

.....  
Introduction  
.....

An interview with Dr Ruth Caleb and  
Dr Nicola Barden  
.....

Pastoral support for students and consumer  
law implications – different pieces of the  
student relationship jigsaw  
.....

Religion or belief discrimination –  
how far does the protection extend?  
.....

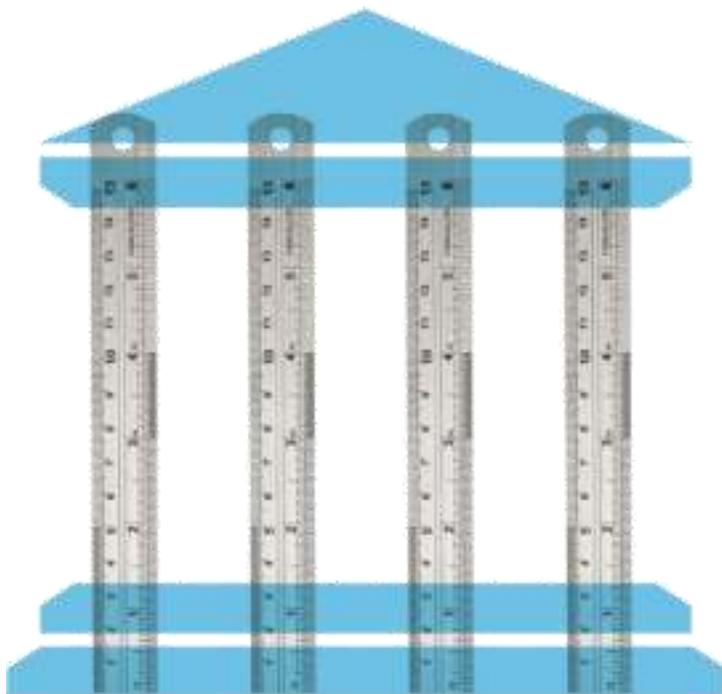
IP in lecture recordings  
.....

Brexit: What do the latest developments mean  
for higher education institutions?  
.....

The Higher Education and Research Act 2017 –  
1 August 2019 and beyond  
.....

An interview with Jon Baskerville  
.....

Unconscious bias – what is it and what should  
institutions be doing?  
.....



## A question of support

Student wellbeing and other  
hot topics in Higher Education



# Contents

- Introduction .....1
- An interview with Dr Ruth Caleb and Dr Nicola Barden .....3
- Pastoral support for students and consumer law implications – different pieces of the student relationship jigsaw .....7
- Religion or belief discrimination – how far does the protection extend? .....9
- IP in lecture recordings .....14
- Brexit: What do the latest developments mean for higher education institutions? .....17
- The Higher Education and Research Act 2017 – 1 August 2019 and beyond .....19
- An interview with Jon Baskerville .....21
- Unconscious bias – what is it and what should institutions be doing? .....23
- Eversheds Sutherland support and offices .....27





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## Introduction

**W**elcome to the Winter edition of our InStep magazine, looking at all things topical in higher education.

The focus on student mental health in the HE sector is more acute than ever. Research suggests that the number of students disclosing a mental health condition has doubled in the past four years and that pressure on counselling services and university staff to deal with the issue is ever increasing. This heightened scrutiny comes at a time when the question of how universities should support their students in the area of mental health and wellbeing, where their responsibilities begin and end, who should be involved and the impact on other students and staff is ever more complex.

I am therefore delighted that in this issue of InStep we have an interview with Dr Ruth Caleb and Dr Nicola Barden, editors of the recently published book *Student Mental Health & Wellbeing in Higher Education* to explain the key messages contained in the book.

In another article, one of our student experts, Siân Jones-Davies, who is one of contributors to the book, provides further advice to institutions on student issues on the subject of consumer law compliance and the role of pastoral care.

The concept of religion or belief discrimination was introduced into UK employment law as long ago as 2003, but the question of what this covers is still a matter for argument at employment tribunals, as has been illustrated by a series of recent cases. We thought it timely, therefore, to remind you of the principles and review the latest developments.

Recording lectures is becoming increasingly commonplace in most universities for a number of reasons. This "lecture capture" gives rise to a number of issues, including the important consideration of intellectual property rights. We explore this area with the help of our education IP lawyers and look at what institutions should be doing to cover the key points.

With the UK set to leave the EU on 31 January 2020, an important issue for higher education institutions is how this will impact on immigration law and the ability for their existing European Economic Area (EEA) staff/students to continue to work/study as before in the UK and their ability to recruit EEA nationals in the future. In this issue members of our specialist immigration education team analyse the current position and what institutions can be doing.

The remaining provisions of the Higher Education and Research Act 2017 were finally brought into force on 1 August 2019 and my corporate education colleagues explain what additional freedom this will give the sector.

The issue of international projects and collaborations is high on the agenda for many HE providers, even more so due to the potential ramifications of Brexit. My colleague Jon Baskerville, who joined Eversheds Sutherland last year, having been General Counsel at INTO, is also interviewed in this issue and, amongst other points, considers the key challenges facing HE in this area.

In the last issue we mentioned unconscious bias training in the context of one of the ways of tackling the gender pay gap. We are seeing more and more institutions interested in this type of training as part of their general diversity and inclusion strategy, so we thought it useful to have an article going into more detail on this subject.

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**



## An interview with...

### **Dr Ruth Caleb and Dr Nicola Barden, editors of the recently published book *Student Mental Health & Wellbeing in Higher Education***



Firstly, could you introduce yourselves and your experience and expertise in this area.

**Dr Ruth Caleb MBE** – I initially trained as a counsellor and psychotherapist in the 1980s, when a relatively small proportion of the UK population went to university and very few from what we now call the “widening participation” groups. In the 26 years that I have been working with university student counselling and mental health, and in particular, my 17 years as Head of Counselling at Brunel University London, there have been enormous changes not only to the student demographic profile but also to the strains and stresses that many if not most students now bear, throughout their undergraduate and postgraduate life.

As Chair of the Mental Wellbeing in HE Working Group (MWBHE), Nicola (the Working Group Secretary) and I worked closely to develop a joint strategic eye that culminated in our addressing the need to support university staff, by co-editing this book.

I am currently a consultant specialising in the mental health and wellbeing of students and staff in higher education, I am also a supervisor and tutor on the doctoral programmes in psychotherapy and counselling psychology at Metanoia Institute/Middlesex University.

