Transforming the sector?
The Augar Report and other key topics in FE

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Recent weeks have been dominated by the publication of the long awaited report from the Augar review of post-18 education and funding in England. Most of the widespread national media coverage focussed on the much anticipated recommendation for a cut in undergraduate tuition fees. This is, however, only one of the 53 recommendations made in the report, which is far more wide-ranging in scope and potential impact than the immediate press coverage suggests. Indeed the recommendations include a shift of emphasis and funding from HE to FE. In this magazine we examine the key issues arising from the report from a further education perspective.

The end of March saw the deadline for colleges and academies in respect of the publication of the second set of gender pay gap statistics. This has allowed for comparison of what, if any, improvement there has been since the first set of figures and the degree to which action plans to reduce the pay gap have worked. In the last issue of InStep we considered how institutions could use positive action to close pay gaps more quickly. In this issue we look at other initiatives, positive steps and critical interventions which colleges and academies may wish to consider as part of their diversity strategy in order to reduce pay gaps and increase representation.

Brexit and the question of citizens’ rights remains at the forefront of the issues facing education institutions. At the time of writing the UK remains in the EU with the question of whether an exit will be with or without a deal still very much up in the air. The immigration White Paper envisages a revised sponsorship system applying equally to EEA and non-EEA nationals. In this issue members of our specialist education immigration team provide an update on the proposed new system and the effect of a deal or no-deal exit on this.

The use of external contractors has been common in the education sector for many years now. Many colleges and academies find outsourcing an effective way of managing the costs of non-core services such as cleaning and catering. However, we have continued to find that colleges and academies struggle to understand the implications of local government pension scheme obligations on an outsourcing. In this edition our specialist education pensions team provides an update on the current position.

In this issue we consider the latest developments in reforms to employment law and practice following the Government’s response to the Taylor Review of Modern Working Practices and the impact this will have on your institution.

Finally, the recent introduction of the Tenant Fees Act provides greater protection to students living in accommodation let by an institution. Colleges with such accommodation and their agents will need to navigate these new rules and satisfy the various conditions in order to avoid falling foul of the Act and suffering the consequences. Members of our education estates team, who recently delivered a webinar on this topic to over 100 delegates from the education sector, provide an update on the key issues.

I hope you find the magazine interesting and useful. As always we value your comments and suggestions for topics to be covered in future issues.

Diane
Augar review recommends wide-ranging changes to education and funding at further education institutions

The long awaited report from the Augar review of post-18 education and funding in England was published by the Department for Education on 30 May 2019. Most of the widespread national media coverage focussed on the much anticipated recommendation for a cut in undergraduate tuition fees. This is, however, only one of the 53 recommendations made in the report, which is far more wide-ranging in scope and potential impact than the immediate press coverage suggests.

Indeed a clear focus in the report is on the strategic balance of public funding for different sectors of tertiary education. The recommendations include a shift of emphasis and funding from HE to FE to address what it describes as the disparity between the 50% of young people who participate in higher education and “the rest” and the UK skills and productivity gap. The report contrasts the fact that, in 2017-18, more than £8 billion of public funding was committed to support 1.2 million UK undergraduate students in English HE institutions in 2017-18 while £2.3 billion of public funding supported 2.2 million full and part time adult FE students in the same period.

The Foreword to the report describes post-18 education in England as “a story of care and neglect”. It acknowledges that universities are one of the UK’s world class industries and, as such they are “cared for” and “worth caring about” and large parts of the report are “devoted to building on their considerable achievements”. However, the report states strongly that “the neglected” 50% of the 18-30 year-old population who do not go to university, and older non-graduates, are also worthy of attention.
The report’s recommendations are guided by eight principles adopted by the review panel:

– post-18 education benefits society, the economy, and individuals
– everyone should have the opportunity to be educated after the age of 18
– the decline in numbers of those getting post-18 education needs to be reversed
– the cost of post-18 education should be shared between taxpayers, employers and learners
– organisations providing education and training must be accountable for the public subsidy they receive
– government has a responsibility to ensure that its investment in tertiary education is appropriately spent and directed
– post-18 education cannot be left entirely to market forces
– post-18 education needs to be forward looking

The panel’s recommendations are made under six headings. The ones which are most relevant to further education institutions are those which fall under further education, apprenticeships, post-18 maintenance and skills. Below we summarise the main recommendations in the report in relation to each of these.

**Further education**

The report sets out a vision for FE colleges as core contributors to employment, productivity and growth and the changes it believes necessary to achieve this.

Many of the recommendations made in this section relate to finance, to address the fact that total spending on adult skills has fallen by approximately 45 per cent in real terms between 2009/10 and 2017/18 and the Association of Colleges’ observation that 40 per cent of FE colleges were in deficit in 2016/17.

The review concludes that funding rules are complex and inflexible and do not allow FE colleges to respond to local labour market needs; the FE college estate is in poor condition with limited capacity in the sector to address it and that the recruitment of a high quality workforce is challenging for many FE colleges (noting that “the most important barrier to workforce improvement is simply a lack of money”).

