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## EDUCATION BRIEF

# FIVE HIGHLIGHTS OF THE HIGHER EDUCATION WHITE PAPER AND THEIR POTENTIAL LEGAL IMPLICATIONS

The White Paper hints at a range of changes which have the potential radically to alter the dynamics of the relationship between institutions and their students, as well as with each other and with new providers who enter the market. Inevitably these will result in changes to the legal framework within which academic institutions operate. We identify five of these below and suggest some of the legal implications that may flow from these.

### 1. Funding

It is almost universally accepted that the shift from block grant funding to funding by way of loans to first-time undergraduates will lead to a more demanding student base. Indeed, insofar as the White Paper has as one of its underlying principles that student choice is the best way to drive up the quality of higher education (a by no means uncontroversial proposition), a more discerning student base is a deliberate and desired consequence of the proposals. It is expected that this will lead to more complaints about perceived defects in the quality of the learning experience and environment. However, it may lead to greater levels of challenge to other aspects of an institution's policy too. Students who withdraw during the first year have a greater financial imperative to seek to

challenge fees policies which commit them to paying all or a significant portion of the first year's tuition fees. Students who are subjected to disciplinary action such as prolonged periods of precautionary suspension or threats to expel them may be even more inclined to defend their positions. Similarly, students who are subject to fitness to practise processes may be more likely to challenge allegations against them with even greater vigour. A more discerning and demanding student could test the robustness and indeed lawfulness of a wide range of processes, and institutions will need to be ready to respond to this.

### 2. Information

Informed student choice will be achieved through the provision of more information about what students can expect, through Key Information Sets (KIS) and student charters. There is some debate around whether or not these are intended to be legally binding. The very purpose of a KIS is to enable students to decide whether or not to apply for a particular course and ultimately enter into a contract with the institution for delivery of that course. It would therefore be surprising indeed if institutions were to be deemed legally able





to walk away from inaccurate information or unfulfilled promises set out in a KIS. Student charters may be more arguable, in that they may simply be intended to signpost students to the key terms of the contract, rather than form part of the contract, but any ambiguity or inconsistency with course and institution regulations may well be reconciled in favour of the student.

### 3. Satisfaction

Permeating the White Paper is the belief that the results of student satisfaction surveys are a reliable indicator to inform judgments about the quality and value for money offered by a particular institution. Leaving aside the not insignificant question as to where student satisfaction should rank in the package of indicators that together demonstrate an institution's quality, it may well be the case that in future institutions need to share more explicitly the obligation to strive to increase student satisfaction rates to those who are crucial to delivery of the student experience, such as staff (academic or otherwise) and outsourced suppliers of key services such as IT, catering and accommodation, as well as taking action more quickly where student satisfaction is low or declining.

### 4. Competition

The changes to funding and the creation of an ever increasing number of contestable places is likely to place some strain on hitherto collaborative relationships. Institutions may find their contractual documentation being scrutinised for escape

routes and lifelines. The proposed simplified processes for applying for degree awarding powers (DAPs) and the more liberal use of university title will create a new set of providers, some teaching, some merely awarding, and many more entitled to call themselves universities, who will change the competitive landscape in which universities operate. These providers will be vulnerable to suspension or removal of their DAPs if the quality of provision drops, with potentially severe consequences for their students and/or graduates. In extreme cases, institutions may find themselves called in to bail out students who are unable to complete their studies at a provider whose DAPs are in jeopardy. Even worse, institutions may find it hard to resist calls that the possibility of suspension/removal of DAPs should apply equally to them.

### 5. Constitutional change

The White Paper refers to the possibility of mechanisms to allow institutions to change their constitutional structure so that they can, for example, attract private investment. The need to consider what impact this has on charitable status and charitable assets is expressly recognised. There will of course be other consequences. A wide range of legislation that applies to universities because they are public bodies and publicly funded may no longer be appropriate. Some of these consequences may be welcome. For example, some universities may not mourn the loss of the obligation to comply with public procurement rules and freedom of information.



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## SPOTLIGHT ON PLAGIARISM

Recent developments from Europe have once again put the spotlight on plagiarism, and serve as a salutary reminder of the prevalence and seriousness of plagiarism.