**Dr Nicola Barden** – I have worked in the area of student mental health since 1991, initially as Head of Counselling at Aston and then Portsmouth Universities and finally as Director of Student Services at Winchester University. During that time there has been an enormous amount of change in the field, with a demand on both students and university staff that was barely a gleam in the eye of the sector 30 years ago.

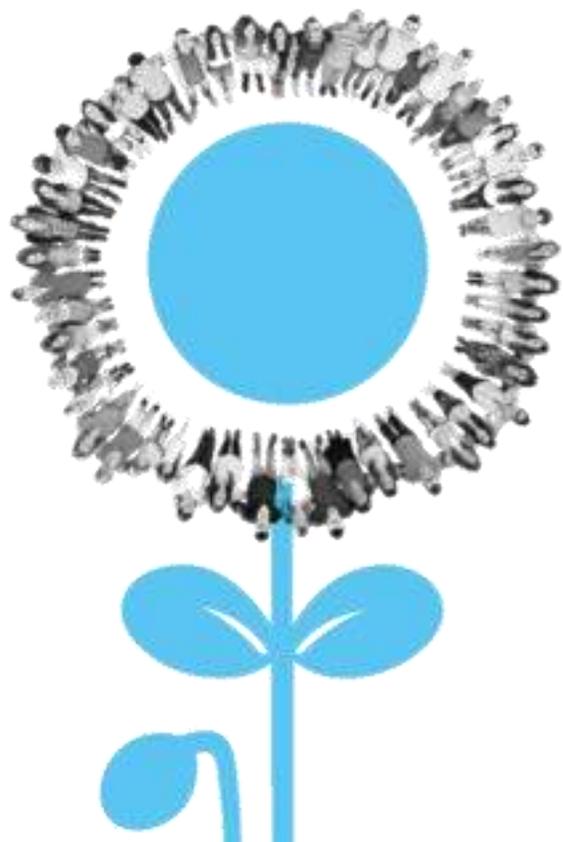
I initially trained as a counsellor and psychotherapist and had a keen involvement with the British Association for Counselling and Psychotherapy (BACP), eventually becoming Chair of the Association from 2005-08. I met Ruth through crossover work on BACP committees, followed by our long involvement with the Mental Wellbeing in Higher Education Working Group. I have now retired from my post while retaining a strong interest in the area, and remain a Professional Services Fellow at Winchester.



What is the subject matter of the book, its key messages and its intended audience, and why now?

Universities have always had a duty of care to their students. Over the years, however, significant changes in the Higher Education sector have impacted directly on the experience of being a student. This has brought considerable complexity to the question of *how* universities should support their students in the area of mental health and wellbeing: where their responsibilities begin and end, who should be involved, the impact on other students (and sometimes staff) and what if anything is the norm for providing positive mental health support.

The purpose of this book is to support all university staff, whatever their role, to offer the best care for mental health and wellbeing of their students. It provides readers with the background necessary to understand mental health in the context of HE, and addresses the concerns of academics and professional services staff in terms of how to respond to wellbeing needs. It asserts that good mental health is essential for students to manage the challenges that university presents, to progress through their studies and to achieve their full potential.





## What are your views of the biggest challenges students currently face in this area?

The student journey has always been one of transition, coping with living in an unfamiliar environment, frequently separated from established family and social networks and any existing professional support. However, in the past students were more likely to come from families with a shared experience of higher education, from schools which prepared them for the academic expectations they would face, and with the financial support of a grant system behind them. Universities did have support services – counselling services became common in the 1980s, and many institutions had integral health centres.

Academic support provided through the personal tutoring system maintained an overview of individual student wellbeing as well as academic performance. However, the reality was also that when students experienced significant difficulties in the area of wellbeing and mental health the solution was all too often to interrupt studies and return (or not) when these were resolved – so the “problem” did not remain on the institution’s doorstep.

Now, students come from a much broader range of backgrounds: 50% of young people attend university. Widening participation targets have increased the numbers of students from under-represented groups, and the Disability Discrimination Act (now the Equality Act) affirmed the right of students with disabilities, including mental ill-health, to have an equal chance of success at university.

Against these positive gains was set the eradication of the grant system in favour of loans, the consequent pressure on students of having part-time jobs on top of their academic commitments, and the new pressures of proving themselves to be exceptional in order to stand out in a job market that is now the province of the many not the few. Student anxiety seems to have risen for both undergraduates and postgraduates. Even first year undergraduates are worried about what degree they might attain, afraid that if they achieve less than a 2:1 they may have difficulty obtaining a job with good prospects, and concerned about financial hardship and a future of debt.

At the same time, there is much more awareness in society as a whole about mental health difficulties. In the year ending December 2018, among the UK population as a whole 19.7% or about 10.3 million people reported high levels of anxiety; young adults aged 16–24 today are more likely than previous generations to experience common mental health conditions. There is also an increased sense of loneliness, which according to the Office for National Statistics (ONS), particularly affects younger adults.

Successful campaigns have reduced shame and encouraged openness in relation the mental health, and the message that universities now give to their students is emphatically to talk to someone about their concerns. This clearly has implications for service provision. The greater openness has come at a time of austerity, which has had a profound impact on the NHS mental health services and their capacity to provide the support that students with mental health challenges might need. Universities themselves are expected to bear a significant responsibility in supporting students in a way that was not expected of them previously. This can be worrying for academic and administrative staff who may feel out of their depth; it can also be challenging for support staff who are managing demands that are ever-increasing in terms of both quantity and severity.

This can sound extremely daunting, but in many ways it is a good “problem” to have. It is quite right that young people who may struggle to maintain good mental health should be able to come to university and achieve their potential; mental health difficulties are not related to academic ability. University is arguably still one of the best-supported transition spaces a person is likely to experience, albeit with corresponding high demands.

And by making universities more inclusive we are part of the journey to make society more inclusive, and where mental health is understood as a spectrum that all of us will travel along during our lifetimes. Helping a student to manage paralysing anxiety or depression while at university will improve their life chances forever after; it is also very rewarding for the staff who contribute to this journey.





What advice would you give to prospective students looking to apply to university, and those who are already there?

Most importantly, don't be afraid right from the start to share any concerns you have about going to university. Talk to your family, your friends and the university services. Having their support can make all the difference.