In response, the report recommends:

– the unit funding rate for economically valuable adult education courses should be increased. This should be achieved by a rebalancing of funding from less economically valuable parts of the Adult Education Budget (AEB) and possibly other funding streams - such as the European Social Fund or its replacement
– the reduction in the core funding rate for 18 year-olds should be reversed
– the Government should provide FE colleges with a dedicated capital investment of at least £1 billion over the next Spending Review period (in addition to funding for T levels) and should also consider redirecting the HE capital grant to further education
– investment in the FE workforce should be a priority, allowing improvements in recruitment and retention, drawing in more expertise from industry, and strengthening professional development
– the Education and Skills Funding Agency funding rules should be simplified, allowing colleges to respond more flexibly and immediately to the particular needs of their local labour market, with the Government providing an indicative AEB that enables colleges to plan on the basis of income over a three-year period and the possible introduction of additional flexibility to transfer a proportion of AEB allocations between years

In relation to consolidation and specialisation, the report notes the programme of FE area reviews which has recently concluded. The panel’s view is that, although there has been considerable change, there are still issues of over-capacity in some areas, while in others learners do not have access to good quality specialised provision. The panel believes that the Government should actively promote partnerships, group structures, and specialisation, in order to deliver a national network of colleges that puts all learners within reach of high quality provision.

To that end it recommends that the structure of the FE college network should be further modified, particularly in large cities, to minimise duplication; in rural and semi-rural areas, small FE colleges should be strongly encouraged to form or join groups in order to ensure sustainable quality provision in the long term and the Government should develop procedures to ensure that there is an efficient distribution of Level 3, 4 and 5 provision within reasonable travel-to-learn areas.

Finally in this section, the review recommends that FE colleges should be more clearly distinguished from other types of training provider in the FE sector, with a protected title similar to that conferred on universities.
Apprenticeships

The review has concluded that as the current reforms to the apprenticeship system remain very much in progress it is not appropriate to undertake a wholesale evaluation of the current arrangements. However, the panel have made recommendations to address emerging issues which they consider to have a direct bearing on whether the current reforms succeed.

Firstly, the panel has concerns about the subjects being studied and their level. The vast majority of apprenticeships are in Business, Administration and Law and very few apprenticeships are at Levels 4 and above (and even then heavily concentrated in a few sectors). Therefore, the report recommends that the Government closely monitors the extent to which apprenticeship take up reflects the priorities of its Industrial Strategy, both in content and in geographic spread.

Secondly, the review identifies specific concerns in relation to degree apprenticeships (level 6 and above), in particular that some employers are rebadging existing training activity – including graduate schemes – to claim apprenticeship funds, and putting senior managers through Level 7 courses paid for by the levy (the review questions whether this represents good value to the public purse); and that early figures show that degree and higher level apprentices are more likely to come from areas with higher participation in education. Consequently, it recommends that funding for Level 6 and above apprenticeships should normally be available only for apprentices who have not previously undertaken a publicly-supported degree.

Thirdly, it believes that the large number of training providers and the wide range of levels of apprenticeship provision make supervision a complex task, with seven responsible bodies working together under the Quality Alliance umbrella. The proposed solution is to make Ofsted the lead responsible body for the inspection of the quality of apprenticeships at all levels with a provision that no provider without an acceptable Ofsted rating should receive a contract to deliver training in their own right.

Fourthly, the review recommends that all approved providers of government-funded training, including apprenticeship training, must make clear provision for the protection of learners in the case of closure or insolvency.

Post-18 maintenance

The report says that maintenance should be available to all learners on equal terms, whether in HE or FE to reflect the principle that everyone should have the opportunity to be educated after the age of 18. Maintenance should apply to higher levels of study (Levels 4 to 6), adjusted for the duration and intensity of study and be set on a basis that reflects the needs and characteristics of learners at different levels and across different modes of study.

The report concludes that the current system works well for most groups but debt is still a deterrent for the disadvantaged - such students leave study with higher levels of debt (particularly since the removal of maintenance grants in 2015/16) and there are growing concerns about the student cost of living.

Amongst the recommendations are:

- that students from low-income households should receive a substantial part of their maintenance support in the form of a grant in order to reduce their level of debt on graduation – a minimum of £3,000 is proposed
- maximum maintenance support should be set in line with the National Minimum Wage for age 21 to 24 on the basis of 37.5 hours per week and 30 weeks per year
- higher levels of support should continue, as now, for courses which are longer in duration
- in delivering a maintenance system comprising a mix of grant, loan and family contribution, the Government should ensure that the level of grant is set as high as possible to minimise or eliminate the amount of additional loans required by students from disadvantaged backgrounds

In relation to student accommodation, the report recommends that the OfS should examine the cost more closely and work with students and providers to improve the quality and consistency of data about costs, rents, profits and quality.

The review concludes that the proposed maintenance system for students at Levels 4 to 6 would not be appropriate for learners at Level 3 and below. Instead the funding available for bursaries should increase to accommodate the likely growth in Level 2 and Level 3 adult learners and the support on offer to Level 2 and Level 3 learners should be made clearer by both the Government and FE colleges to ensure that prospective learners are aware of the support available to them.
Skills
The review considers the capacity of the post-18 education system to produce a suitably skilled workforce, and how this might be improved. The panel concludes that the small number of Level 4 and 5 students - only 4% of 25 year-olds hold qualifications at his level as their highest achievement compared with 30% for level 6 - translates into persistent skill gaps at technician level and reduces opportunities for people who are unable, for whatever reason, to progress directly from Level 3 to Level 6.

To promote the uptake of higher technical qualifications and flexible study the report recommends:

- the introduction of a single lifelong learning loan allowance of £30,000 for tuition loans at Levels 4, 5 and 6, available for adults aged 18 or over without a publicly funded degree
- learners should be able to access student finance for tuition fee and maintenance support for modules of credit-based Level 4, 5 and 6 qualifications
- the Equivalent or Lower Level Qualification (ELQ) rules that generally mean that funding for tuition fees or maintenance loans is not provided for students taking equivalent or lower qualifications in HE at Levels 4, 5 and 6 should be scrapped for those taking out loans for these Levels

In order to help students who have to interrupt their studies, and to motivate students struggling to complete their current year successfully, it is proposed that universities should change the way they award qualifications by awarding at least one mid-point qualification to all students who are following a Level 6 course successfully.