The issue hit the headlines both in the UK and Europe as a result of shocking revelations regarding well-known political figures, and these have had a huge impact upon the academic institutions involved.

The University of Bayreuth was forced to investigate plagiarism allegations published on the internet concerning the then current German defence minister Karl Theodor zu Guttenberg's summa cum laude PhD thesis in law. The investigation revealed that Guttenberg had deliberately plagiarised work, and in any case did not deserve the mark awarded to him. Public outrage and embarrassment resulted in Guttenberg's resignation.

The University of Konstanz has also revoked the PhD in law awarded to Veronica Sass, the daughter of German politician Edmund Stoiber, following similar internet rumours and an enquiry which revealed mass copying in her thesis.

Further internet rumours concerning German liberal democrat Silvana Koch-Mehrin's PhD in philosophy have drawn the University of Heidelberg into the mounting storm, causing her to resign from her political posts. The results of the University's investigation into these claims of plagiarism are due to be published later this month.

Not only is plagiarism considered morally wrong, but the type of copying which is reported or alleged in the above cases would likely amount to infringement of copyright and/or database rights (and in very limited circumstances an author's moral rights) in the UK. This is because the exceptions which permit certain forms of copying for academic research and study in the UK come with provisos which require acknowledgement of the author, or an indication of the source of the copied work.

These intensely public disclosures of plagiarism have been very damaging to the universities involved, their reputation, and their perceived integrity in the academic sphere. They provide a prompt for all

academic institutions to review, and if necessary amend, their internal IP and plagiarism policies and procedures to ensure they are fit for purpose. Institutions should also ensure that information for students makes clear the gravity of this issue, in order to overcome issues with student perception; and should consider thoughtful implementation of counter-plagiarism measures such as software screening of submitted texts for plagiarised material.

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## CRC - ANNUAL REPORTS BY 29 JULY AND PROPOSALS FOR SIMPLIFICATION

The CRC Energy Efficiency Scheme (CRC) is a compulsory scheme affecting many institutions, which aims to encourage the development of energy management strategies to reduce energy consumption, and hence carbon emissions. Obligations under the CRC are currently high on the agenda, with CRC annual reports due by 29 July 2011 from those organisations caught. The fines for non-compliance are significant. There's an initial penalty of £5,000 escalating at a rate of £500 per day for 40 days (until 26 September 2011), when the accumulated daily rate fine is doubled to £40,000 and supplementary sanctions apply.

Looking forwards, there are welcome proposals to simplify the CRC, after feedback on its effectiveness and complexity.

In April this year, initial simplification measures came into force extending the Introductory Phase, Phase 1, by a year, so that it now covers the 4 year period from 1 April 2010 to 1 April 2014. This gives an additional year's experience of managing compliance and also provides a window to consider further simplification. So now Phase 2 will run for six years from 1 April 2013 to 1 April 2019 - its first year overlaps with the last year of the Introductory Phase. Also, where electricity supply is 6000 MWh or less, information disclosure requirements are being removed.

In the latest developments, on 30 June DECC published proposals for simplifying the CRC further from the start of Phase 2, April 2013. DECC rejected the option of replacing the CRC with a simple carbon tax: DECC has ample evidence that price alone does not ensure that organisations will implement energy efficiency measures. DECC has preferred to simplify the CRC, combining reputational, financial and standardised energy measurement and monitoring drivers as the best way to achieve greater energy efficiency and reduce emissions. The main proposals for simplifying the scheme are as follows:



- Reduce the number of fuels covered by the scheme: Participants will only have to report on four fuels instead of the current 29 - electricity and gas and (if used for heating purposes) kerosene and diesel;
- Move to fixed price allowance sales: Allowances in Phase 2 will no longer be auctioned; instead, there will be two fixed price sales per year, from 2014 onwards. The sale in Phase 1 will be retrospective only and is still going to take place in 2012 as planned;
- Simplify the organisational rules: The current rules on organisation structures will be simplified. The top parent organisation will still have to notify the Environment Agency of the overall structure of its group, at the beginning of each Phase, but the group may disaggregate itself to best reflect its "natural business units";
- Make qualification processes easier: The qualification process will simplify, so that only electricity that is measured by settled half hourly meters (HHMs) will count towards deciding if an organisation is covered by the CRC;
- Reducing overlap with other schemes: Any sites covered by a Climate Change Agreement (CCA) or the EU Emissions Trading Scheme (EU ETS) will be excluded from the CRC scheme;

- League tables will be retained: The first league tables will be published in October 2011 as planned, but the government may revise the reputational element;
- Changes for trusts: The current rules on how the CRC applies to trusts will change so that responsibility for compliance is allocated to the entity with genuine commercial interest.