If possible, visit the university in person on one of their Open Days. See if it is the sort of place you can imagine yourself living and working. Do you like the feel of it, the environment, the staff that you meet? Talk to the lecturers who will be teaching you, look at the planned curriculum and think "does this interest me?" – you will spend a lot of time studying it!

Talk to the support services and ask how they can help you to make a success of your time at university. Tell them if you have specific needs that you are already aware of. And talk to the students – most of the helpers on Open Days will be current students, so ask them what their experience has been like, the highs and the lows, and what makes them recommend it.

Take control of your budget. Find out what financial support is available from each university – they can have different offers, although the government support is the same across all of them – and work out a draft budget in advance to keep control of your money.

If you can't get to an Open Day, have a good look round the website, including the prospectus, and talk to someone over the phone – admissions offices and support services will be pleased to talk you through things and answer any questions.

Expect things to be a bit of a rollercoaster. Fantastic days and down days are both normal. No-one will feel great all the time, no matter what they tell you. It's fine to spend time on your own, and fine to feel awkward and anxious making new friends. Just don't give up on it – keep talking to people and you will find those you get on with. Join things you are interested in. Cook and eat in the communal kitchen. Ask people about themselves and how they are; tell them a bit about yourself. Let it take time.



What advice would you give to colleagues?

Supporting student wellbeing is the responsibility of the whole university; everyone needs to play their part. This is not the same as everyone becoming a counsellor, but it does mean then everyone has a responsibility to act supportively within and appropriate to their roles. This can range from thinking about how to introduce anxious students to the process of giving presentations to designing a campus that has quiet as well as social spaces.

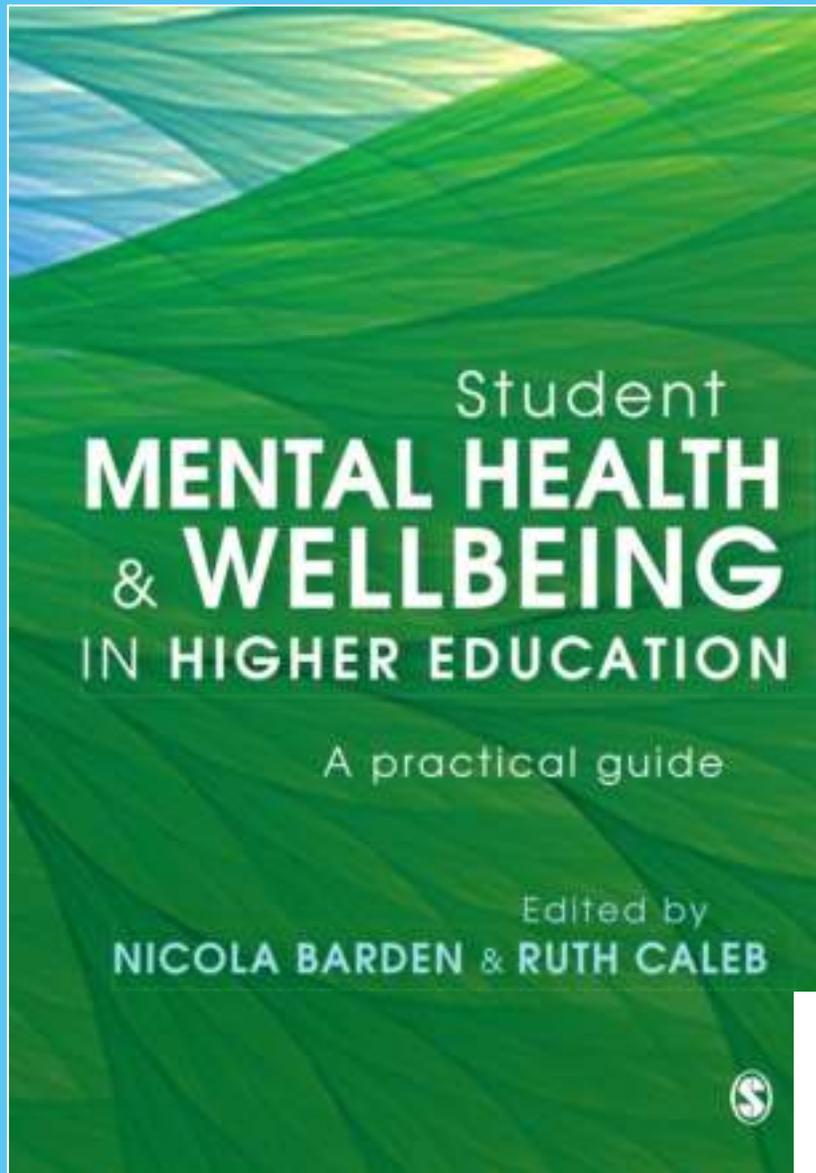
Most universities offer training to staff to help them recognise common mental health difficulties and develop confidence in being proactive in offering a sympathetic response and referring appropriately. Do take advantage of this training.

Remember that most students enjoy their time at university and flourish both personally and academically. Some will of course have challenges on the way, and if you notice a student who is struggling, just ask them how they are – this will not make things worse. Just talking to you may help. Tell them about the support services available, and voice your own conviction that these services are good and useful. Your confidence will help them to feel confident, and a positively phrased referral is much more likely to succeed. If you are really worried about someone, follow them up, and talk to student services.

Confidentiality should be appropriate to your role – don't promise it unless your role requires it. It may well be in the best interests of the student that you share their information with someone. It can also place a burden on the staff member to feel they have to retain information that worries them.



Dr Ruth Caleb and Dr Nicola Barden, thank you very much.



Eversheds Sutherland has contributed the legal chapter for *Student Mental Health & Wellbeing in Higher Education: A practical guide*. Prepared by Siân Jones-Davies (Senior Associate), the chapter summarises the key legal obligations which higher education institutions owe to their students in the context of mental health and wellbeing. The chapter comments on the part that staff play in assisting to discharge these legal obligations, highlights the importance of institutions delivering the pastoral support they promise whilst making clear the limitations on that support, considers the importance of staff awareness of the boundaries of their roles in supporting students (drawing a distinction between legal obligations and perceived moral duties), and highlights the importance of institutions providing support to staff who are supporting students with mental health difficulties. *Student Mental Health & Wellbeing in Higher Education: A practical guide* is published by Sage.