Further recommendations are that the number of Level 4 and 5 qualifications should be streamlined (in 2016/17 there were over 3,000 separate qualifications at Levels 4 and 5 available to learners); that the OfS should become the national regulator of all non-apprenticeship provision at Levels 4 and above and that, in order to ensure a national network of high quality technical provision, the Government should provide additional support and capital funding to specific FE colleges and work with the OfS to determine how best to allocate this.

On fees, the report concludes that the wide range charged by universities and colleges for prescribed HE Level 4 and 5 courses should be rationalised with a fee cap of £7,500 from 2021-22. In the longer term, the review considers that fees up to this cap should only be chargeable for kite marked Level 4 and 5 qualifications meeting the new employer-led national standards.

Comment and reaction
Theresa May, who commissioned the review, has welcomed its proposals including the reintroduction of means-tested maintenance grants, the reduction in tuition fees and increased financial support for FE. However, what is less clear is what approach her successor will take. Continuing political uncertainty creates significant doubt as to which recommendations will be implemented, to what extent and over what timescale - the review must be seen as a potential direction of travel rather than any definitive blueprint for reform.

At FE level the report has been broadly welcomed, with David Hughes, Chief Executive of the AoC commenting “We need a diverse and thriving post-18 education sector, led by universities and colleges, working closely with employers and communities. The post-18 review report helps us start building that system and supporting everyone throughout their lives”.

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Reducing gender pay gaps and increasing representation - initiatives, positive steps and critical interventions

Legislation on gender pay gap reporting was introduced in March 2017, with education institutions given a deadline of 30 March 2018 for the first set of reporting statistics. The primary aim of revealing pay gaps is to encourage employers to focus their efforts on reducing them. However, there appears to be little improvement in national pay gap figures between the figures for 2017 and 2018.

So what do the latest set of sector figures in fact show? We have analysed the figures reported by 206 FE colleges and academies. These show an increase in the median gender pay gap from 16.1% in 2017 to 16.4% in 2018 and a similar increase in the mean gender pay gap from 11.6% to 11.9%. The percentage of women in the top pay quartile has increased from 56.9% to 57.6% but the percentage in the lower pay quartile has also increased from 72.4% to 73.6%. While Schools Week has calculated from the latest round of reporting that the gender pay gap widened in 10 of 16 the largest academy trusts resulting in a pay gap of 31% in comparison to the national average of 9.1%.

In the last issue of InStep we considered how colleges and academies could use positive action to close pay gaps more quickly. In this article we look at other initiatives, positive steps and critical interventions which institutions may wish to consider as part of their diversity strategy in order to reduce pay gaps and increase representation.

What steps should colleges and academies be taking?

In the year between publication of the first and second set of pay gap figures, a lot of helpful guidance has been published on the types of steps employers may take to narrow their gender pay gap, including guidance provided by the Government Equalities Office (“GEO”) and ACAS.

In our experience these suggestions reflect the steps institutions are taking to address their gender pay gaps but it is worth a reminder of the guidance so that institutions can review whether there are any additional actions which they have not yet considered.

In August 2018, the GEO published guidance entitled: Reducing the gender pay gap and improving gender equality in organisations: evidence-based actions for employers. The intention of the guidance is to help employers create more effective actions plans and it sets out a number of actions which it says are likely to improve the recruitment and progression of women and reduce the gender pay gap. These are split into three categories - effective actions, promising actions and actions with mixed results.

Effective actions (which have been tested in real world settings and have been found to have a positive impact are:

- including multiple women in shortlists, ensuring that there is more than one woman in the shortlisted qualified candidates
- using skill-based assessment tasks in recruitment, rather than relying only on interviews
- using structured interviews for recruitment and promotions to reduce the risk of unfair bias to influence decisions
- encouraging salary negotiation by showing salary ranges, as research suggests that women are less likely to negotiate their pay
- introducing transparency to promotion, pay and reward processes, so that managers understand that their decisions need to be objective and evidence based, as they can be reviewed by others
- appointing diversity managers and/or a diversity task force
The second category is promising actions (those which are promising and require further research to improve the evidence on their effectiveness and how best to implement them). These include improving workplace flexibility for both men and women, encouraging the uptake of shared parental leave and offering mentoring, sponsorship and networking programmes.

The final category of actions with mixed results includes having diverse selection panels and providing training in relation to unconscious bias, diversity and leadership development. These actions are described as "mixed" as they have been shown to have a positive impact sometimes and at other times a negative impact - this might be due to how they are implemented or other factors that are not yet fully understood. However, our experience is that a number of institutions have found these initiatives helpful.

In February 2019, the GEO put the examples of actions employers can take into context, and published guidance entitled: Four steps to developing a gender pay gap action plan. Based upon GEO's analysis of what employers who have developed successful action plans said about the process, the four steps recommend by the GEO to develop a gender pay gap action plan are as follows:

1. analyse your data and identify actions (understanding why your organisation's gender pay gap exists and adopting a systematic approach to identifying actions)
2. consult and engage (gain buy-in from senior people and involve a wide range of stakeholders and staff bodies)
3. revise, assess and embed your action plan (it is important to monitor and evaluate your action plan, changing and adapting it as required)
4. allow enough time (developing an action plan is an ongoing process, from considering and planning the approach to adopt to reviewing effectiveness and ensuring that it continues to remain relevant to any issues with your gender pay gap that you are trying to address)

Finally, the ACAS publication Managing gender pay reporting, updated in February 2019, repeats its original guidance on the essential considerations for reducing the gender pay gap. Those actions include developing an evidence base, ensuring related policies and practices are consistent and up to date, providing training and support for managers, encouraging and reviewing career development, promoting flexible working and family rights and considering positive action (which was considered in our last issue).