There are currently no planned changes for the treatment of renewable energy, the landlord/tenant rules or the rules on franchises.

How will these proposals be taken forwards? The planned timeframe is as follows:

- 2 September 2011: Closing date for comments on the proposals.
- February to April 2012: Government to publish formal consultation on simplified CRC.
- September 2012: Government to publish response to simplified CRC consultation.
- April 2013: Legislation to implement simplified CRC comes in to force.

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# PROTECTING EMPLOYEES ON MATERNITY LEAVE DURING REDUNDANCY

A recent case has highlighted the need for employers to act reasonably in the protection given to women on maternity leave, where a redundancy situation arises during their maternity leave.

Insitutions are likely to be aware of the provision in the Maternity & Parental Leave etc Regulations 1999 which provides that, if it is impractical by reason of redundancy to continue to employ a woman on maternity leave under her existing contract, then where a suitable available vacancy exists the woman is entitled to be offered that employment (assuming that the specific conditions set out in the 1999 Regulations are satisfied).

However, before getting to the position of a potential redundancy, employers usually have to undertake a selection process. Where women on maternity leave are involved, this will involve a comparison of employees currently at work, and the woman, or women, on leave. Depending on the selection criteria used, there may not be relevant contemporaneous data in respect of the woman or women on maternity leave.

This was the issue faced by the law firm Eversheds when carrying out a recent redundancy exercise. A male lawyer was made redundant because he had obtained a lower overall score than a female lawyer on maternity leave. The sole reason for this was that the female lawyer had been awarded the maximum score for a particular criteria measuring performance, whilst the male lawyer had scored lower. However, the



female lawyer had in fact been on maternity leave during the relevant period and had thus no performance to measure.

Eversheds had awarded the female lawyer the maximum score, as a result the male lawyer was made redundant, and the male lawyer brought claims, both of unfair dismissal and sex discrimination. What is now section 13(6)(b) of the Equality Act 2010 (previously included in the Sex Discrimination Act 1975) provides that there will be no sex discrimination against a man where "special treatment is afforded to a woman in connection with pregnancy or

childbirth." The question before the Employment Tribunal, and subsequently the Employment Appeal Tribunal, was thus whether Eversheds' decision to award the maximum score, saving the woman's job and costing the man his, fell within this exception.

The EAT decided that the exception is limited to treatment that constitutes a proportionate means of achieving the legitimate aim of compensating the woman for the disadvantages occasioned by her pregnancy or her maternity leave. Therefore, in this particular case, awarding a maximum score went beyond what was proportionate because there were less discriminatory alternative measures available, such as measuring performance at a time when both candidates had been at work. The claims of sex discrimination and unfair dismissal thus both succeeded.

This case is therefore a handy reminder to insitutions that although they must avoid discriminating against women absent on maternity leave during a redundancy exercise, equally they must take care not to be overgenerous to those women, such that they end up discriminating against, and unfairly dismissing, their male colleagues.

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## EDUCATION NEWS



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### Education Conference: Shaping your Workforce for the Future

Pressure on budgets, from unions and from competitors ... all of this makes the current landscape in higher and further education very challenging to navigate, and demands of HR leaders that they imagine and plan for a different workforce for the future.

We are holding a half-day conference on Wednesday 2 November at our office in Birmingham which will consider the legal/procedural framework and the practical skill-set institutions will need to have in place in order to thrive in the challenging years ahead.

See [www.martineau-uk.com/SeminarPage.aspx?SeminarId=60](http://www.martineau-uk.com/SeminarPage.aspx?SeminarId=60) for more details.



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