# Pastoral support for students and consumer law implications – different pieces of the student relationship jigsaw

## Continuing scrutiny of the tertiary education sector for consumer law compliance

The scrutiny of HE and FE providers' legal relationships with their students for compliance with consumer law continues unabated, fuelled by the watchful gaze of the Office of the Independent Adjudicator (for HE providers in England) and the Office for Students as well as increasing awareness by students (and their parents) of their consumer law rights and the topic's ongoing amenability for attention-grabbing headlines. Indeed, the topicality of the area may increase further with the latest wave of sector industrial action and the potential for students to perceive that they have not received the educational services they have paid for under their "student contracts" with their providers.

Much of the focus in this area has, and continues to be, on providers' consumer law compliance in the context of the educational and academic-related services which they have promised to deliver under their student contracts (such as course modules, contact hours, campus location and library opening times). What has, perhaps, attracted less commentary is any perceived compliance-failings in the context of a provider's pastoral support offering to students. Indeed, it may not always be clear what pastoral support services a particular provider is offering under its student contract and what (distinctly) it regards itself as making available on a discretionary basis.

## Terms and conditions, fairness, variations and force majeure

It is crucial that providers make clear in their "terms and conditions" that generally comprise the heart of their student contracts precisely what pastoral support services they provide (for example, a counselling service) and any limitations or restrictions on that support service (for example, on the maximum number of counselling sessions available, opening times or waiting lists). Providers should also make clear what pastoral or wellbeing services they offer on a purely discretionary basis (for example, depending on the circumstances, mindfulness classes).

Having specified the pastoral services to be delivered under the contract, providers should also consider the circumstances in which they may need to change or even withdraw the particular service (for example, due to campus closure, staff absences or financial restraints) and seek to cover those scenarios in suitably drafted variation provisions in their "terms and conditions" which permit them *lawfully* to make such changes to the terms of the contract.

Variation provisions can be "magnets" for challenge and will need to be drafted with great care in order to meet the consumer law test of "fairness" (which will always be interpreted in favour of the student) in order to be enforceable in law.

Similarly, providers should consider whether the "force majeure" (or "events outside our control") provisions of their terms and conditions adequately capture the pastoral services that may be disrupted or otherwise affected in the face, say, of a fire or flood that closed a service temporarily.



### Accurate impressions and informed choices

The nature and extent of a provider’s pastoral support offering may be instrumental in a prospective student choosing to apply to a particular provider, accepting a place at a particular provider, or choosing one provider over another, and it is vital that providers give prospective students an accurate impression of what support will be on offer to them, and any restrictions on that support, should they accept a place there. This will allow prospective students to make informed decisions of whether or not to apply to a provider or accept an offer of a place.

Having defined the nature and extent of the pastoral services that a provider offers on a contractual basis under its student contract, it will then need to ensure that it delivers those services in practice so as to avoid potential challenge by way of complaint or even a court claim for breach of contract. And it will need to deliver the pastoral services with reasonable skill and care in accordance with the statutory guarantee given to students under the Consumer Rights Act 2015.

### And providers’ duty of care

Of course, defining the nature and scope of the pastoral support on offer, and delivering those pastoral services competently, will also assist providers to manage and comply with their “duty of care” to students, a distinct legal area from the contract and consumer law aspects highlighted above, but a no less crucial piece of the student jigsaw.

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# Religion or belief discrimination – how far does the protection extend?

## Introduction

Religion or belief is one of the nine protected characteristics covered by the Equality Act 2010 (the Act), and the provisions rendering actions unlawful where they amount to direct discrimination, indirect discrimination, victimisation and harassment. Whilst the definition of many of the other protected characteristics under the Act is fairly straightforward or goes into some detail, arguably that of religion or belief falls into neither of these categories.

Indeed, some 16 years after the concept of religion or belief discrimination was introduced into UK law by the Employment Equality (Religion or Belief) Regulations 2003, we are still seeing cases interpreting what sort of beliefs the legislation does and does not cover.

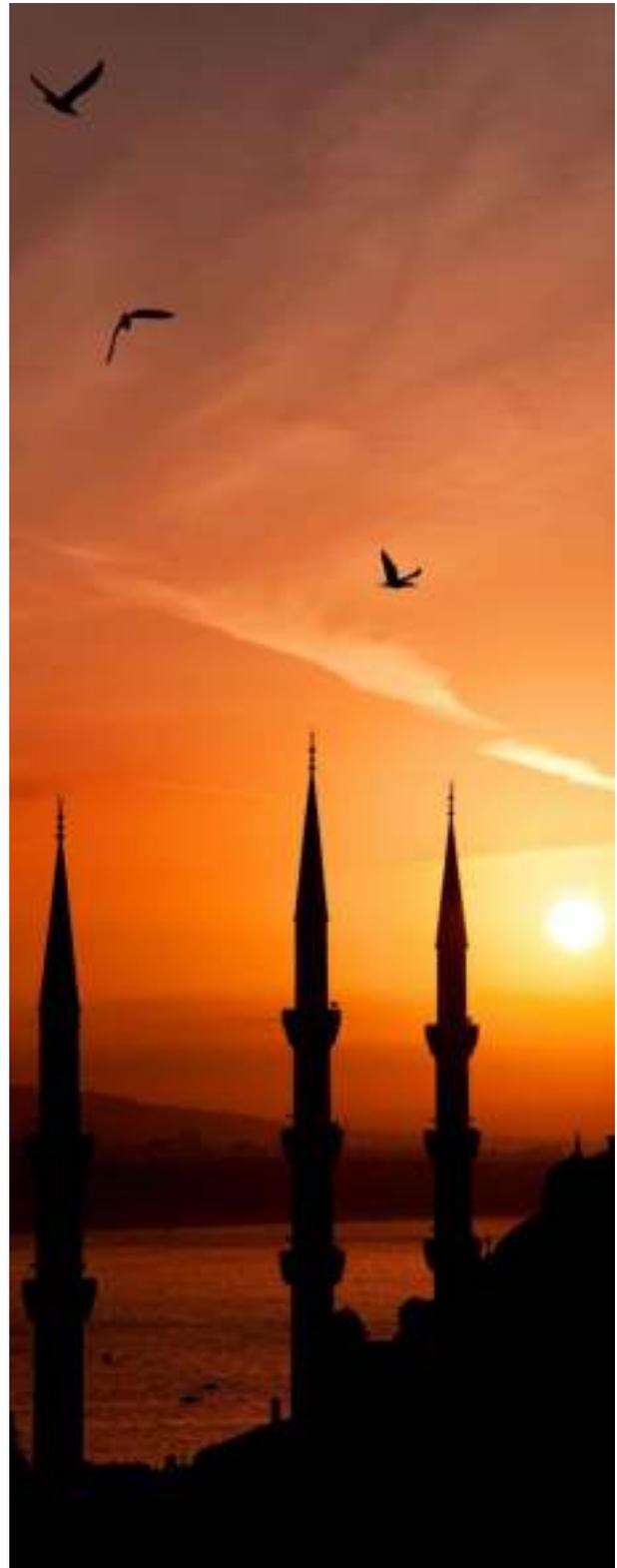
This has been recently illustrated in the latest employment tribunal case of *Costa v The League Against Cruel Sports* (on whether ethical veganism is protected under the Act) which has received substantial national media coverage.