This plethora of guidance provides a useful insight into potential actions institutions may take and how institutions should approach developing gender pay gap action plans. It is, however, for institutions to consider what works best for them. So what actions are institutions actually taking?

**What actions are institutions taking?**

We have analysed the action plans of colleges and academies, published on the Government Gender Pay Gap Service website. Perhaps not surprisingly colleges and academies are less likely than universities to publish action plans and where an action plan is published it is often, though not always, less detailed. Common action points, however, include having plans in place in relation to recruitment processes and career development opportunities with a focus on fair selection, providing training in respect of unconscious bias, reviewing pay systems and ensuring policies are family friendly and promote flexible working.

Actions that appeared less often included wider equality training, gender neutral job descriptions and adverts, ensuring there is a good ratio of male to female candidates in all shortlists for recruitment and setting specific targets.

Some of these points very much fit with our own experience of advising clients on actions to close the gender pay gap. However, there are some differences in what we are seeing in the wider education sector and other public and private employers outside the sector. Colleges and academies may therefore be interested that looking at employers as a whole we are finding that the following are the most common steps being taken:

- reviewing salary bands and levels
- considering changes to recruitment practices such as removing names from applications and having a gender balanced appointment panel
- introducing development programmes for female talent to break down promotion barriers
- implementing initiatives (such as taster days) to provide a better understanding of what the roles involve and can offer female candidates to attract talent of the future
- increasing flexible working - such as encouraging shared parental leave take up
- undertaking equal pay audits (to check no equal pay risks)
- providing unconscious bias training
Conclusion
With the annual publication of gender pay gap statistics and the forthcoming requirement for employers to publish pay data in relation to ethnicity, effective action plans putting into place steps to address pay gaps are a key priority for institutions. Furthermore, many of the steps referred to above can be equally applicable in addressing other pay gaps, such as for ethnicity.

On publication of the first set of gender pay gap figures last year much of the attention was on the size of the gap itself. Whilst this will no doubt continue our view is that, with the ability to compare statistics for each institution on a year by year basis, we are likely to see a subtle shift in interest away from the actual figure itself to how it has changed in relation to previous years and, in particular, what each institution is doing to reduce its pay gap over time.

There are clearly a number of positive steps that can be effective to tackle pay gaps but, of course, what may be effective for one individual institution may not necessarily be so for another. However, this in itself demonstrates the importance of institutions really understanding why their pay gap exists, pledging to continually monitor any pay gap issues and committing to develop and adapt their action plans as appropriate.

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The outcome of Brexit remains uncertain (though the extension of the deadline to 30 October by which an agreement must be reached has been generally welcomed by our clients as a greater opportunity to plan for changes) but the immigration position of EEA citizens living and working in the UK has now been defined by the Government in the event of a deal, no deal or a long delay. If an agreement is reached on the terms for the UK to leave the European Union, all citizens of EEA countries arriving before 31 December 2020 must apply to stay permanently by 30 June 2021.

Should no deal be agreed, only those EEA citizens arriving in the UK before the Brexit day would be able to make such applications. Those arriving between that date and the end of 2020 would be able to obtain a temporary working visa, valid for up to three years, only. The Home Office also advises employers that the current process to make right-to-work checks, whereby only evidence of the citizenship of EEA citizens is necessary, will continue to be all that is required of anyone hired before 2021; employers will not need to confirm their current staff have settled or pre-settled status either now or in the future.

It is tempting to consider immigration law as the one part of the Brexit process which has actually been resolved, but what of the system to be introduced for workers from EEA countries after 2020, when applications to register for settled and pre settled status will no longer be possible? We have some detail regarding this also. The Immigration White Paper, published at the end of last year, will be subject to detailed consultation, with implementation set to commence in 2021. A consultation period of one year is proposed during which the efficacy of the new system is assessed.

The key recommendation of the White Paper is that the UK’s Immigration Rules will apply to EEA and non-EEA migrants alike, replacing the current immigration system with one applicable equally to both. Tier 2 would therefore become the main route for EU nationals to work in the UK from January 2021. This builds on the previous report of the Migration Advisory Committee and the report envisages restricting immigration from EEA countries in 2021, accommodating potential workers within a slightly expanded points based system.

Many of the proposals in the White Paper simplify current business immigration requirements, a positive step for employers. Removal of the current Tier 2 immigration quota, an end to the resident labour market test, assistance to students seeking to remain and greater possibility to apply in-country for permission to work would all reduce the considerable regulatory burdens on institutions seeking to sponsor workers for employment and will be welcome. Comments that the system should be “as straightforward and light touch as possible” and low-cost to employers where possible acknowledge long-standing concerns about a complex system which transfers significant risk to employers who choose to hire overseas workers. Suggestions elsewhere in the White Paper that the system should be self-funding and that increasing the level of the Immigration Skills Charge may control applications in future hint that the Government may seek to regulate permission to work in practice with high application fees, which will of course be less popular.

The greatest immediate concern for employers is likely to lie in the proposals regarding lower skilled workers as Tier 2 has skills and salary criteria. For permission to sponsor most workers, a minimum salary of £30,000 is suggested; whilst there is to be further consultation about this, that has been a major source of concern for employers to date and means the alternative suggested visa for lower-skilled workers becomes very significant. The White Paper envisages that lower skilled workers should be limited to a twelve month working visa and this period would be followed by a “cooling off” period, meaning employers would effectively be limited to one year of employment per member of staff, then obliged to seek a replacement. There is a proposal that such a visa category
should only exist temporarily to assist with short-term labour shortages following Brexit and would come with restrictions based on nationality, duration and, possibly, a quota.

