (e.g. quality, location and amenities).

3. **Early Warning Notices** – Whilst not providing a remedy, a requirement to provide early warning notices as soon as the contractor is aware of an issue which may cause delay can allow the employer to put contingency plans in place and steps can be taken to address the issue sooner rather than later. However, the success of such clauses relies on co-operation and clear and open communication between the employer, the contractor and the project manager, which may not always be the case.

4. **Programme Due Diligence** – Practically, it is important that thorough due diligence of the contractor's programme has been undertaken. It will be important to consider how much "float" the contractor has built into the programme, the time of year in which it intends to carry out certain work and whether the timelines given for completing the work are realistic.

Whilst LD and alternative accommodation clauses can help to mitigate the impact of late completion, these are unlikely to address the reputational damage suffered as a result of failing to deliver. It is important to ensure that the procured contractor has a proven track record of delivering such projects and notifies any potential delays to provide a full opportunity to mitigate its impact.

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