The Act itself, repeating the definition of religion or belief contained in the 2003 Regulations, merely states that religion means any religion (including a lack of religion) and belief means any religious or philosophical belief (including a lack of such belief). The Equality and Human Rights Commission's (EHRC) Employment Statutory Code of Practice provides some assistance on the definition.

This states that "religion" includes the more commonly recognised religions in the UK, such as the Bah'ai faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism. It states that a religion need not be mainstream or well known to gain protection, but must have a clear structure and belief system.

In relation to "belief", the Code says that "religious belief" goes beyond beliefs about and adherence to a religion or its central articles of faith and may vary from person to person within the same religion. The more difficult issue is deciding what amounts to a "philosophical belief". The Code says that a belief which is not a religious belief may be a philosophical belief and gives as examples Humanism and Atheism. It says a belief need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world.

The Code makes it clear, however, that it is for the courts to determine what falls within the definition of religion or belief. So what have the courts decided?



## Grainger

The leading case is that of Grainger Plc v Nicholson. Mr Nicholson was dismissed by his employer, Grainger Plc. He argued that that in being dismissed he had been discriminated against due to his philosophical belief. Mr Nicholson argued that he had a strongly-held philosophical belief about climate change and the environment which caused him to believe that the human race must urgently cut carbon emissions. Mr Nicholson stated that this was not merely an opinion, but a philosophical belief which affected how he lived his life, including his choice of home, how he travelled, what he bought, and what he ate and drank. The Employment Tribunal (ET) concluded that Mr Nicholson was covered by the legislation and Grainger Plc appealed against that decision.

On appeal the Employment Appeal Tribunal (EAT) reviewed the legislation and previous case law, primarily under the European Convention on Human Rights. The EAT concluded that there needed to be some limit placed upon the definition of philosophical belief and that was that the belief must:

- be genuinely held
- be a belief and not merely an opinion or viewpoint based on the present state of information available
- be a belief as to a weighty and substantial aspect of human life and behaviour
- attain a certain level of cogency, seriousness, cohesion and importance
- be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others

These five key points are also now contained in the EHRC Code. This gives as an example that would not constitute a philosophical belief that of someone who believes in a philosophy of racial superiority for a particular racial group, as this is not compatible with human dignity and conflicts with the fundamental rights of others.

In Grainger the EAT also commented that, although it was necessary for the belief to have a similar status or cogency to a religious belief, it was not required to be one that was shared by others nor did it have to govern the entirety of a person's life and suggested that pacifism and vegetarianism could be philosophical beliefs under the legislation. In addition, although support of a political party might not constitute a philosophical belief, a belief in a political philosophy such as socialism, Marxism, communism or free market capitalism might, in the view of the EAT, qualify.

Furthermore if a person could establish that he held a belief based on science, as opposed, for example, to religion, then there was no reason to disqualify that from protection – the EAT gave an example of Darwinism.

In the case itself, the EAT concluded that Mr Nicholson's belief was capable of being a belief for the purposes of the legislation, although it remitted the case to the ET to decide whether, having heard evidence from Mr Nicholson, his belief did in fact satisfy the test it had set out. Furthermore, if so, it was then a separate matter as to whether Mr Nicholson had in fact been discriminated against.

What is clear from the case law is that whether the "philosophical belief" in question is covered by the legislation will very much depend on a case by case basis and the evidence given by the individual concerned.

### What else has been included/excluded?

Bearing that in mind – beliefs which have, on the particular facts of the case, been held to fall within the definition have included a belief:

- in the sanctity of life, which extends to a fervent belief in anti-fox hunting and anti-hare coursing
- in the "higher purpose" of public service broadcasting in promoting cultural interchange and social cohesion
- that public service and the need to engender in others a desire and commitment to serve the community for the common good
- that an individual should not tell lies under any circumstances
- in democratic socialism



Those which have been held to fall outside protection have included:

- a belief that people should pay their respects by wearing a poppy from 2 November to Remembrance Day
- membership of the British National Party
- a belief in spiritualism, life after death and that the dead can be contacted through mediums or psychics

### Recent cases

Given that cases turn on their facts it is instructive to look in a little more detail at some of the most recent decisions and the reasoning behind the conclusions.

In **McEleny v Ministry of Defence**, Mr McEleny claimed that he had been directly discriminated against as a result of his philosophical belief in Scottish independence and the social democratic values of the Scottish National Party (SNP). The ET decided that the element in relation to the SNP could not be defined as philosophical in nature, as it was a party-political attachment based on a belief in Scottish independence and that if the SNP were to abandon its commitment to Scottish independence it could no longer be guaranteed Mr McEleny's support.

However, the ET was satisfied that his belief in Scottish independence could be considered separately and this did amount to a philosophical belief as it satisfied the Grainger test. In addition to concluding it was genuinely held, was a belief (and not merely an opinion or viewpoint) and was worthy of respect in a democratic society, the ET was satisfied that belief in Scottish independence was a belief as to a weighty and substantial aspect of human life and behaviour and attained a certain level of cogency, seriousness, cohesion and importance. This was on the basis that how a country should be governed was sufficiently serious to amount to a philosophical belief.