Eversheds Sutherland has recently conducted nationwide training with Home Office representatives for employers, attended by those representing universities, colleges, academies and a wide cross-section of the economy. We have identified several areas in respect of which we feel employers within the education sector are likely to have further questions regarding the White Paper:

1. How may lower-skilled workers be accommodated by the new system?

Major areas of the economy relies on lower skilled (or, more accurately here, lower salaried) workers. There is no obvious way for them to stay longer than twelve months within these proposals and the obligations of employers when offering them employment are not clear at present. Feedback we have received from clients indicates this suggested visa route would not adequately serve those who rely on large numbers of EEA staff. Employers often seek to invest in such staff, ensuring they gain skills as they have more experience to take up more senior positions in organisations. A twelve month “guest worker” visa simply does not allow that to happen; only the shortest-term resource needs could be met by this.

The need to abide by “cooling off” requirements would be an additional complication, as would the possibility that this may be limited by quotas. We would anticipate, on the basis of the feedback we have received, that there would be significant employment gaps in the UK unless an alternative means to sponsor workers with lower salaries could be found. We would hope the consultation period would allow evidence of the impact of this to be fully assessed.

2. Is the right balance being struck between skill, salary and shortage?

Theresa May stated in the preface to the report that the intention is to create a system “where it is workers’ skills that matter”. In fact, the report consistently emphasises salary as the key determinant of whether permission to work will be issued, not skill nor shortage. It is proposed to reduce the skill level necessary to qualify for a Certificate of Sponsorship to RQF Level 3 rather than the current requirement (Level 6) and to abolish the requirement that employers can demonstrate no settled workers are available to fill a specific role. Mrs May’s statement should have replaced the word “skills” with “salaries”; there would actually be fewer checks in this proposed system on the workers having the necessary skills.

The new proposals may make it significantly easier to work in the UK if paid a salary of above £30,000 per year or, possibly, less than that, but many currently sponsored workers earn less than that. Those who struggle to accommodate post-doctoral researchers in the current points based system, for example, will appreciate that amendments which oblige them to be paid higher salaries may well simply mean it becomes impossible to offer sponsorship to many international candidates.

The Migration Advisory Committee has previously distinguished roles for sponsorship based on whether they are suitably skilled, in shortage within the British economic and, more generally, if it is otherwise sensible to include them. Restricting lower skilled migration may have a dramatic impact in some sectors of the economy. The final element of that consideration, “sensibly” assessing what the needs of each sector are likely to be in future, is a more subjective way to consider the immigration system but could be examined in far greater detail during the consultation period. A subsequent publication by the Migration Advisory Committee has recommended to the Government a considerable expansion of the Shortage Occupation List, those roles which are considered in
endemic shortage within the UK. It is not clear, however, what role the Shortage Occupation List is to play in the new immigration system.

3. Is the system simple enough?
The White Paper acknowledges that reporting requirements and upfront costs for employers should be kept to an absolute minimum. This will be partly achieved through greater sharing of employment, benefits and immigration records, which may minimise the time it takes to hire a skilled migrant. An intention to process most work visas within three weeks is welcome.

The current points-based immigration system, originally intended to be transparent and objective, now requires over a thousand pages of law, policy and guidance on how to interpret both. Adding to the current complexity, a far more complicated immigration regime will exist in the UK post-Brexit. The EU Settlement Scheme, to be implemented in the UK whether there is an agreement to leave the EU or not, provides a deadline of 18 months for 3.6 million people, currently considered generally outside such requirements, to make immigration applications. Citizens of EEA countries will, by 2021, change from being considered as if permanent residents of the UK to people with either settled status, pre settled status, those who could have applied but did not so have unclear status, individuals with temporary visas in the event of no-deal Brexit (European Temporary Leave to Remain), family members with derivative rights based only on the four above categories and those subject to the new immigration system needing working visas; six categories instead of one! How can employers supposed to distinguish between these in 2021? Can they genuinely be confident that UKVI will be able to create processes simple enough to do so?

4. How will this be impacted by wider negotiations after Brexit?
This White Paper is set against the backdrop of uncertainty regarding the terms on which the UK will leave the European Union. It is unclear at present whether there will be an agreement to do so and the terms on which the UK will trade with EU states in future are far from resolved as yet.

The Migration Advisory Committee’s report advised there would be no inherent benefit in continuing to allow free movement for European Union citizens in itself. That has been accepted by the Government in this report, but the presumption that there would be no further discussion of the benefits of free movement in trade agreements seems an unlikely one. The Home Secretary acknowledges as much in the report, advising that the future system “will be flexible as we go on to strike future trade deals with the EU and other countries”. We would anticipate considerable revision to a new immigration system to be introduced in 2021 as a result.

5. What is the wider message of restrictive immigration policies?
The Home Secretary is clear that it is not the Government’s intention to limit immigration to extent that this may damage the UK. The system “welcomes talent from every corner of globe and demonstrates the United Kingdom is open for business.” Notwithstanding that, an Annex to the report acknowledges the definite economic consequence of restricting immigration by EU citizens; it is estimated that a reduction in the UK workforce of between 200,000 and 400,000 EEA citizens could mean GDP will be between 0.4% and 0.9% lower than it would otherwise have been in 2025.

We would hope the consultation would address issues arising from perceptions that the UK is no longer a suitable destination for EEA citizens, such that difficulties in recruitment and retention of staff are minimised. Our clients report recruitment difficulty and loss of EEA staff already due to uncertainty regarding research funding after Brexit. A reduction in economic growth, combined with a more general concern of EEA citizens that they are less welcome in the UK than previously, may make it difficult to attract and retain talented staff from outside the UK.

The report comments that the changes outlined represent the “most significant changes to the immigration system in more than 40 years”, with employers therefore requiring time to adjust. When introducing the White Paper to the House of Commons, the Home Secretary further commented that the year-long programme of engagement would help to refine the new system, which should not be considered final at this stage. This approach does seem appropriate; we would anticipate revision of the White Paper based on the terms of the UK’s departure from the European Union and, we hope, employers’ feedback.

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Navigating pension obligations on outsourcings for academies and colleges

What’s the issue? The use of external contractors has been common in the education sector for many years now. Many colleges and academies find outsourcing an effective way of managing the costs of non-core services such as cleaning and catering. However, we have continued to find that colleges and academies struggle to understand the implications of local government pension scheme (LGPS) obligations on an outsourcing.

Such obligations may potentially cause significant financial and workforce issues, if incorrectly managed. However, whether New Fair Deal applies is fact-specific and we would encourage both colleges and academies to seek advice if they are unsure if it applies to them.

What happens on an outsourcing?
The terms of the outsourcing will usually be set out in an outsourcing agreement (also known as a “services contract”), entered into between the college or academy (as applicable) and the contractor.

Under the Transfer of Undertaking (Protection of Employment) Regulations 2006 (“TUPE”), those non-teaching employees who are currently carrying out the services in-house for the college or academy which are covered by the outsourcing are likely to be transferred to the contractor. This also applies on subsequent outsourcings and re-tendering of the services too. We would recommend that advice is sought as to whether TUPE would apply in any given scenario.

Under TUPE, employees’ rights to continued access of an occupational pension scheme (such as the LGPS) do not automatically pass to the contractor. Transferring staff who are eligible or participate in the LGPS would therefore, by default, be left without LGPS access. As result the Government agreed with stakeholders that some form of pension protection for public sector employees was required on a TUPE transfer.

New Fair Deal – pension protection for employees
The Government introduced pension protection guidance for outsourcings, known as ‘Fair Deal’, in 1999. The 2013 New Fair Deal guidance (“New Fair Deal”) replaced this earlier guidance and expanded its scope to explicitly include academies, as it was previously ambiguous as to whether they were covered. Broadly, New Fair Deal covers public sector organisations (such as academies) who are not ‘best value authorities’ (e.g. local councils) – such authorities are covered by separate pension protection provisions. However, New Fair Deal does not cover colleges in the FE sector (although some colleges have opted to comply with it in any case).

What do academies or colleges need to do?
For academies, New Fair Deal (broadly) provides that:

- staff who are members of the LGPS and who are compulsorily transferred from the academy to a private sector contractor, and who remain continuously employed on the delivery of the outsourced service or function, will remain eligible to be members of the LGPS while they continue to be employed on the transferred service or function
- this protection does not apply in relation to other staff of the independent contractor, including any staff employed to deliver the outsourcing service or function who were not compulsorily transferred from the academy
- it is the responsibility of the academy to ensure that the terms of the outsourcing contract require the contractor to provide protected staff with continued access to the LGPS in their new employment
- academies should also ensure that staff protected by the New Fair Deal are provided with continued access to the LGPS on any subsequent compulsory transfer while they continue to be employed on the contracted-out service or function, including any transfer to a sub-contractor or on a sale by the contractor of part of its business.
When the outsourcing contract is being negotiated, the academy must consider including appropriate provisions on pensions which comply with the requirements of New Fair Deal. If a college intends to comply with New Fair Deal too, it would also need to follow these provisions.

**Is New Fair Deal mandatory?**

Although New Fair Deal does not have the force of law, the Department for Education – and public sector unions – expect academies to comply with it as a matter of practice, as well as any colleges that have chosen to comply with it. It is also important to note that the policy is not overriding, and that failure to include appropriate provisions in the outsourcing contract will result in staff having no protection.

Failure of an academy or, if applicable, a college, to properly follow New Fair Deal guidance would likely result in action by their recognised trade unions and may lead to complaints to the Pensions Ombudsman (“PO”) by individual employees. The PO is a quasi-judicial authority that has the discretion to make public determinations and make financial awards (similar to a court or tribunal), in respect of occupational pension schemes like the LGPS. There may be both financial and reputational risk if relevant institutions do not comply with New Fair Deal. It is therefore worth considering the implications of New Fair Deal from the outset of any outsourcing.

As noted below, the UK Government has recently proposed revising the LGPS Regulations 2013 (the “2013 Regulations”) to include New Fair Deal principles, which would put New Fair Deal on a statutory footing.

**Admission agreements – gaining access to the LGPS for staff**

Continued access to the LGPS for staff post-TUPE transfer is currently provided by the well-established mechanism of an admission agreement. An admission agreement, in these cases, will be a tripartite agreement between the contractor, the college or academy and the relevant LGPS administering authority. The admission agreement contains various provisions required under the 2013 Regulations as well as some bespoke arrangements which can be agreed between the parties (e.g. in relation to risk sharing).

**Managing pension risk on outsourcing**

Under the 2013 Regulations, an outsourcing college or academy will be the relevant ‘Scheme employer’. Under the 2013 Regulations, the ‘Scheme employer’ is, among other things, the de facto guarantor of last resort for the contractor’s LGPS liabilities (e.g. the payment of contributions into the Fund or any exit deficit which may become payable if the contractor becomes insolvent).