In **Conisbee v Crossley Farms Limited and others**, Mr Conisbee resigned after five months' employment. He did not have the necessary service to bring a constructive unfair dismissal case and instead claimed that he had been discriminated against on the grounds of religion and belief, arguing that his vegetarianism constituted a philosophical belief. His former employers did not dispute that Mr Conisbee was a vegetarian, nor that he had a genuine belief in his vegetarianism, but argued that simply being a vegetarian itself could not amount to being a protected characteristic.

A preliminary hearing took place to determine whether or not vegetarianism is capable of satisfying the definition of being a philosophical belief. The ET concluded that it was not. It agreed that Mr Conisbee's belief was genuinely held and was worthy of respect in a democratic society and not incompatible with human dignity. However, the ET decided that it was not a belief as to a weighty and a substantial aspect of human life and behaviour, did not attain a certain level of cogency, seriousness, cohesion and importance and did not have a similar status or cogency to religious beliefs.

Interestingly the ET contrasted vegetarianism with veganism, saying that the reason for being a vegetarian differs greatly, unlike veganism where the reasons for being a vegan appear to be largely the same and that "you can see a clear cogency and cohesion in vegan belief, which appears contrary to vegetarianism". It also referred to vegetarianism as "a life style choice".

In **Gray v Mulberry Company (Design) Limited**, Ms Gray commenced employment with Mulberry as a market support assistant and was asked to sign a copyright agreement conferring certain rights on Mulberry in respect of works created by her. She refused to do so and her employment was subsequently terminated. She brought claims of direct and indirect discrimination arguing that she had been dismissed because of her philosophical belief in "the statutory human or moral right to own the copyright and moral rights of her own creative works and output".

The ET concluded that she did not have a philosophical belief under the Equality Act 2010 as the requirement that the belief attain a certain level of cogency, seriousness, cohesion and importance was not met – in coming to this decision the ET did not accept that she held the belief as any sort of philosophical touchstone to her life. In any event, the ET went on to hold that, even if she was covered, she had not been discriminated against. On appeal, the EAT agreed with the Tribunal and Ms Gray appealed further to the Court of Appeal.

On the question of whether Ms Gray had a philosophical belief for the purposes of the Act, the Court concluded that she did not, although it took "a slightly different route" from the ET and EAT as it said that what led to Ms Gray's refusal to sign the agreement – and thus to her dismissal – was her concern that the wording of the relevant clause leaned too far in the direction of the employer or failed sufficiently to protect her own interest, and that this dispute about the wording or interpretation of an agreement could not be a philosophical belief within the meaning of the Act.



In **Costa v The League Against Cruel Sports**, Mr Costa worked for his employer as Head of Policy and Research when he was summarily dismissed on 6 April 2018. Mr Costa brought a number of claims, including that he had been discriminated against due to his belief in ethical veganism, which he argued was a philosophical belief within the meaning of the Act.

In fact, The League Against Cruel Sports conceded that Mr Costa's belief did fall within the Act but the ET decided that, notwithstanding this concession, it had to satisfy itself whether ethical veganism is capable of being a philosophical belief and, if so, whether Costa adhered to that belief.

Therefore, a preliminary hearing was held on 2 and 3 January 2020 at which Mr Costa gave evidence. Having considered the matter the ET concluded that Mr Costa's belief satisfied the five limbs of the Grainger test.

The League Against Cruel Sports deny that Mr Costa was dismissed due to his belief – and this point will be determined at the full hearing which is due to take place in the last week of February and first week of March 2020.

## Conclusion

Whilst it might seem surprising that the issue of what constitutes a religion or belief – and in particular what is a philosophical belief – is still, in many cases, up for debate, in reality that is a natural consequence of the wording of the Act. The test laid down in Grainger (and contained in the EHRC Code) has introduced more certainty but, as is clear from the decisions since Grainger, which have endorsed the principles set out in the case, whether the belief in question is covered by the legislation will very much depend on a case by case basis and the evidence of the individual.

The decision in Conisbee, in particular, may seem surprising given that in Grainger the EAT commented that vegetarianism could fall under the definition and that the EHRC in its publication 'Religion or belief: a guide to the law' says that "Beliefs such as humanism, pacifism, vegetarianism and the belief in man-made climate change are all protected".

Grainger, however, is not an authority that vegetarianism is covered under the Act, as that was not the belief in question in the case. The EHRC guidance is just that and it is clear that whether a belief falls within the Act is for the courts to decide. Having said that, whilst the ET's decision is an interesting example of how to approach such a claim it is, of course, not binding on other tribunals.

What the cases do illustrate is the sensitivity of this area and the difficulty employers may face in deciding whether the "belief" is one that is covered by the Act. It is therefore crucial that employers are thoughtful and considerate in how they manage issues which are important to their staff.

The area where it may be easiest to conclude that the individual is not protected is where it can be argued that such a belief is not worthy of respect in a democratic society, incompatible with human dignity and conflicts with the fundamental rights of others. Although even this can be a controversial area and a matter for debate.

The issue of what is a belief is likely to continue to be in dispute, particularly as society's views expand and change over time. However, it is important not to lose sight of the fact that even if the requirement of having a religion or belief is satisfied, the institution may well have a very good argument that there was no act of discrimination anyway.

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## IP in lecture recordings

**R**ecording lectures is becoming increasingly commonplace in most universities for a number of reasons. Whilst recordings that are made available online are not usually intended to replace attendance at lectures, they are a useful learning resource, and provide both flexibility and accessibility for students who are not able to attend or who benefit from being able to view the lectures after the event.

**Given, however, the nature of the recordings it is important that universities ensure that they either own or have the right to use them.**

### What intellectual property rights are relevant to recordings?

There are potentially numerous different copyright works that could arise in the context of lecture recordings, including any scripted and/or ad-libbed content, the sound recording itself, and the performance.

Although the rules governing IP ownership differ in respect of each right, the university will generally own the copyright in the recording itself – assuming that the university makes the necessary arrangements for the recording to take place.

In relation to the recorded content, if the university is the employer of the lecturer then the position in the UK is that, unless there is an agreement to the contrary, the university will own the IP that the lecturer creates in the course of his/her employment. This would ordinarily include lecture contents. If there is an agreement to the contrary, that would typically be found in an IP policy or, less frequently, expressly in a contract of employment.

One important point to remember is that in absence of the employer/employee relationship referred to above, the first owner of copyright in a qualifying work will be the author. This means that if the university engages any third parties to give lectures or create content, such as visiting academics, the university may not own any IP those individuals create (in the absence of a contract confirming such ownership).



## What are performers' rights?

Performers' rights are personal rights which attach to the individual performance a person makes, for example through their participation in a lecture that is recorded. As a result, performers have certain rights that afford protection to their own individual performance of content, rather than to the content itself.

These rules are complex and performers' rights are divided into property rights subsisting in authorised copies of the recording (which can be assigned, eg to the university) and the non-property right that a performer has against unauthorised recordings of live performances (which cannot be assigned). This is relevant to lecture capture because lecturers are very likely to have performance rights in the lectures that are recorded.

Property rights can be assigned, so ownership of such rights will depend upon whether there is an assignment, for example contained in their contract of employment. Within lecturer contracts of employment it is therefore important to ensure that the definition of IP rights is broad enough to capture these performance rights. If these performance rights are not assigned to the university, then the individual's consent is required to undertake certain acts in respect of the recording. Acts which require a performer's consent include making copies of the recording, and certain uses of the recording (including making it available online).

As the non-property performance rights cannot be assigned, this means that an individual must give their consent for the lecture to be recorded and made available, for example to students via the institution's online learning platform.

## What about students?

One key point in relation to students is that IP created by students is not automatically owned by the university; it is owned by the student themselves.

From an IP perspective, a student who is recorded as part of a lecture may attract the same rights as a university lecturer. However, this is unlikely to arise too often, as a student attending a lecture is far less likely to contribute in a material way (unlike the delivering lecturer), and if students' performances are minimal then they can be more easily excluded or edited out of recordings.

In terms of the performance itself, any student contribution is less likely to qualify as (i) a copyright-protected work or (ii) a performance attracting performer's rights. However, this may not always be the case – for example if a student gives a presentation as a part of the lecture. A contribution that is more significant in nature, may attract copyright and/or performers' rights that would be owned by the student.

## Moral rights

In addition, and for completeness, it should be noted that under copyright law there is also a concept of "moral rights", which are personal to the authors of copyright works.

If a lecturer is the author of any relevant copyright works then unless they have waived their moral rights in their employment contract or otherwise then they would be able to assert these rights in relation to the use of their works. Moral rights include the right to be identified as an author and/or performer, and the right to object to derogatory treatment of the work and/or performance in question. They do not, therefore, prevent use of the work as such, but they can impact on the way the university uses it.

A waiver of moral rights is usually included in contracts of employment, but this is not always the case.



## Practical steps and the value of lecture capture policies

To avoid any issues regarding use of recorded lectures which include contributions from lecturers and students, universities should use lecture capture policies to set out key information such as what the recordings are, how they are used and how they can be modified.

To ensure consent is obtained, they are incorporated as either "opt-in" or "opt-out" policies. "Opt-in" requires that consent be obtained from lecturers and students before the recording is made, whereas "opt-out" involves notifying the individuals that the recording will be made, giving details for how they can decline being recorded if they so wish. "Opt-out" policies are often popular as they are less administratively burdensome.

Of course, such a policy is only of value if measures are put in place to make sure it is effective, including recording of given or withheld consent and processes whereby individuals can request that contributions are removed and ensuring that this is followed through. The policies also need to be brought to the attention of each individual to ensure they are aware of their rights and incorporated into contractual agreements, such as employment/student contracts and agreements, in order to have contractually binding effect.

Consent given to recordings can also be revoked at any time, unless consent has been given on a perpetual and irrevocable basis. It is therefore important to consider whether it is appropriate to state in the relevant policies/contracts that consent is given on a perpetual and irrevocable basis and, if it is not, to have procedures in place to deal with such revocations of consent to ensure that the institution does not infringe upon the individual's rights.

## What next?

We recommend that universities review their IP and lecture capture policies and employee/student contracts on a regular basis to make sure that they include guidelines in relation to lecture capture, consent and removal, and that such guidelines accurately reflect the universities' internal procedures.



**Please note** that this article focuses on sound recordings of lectures given by employee lecturers. There are other issues that may arise in the context of lecture recordings which are not covered above, such as use of third party materials, guest lecturers or academics, and data protection. Due to the complex and multifaceted nature of IP rights in this area, specialist IP legal advice should always be sought in relation to lecture capture issues.

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# Brexit: What do the latest developments mean for higher education institutions?

## What is the current position?

Brexit is finally due to take place on 31 January 2020, at which point the UK will leave the European Union (EU). Agreement about the terms on which the UK should leave has been reached with the European Commission previously on two occasions, but neither has ultimately been passed into legislation. However, following the outcome of the General Election, the European Union (Withdrawal Agreement) Bill was introduced into the House of Commons on 19 December 2019 and is now making its way through the Parliamentary process.

It is expected that the legislation will be passed before the end of the month confirming the UK's departure from the EU, with a "deal" and with a transitional implementation period which will last until 11pm on 31 December 2020.

## How will this change things?

An important issue for higher education institutions is how this will impact on immigration law and the ability for their existing European Economic Area (EEA) staff/students to continue to work/study as before in the UK as well as their ability to recruit EEA nationals in the future. Under the terms of the Bill, free movement between EEA countries and the UK will end on 31 December 2020. As things currently stand, this means that:

- EEA citizens currently in the UK who wish to remain need to apply (if they have not already done so) for settled or pre-settled status, which will allow permanent residence
- all arriving in 2020 will be able to apply and have until July 2021 to do so
- there will be no requirement on employers to confirm that any employees hired before 2021 have obtained settled or pre settled status

The requirements do not apply to citizens of the Republic of Ireland, who can exercise a right to permanent residence via different domestic law.

This is going to impact how institutions recruit and retain both staff and students from EEA countries. Whilst, for most people, the necessary applications are not difficult, EEA citizens have simply not had to do anything to establish their right to live and work and study in the UK for many years. Those who have difficulty making the application, or read about others who do, are often distressed at the situation.

Therefore, whilst our experience is that higher education institutions tend to be well aware of the EU Settlement Scheme and (since employees have been able to make such applications for over a year) often have well-established processes to assist those who have yet to do so, institutions still need to reflect on what they can do - especially in relation to those who join during the implementation period.