The 2013 Regulations provide some comfort as the risk of the contractor’s failure to pay must be calculated to the satisfaction of both the ‘administering authority’ (i.e. the Council with responsibility for the relevant LGPS fund) and the academy or college (as Scheme employer). An actuary (a pensions professional who calculates this risk) will usually provide a report to both the administering authority and academy or college setting out the risk and making a recommendation as to how any risk should be managed.

A common option is that the contractor is required to obtain a bond from a third-party provider, which will help to protect and mitigate the academy or college against financial risk as ultimate guarantor.

**Other issues to consider**

Contractors often seek protection against any existing deficit relating to the relevant staff (which would otherwise transfer to the contractor along with the contracts of employment), and also against the need to make good any deficit which may be present on any re-tendering. Such issues are usually dealt with in the service contract or, if not, the admission agreement.

**Will New Fair Deal change in the future?**

The Government issued a consultation on 10 January 2019 in respect of, amongst other things, bringing New Fair Deal principles into the 2013 Regulations. The consultation period closed on 4 April 2019 and we are awaiting the Government’s response.

The changes will give New Fair Deal principles the force of law and are intended to provide greater flexibility by, for example, providing an option for dispensing with the need for an admission agreement and having the Scheme employer continue paying the employer’s pension contributions in respect of outsourced employees. The proposed drafting also continues the policy of expressly carving-out further education corporations, sixth form college corporations and higher education corporations from being mandated to comply with New Fair Deal. However, as is the case currently, it is intended that such institutions could choose to follow the new legislation if they wish.
Given the significance of these amendments, we would recommend legal advice is sought on the implications of the new regime on both existing and new contracts, once the changes come into effect.

For now however, the current New Fair Deal guidance remains in place and should be followed until these changes are legally enforceable and there is greater clarity.
The Good Work Plan: Consequences for Education Institutions

Following its response in February 2018 to the Taylor Review of Modern Working Practices, the Government has finally taken steps to implement many of Matthew Taylor’s recommended changes. Some changes have already come into force, including increases to the maximum penalty for an “aggravated” breach of employment and the extension of the right to a payslip to all workers from their first day. Further commitments have been set out in the Government’s Good Work Plan, published just before Christmas, under the headings of fair and decent work; fairer enforcement and clarity for employers and workers. In this article, we look at the potential impact of the more important of these commitments.

Fair and decent work
The Good Work Plan states that “At the heart of Matthew Taylor’s recommendations was an overarching ambition that all work should be fair and decent and for employers to offer opportunities that give individuals realistic scope to develop and progress”. This was in part due to findings in the Taylor Review that the one-sided flexibility of atypical working practices can leave workers in a vulnerable position, particularly in respect of unpredictable working patterns, establishing continuous employment and holiday pay. The Government has therefore made a number of commitments intended to give effect to the Taylor Review’s overarching ambition.

Stable and predictable contracts
The Government has committed to providing a statutory right for workers to request a more fixed working pattern in terms of the number of hours worked or fixed working days from their employer after 26 weeks of service. Many roles within the education sector rely on non-standard working practices, from supply teachers, exam invigilators and associate lecturers to catering and administrative support staff. The majority of atypical working practices within the education sector are welcomed by both the employer and the worker. However, some workers would prefer improved regularity of work and financial stability which are currently not provided by their flexible working arrangements. If an education institution has such workers, they can expect fixed working pattern requests when the legislation is introduced.

No timescale has been given for this legislation, or the form it will take (we are anticipating that it will be similar to the right to request flexible working), but education institutions may want to consider planning for the changes straightaway. Reviews could be carried out of all atypical working arrangements to ensure that the different types of workers are fully understood. Steps could also be taken to understand whether workers are content with their working patterns and how to overcome any issues. Such a review could lead to policies being implemented on how to approach atypical contracts which will help to ensure that institutions are prepared for the future reform.

Continuity of employment
In the Good Work Plan, the Government has announced its intention to legislate to extend the qualifying period for a break in continuous service from one week to four weeks. It is hoped that this will deter unscrupulous employers from imposing very short, artificial breaks in service as a means of reducing their liabilities or, where breaks are genuine, give extra protection to those who work intermittently for the same employer.

This new legislation will not change the current position that temporary cessations of work during holidays is unlikely to amount to a break in service for term time workers. Therefore continuity of employment will be preserved for holiday periods. Extra care should be taken, however, if ex-employees are offered new roles shortly after their previous employment has ended to ensure their length of continue service is accurately reflected in their employment contracts or, if they are not being re-engaged as employees, but offered consultancy work, it is genuinely not an employment relationship.
Abolition of Swedish Derogation

As of 6 April 2020, the “Swedish Derogation”, whereby agency workers can be excluded from the equality provisions through relying on their agency paying them between assignments, will be abolished and all agency workers will now have the right to pay parity with comparable workers after 12 weeks’ continuous service within an assignment. It is hoped that this will protect agency workers against the risk of exploitation from contracts preventing them from receiving equal pay treatment. Most education institutions do not engage agency workers who operate under these contracts. However, this presents a good opportunity for institutions to revisit their arrangements with agency workers to ensure that they will be given pay parity with comparable workers after 12 weeks of continuous service within an assignment.

Clarity for employers and workers

New working practices, in particular in the context of the rise in the gig economy, have clouded the distinction between employees, workers and the self-employed. The Government agrees with the Taylor Review that effort should be made to align the employment status frameworks for the purposes of employment rights and tax and has confirmed its intention to clarify employment status test in statute, to be supplemented by legal guidance and an online employment status test. No timescale has been provided for any such change. Given the complexity of ensuring legislation is fit for purpose and able to adapt to future changes in evolving business models, we would not imagine that change will happen any time soon and indeed the Government has commissioned research to help it understand how best to support those with uncertain employment status when drafting the legislation. Institutions should, however, keep abreast of any updates and consider the implications of changes to the status of workers who work under a wide range of different contracts or practices.

To stay ahead of the game, institutions may want to consider reviewing their worker and self-employed contracts to ensure they accurately reflect the reality of the working relationship. All too often, self-employed contractors fall within the worker category inadvertently and therefore are not being provided with the rights they are entitled to. Further, arrangements made for workers can result in them being held to be employees. It is important that institutions correctly categorise the individuals they engage given the disparity of rights they are entitled to.

From 6 April 2020, the Government will increase the reference period for determining the calculation of holiday pay for workers with no normal hours of work from 12 to 52 weeks. The Government stated that this change will allow greater flexibility for workers in choosing when to take holiday. However, in many education institutions, such workers are required to take their annual leave during the designated holidays between terms. Calculating holiday pay based on earning in the previous 12 weeks typically resulted in favourable holiday pay for term time workers given that they would have worked proportionately more hours during the 12 weeks before their holiday than they would over the whole year.
as was the case in Brazel v Harper Trust. In addition, the Government has also announced that HMRC will be given enforcement powers in respect of holiday pay which will be supplemented and a campaign to raise awareness of rights to holiday pay commenced in March 2019.

From 6 April 2020, written statements of terms and conditions will also have to be given to all workers, and not just employees, from the first day of their employment. Statements of terms will also need to set out whether there is a probationary period, give more detail around hours and days of work and whether variable, provide details of other paid leave (in addition to holidays) and outline any training entitlement.

**Fairer enforcement**

Education institutions should be aware of the potentially more significant consequences of breaching employment law, given the maximum penalty for an “aggravated” breach has as of 6 April 2019 been raised from £5,000 to £20,000.

Education institutions are also reminded of the importance of paying employment tribunal awards made against them. From 18 December 2018, the Department for Business, Energy and Industrial Strategy (BEIS) will name employers on the gov.uk website who fail to pay employment tribunal awards within 14 days of receiving a notification.

**On the horizon**

The Taylor Review has identified deep-rooted issues with current working practices in the context of the type of labour market needed in today’s society. Its recommendations have encompassed a broad range of topics with a holistic approach, rather than identifying quick fixes to isolated problems.

Further consultations by the Government and other organisations, including the Low Pay Commission, have examined how best to tackle problems including late notice cancellation of shifts, the minimum wage for non-guaranteed hours and employment status.

Indeed on 16 July 2019 the Government commenced a consultation exercise (closing on 6 October 2019) on the possible creation of a new single enforcement body for employment rights and on 19 July 2019 it commenced another consultation (closing on 11 October 2019) on measures to address one-sided flexibility. This proposes the introduction of compensation for workers when shifts are cancelled at short notice, entitlement to a reasonable period of notice for their allocated shifts and additional protections for individuals who are penalised if they do not accept shifts at the last minute. It is therefore highly likely that we will see further developments coming out of the report.

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The Tenant Fees Act 2019 (the “Act”) came into force on 1 June 2019. The Act applies to assured shorthold tenancies, residential licences to occupy and student accommodation tenancies (by a specified educational institution) in England, with the Act proposed to come into force in Wales in September 2019. The Act seeks to shake up the landlord/agent/occupier relationship by giving greater protection to residential tenants. This will affect any institution – higher and further education – who have student accommodation which they let out.

The Act introduces a distinction between “Permitted Payments” and “Prohibited Payments”; governing the types of fees institutions and their agents will and will not be able to charge students. The former includes rent, holding and security deposits, default and termination payments with the latter capturing charges for inventories, credit checks, cleaning services and administration, amongst others. Institutions and their agents will need to navigate these new rules and satisfy the various conditions in order to avoid falling foul of the Act and suffering the consequences.

Whilst the new regime currently only applies to new and renewed agreements, from 1 June 2020 it will apply to all agreements, whenever they were entered into. This will have significant implications for institutions and their agents who will find certain charges newly classified as “Prohibited Payments”, and so unenforceable.

Although we believe there are relatively few student accommodation agreements currently in force which will still be live when 1 June 2020 comes around, the retrospective nature of the reforms will make it necessary for institutions to future-proof their template agreements. This will apply to accommodation contracts entered into by students attending institutions from September 2019 who have not entered into their accommodation agreement before 1 June 2019.

Key Points
- rent is a Permitted Payment but an institution or its agent cannot have a stepped rent, e.g. the student paying a higher amount of rent for the first few months, in order to recover costs the institution would otherwise have charged for administration, inventories, end of term cleaning etc.
- security deposits are Permitted Payments but there are caps which are tied to the annual rent under the accommodation contract. Where the rent payable under the accommodation contract is less than £50,000 per annum, the security deposit held by the institution is a maximum of the equivalent of 5 weeks rent.
- holding deposits can only be as much as one week’s rent and, in the event that the agreement is not entered into within 14 days of the deposit being paid, it must be returned to the person who paid it, unless the payee has otherwise agreed.
- if a tenancy agreement is entered into, the holding deposit must be repaid to the payee unless the payee agrees that it can be used towards the security deposit or rent.
- payments for default are limited to loss of keys and failing to pay rent. There are further rules which must be complied with in relation to these, contained in the Act.
- payments for damages for breach are unaffected but must still be compliant with the consumer law framework.
- institutions should check their template accommodation contracts to ensure these are compliant with the Act.

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Eversheds Sutherland has unrivalled experience in the education sector for the provision of legal advice both within the UK and internationally. Details of our offices are set out below but if you do have any questions arising from this issue of InStep, or you would like to talk to us to explore how we can help you with your requirements, please do contact me.

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