### What are others doing?

We have found three approaches from those we have worked with regarding Brexit which have proved helpful:

1. Obtaining information to know whether employees are making settled status applications or not can identify knowledge gaps and resource needs. It is not a right-to-work requirement that they do so, however, and the Government has specifically stated that there will be no obligation on employers, either before or after Brexit, to establish that an employee hired before 2021 has acquired settled or pre settled status. Trying to police whether staff apply for settled or pre-settled status is therefore not advised.
2. Assessing who works within the university and is an EEA citizen can be valuable information. We have found that HR systems often do not retain that information as a matter of course, so institutions seeking to communicate with EEA staff often need to identify who they are and where they work.
3. Providing support is often a feature of how institutions try to manage this risk. It may simply be to advise staff/students that settled status exists but other institutions do much more than this – conducting workshops, making statements on the institution’s own website and publishing Government information about the process are all commonly adopted.

It does seem clear that there will continue to be actions for higher education institutions to take in 2020 regarding Brexit. Looking further ahead, the Government’s intention is that a new immigration regime, which will apply equally to non UK and Irish nationals, will be in place from 2021. Although there has been copious speculation as to what the new regime will look like, the exact details are still awaited. We would suggest careful monitoring of developments in this rapidly changing area.

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# The Higher Education and Research Act 2017 – 1 August 2019 and beyond

**From 1 August 2019, a number of long-awaited reforms introduced by the Higher Education and Research Act 2017 (HERA) finally came into legal effect under the Higher Education and Research Act 2017 (Further Implementation etc.) Regulations 2019 (Regulations). As well as effecting changes to current education legislation to refer to the Office for Students rather than HEFCE, the Regulations broadened the regulation of student unions and paved the way for Higher Education Corporations (HEC) to have more freedom to determine the content of their Instrument and Articles of Government and increased the number of higher education institutions entitled to exempt charity status.**

## HECs

HECs derive their existence and power from the Education Reform Act 1988 (as amended). They are “statutory corporations”, meaning that their only powers are those derived from the Act under which they were set up. Under the Education Reform Act, a HEC is required to have as its constitution an Instrument and Articles of Government (I&As).

Schedule 8 of HERA does not prescribe the content of a HEC’s I&As. HECs are now permitted to amend, replace or revoke their I&As, subject to such changes not having a negative impact on a corporation’s charitable status. HECs needing to make changes to their I&As will no longer need the approval of the Privy Council. However, up and until the current I&As of a HEC have been approved by the Privy Council to remove the requirement to seek its approval, the Privy Council will continue to be the first port of call for a HEC seeking to do this. We have developed a straightforward mechanism for HECs navigating this change, so do let us know if you are interested in pursuing this.

The ability for HECs to more easily amend their I&As is reflective of the trend towards requiring less prescriptive constitutions in the higher education sector. In our experience, Royal Charter corporations and HEIs operating through companies limited by guarantees typically have this level of constitutional flexibility. This means, however, that other forms of governance are more important for higher education institutions, ie standing orders, reviews and compliance with the Committee of University Chairs’ Code.



## Student Unions

Prior to the Regulations, the Education Act 1994 (the Act) governed how a student union should operate, what a student union was and what type of educational establishments the Act applied to. The type of higher education establishments that were caught by the Act were public education providers in receipt of funding under the Further and Higher Education Act 1992.

The Regulations significantly broaden the type of education institutions caught by the Act by applying the Act to all registered higher education providers receiving financial support under section 39(1) of HERA. Effectively, all registered Approved (fee cap) providers fall under the requirements of the Act, whether public or private higher education institutions. The broadening of the application of the Act to private providers is reflective of the general direction of travel of HERA, focusing on the levelling of the playing field across higher education providers.

It should be noted that there is no absolute requirement for an educational institution caught by the Act to have a student union. What the Act actually requires is for the governing body of educational institutions that have a student union to actively engage with it. Note also that the definition of a "student union" is broadly drafted to capture student associations or representative bodies, regardless of whether they call themselves student unions. The key features of a student union under the Act are that any student may join the organisation and the principal purpose of the organisation includes representing the student body.

## Exempt Charity Status

The Regulations also introduce the ability for certain higher education providers that are registered charities to apply for exempt charity status by way of an Order in Council. To make an application for a change of status, higher education providers must carry out, or principally carry out, their activities in England. As mentioned above, applications can only be made by certain providers and specific providers, for example Welsh universities, colleges or halls in the Universities of Oxford, Cambridge or Durham and any students' unions, are excluded.

As the majority of English universities have exempt charitable status, this regulatory change will only impact a minority of providers. Yet, for this minority of a few registered charities, this change of status could have a significant impact on its governance and constitutional freedom.

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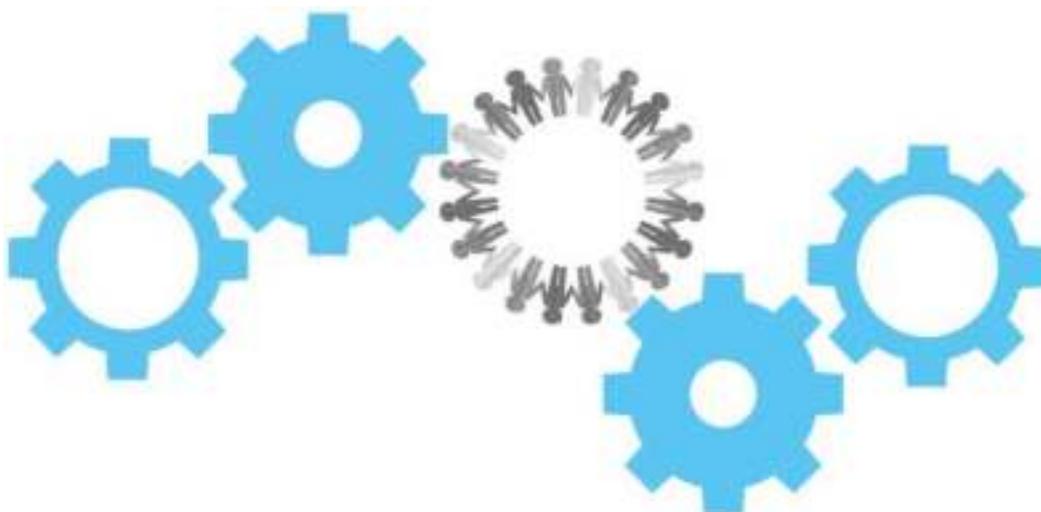
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# An interview with...

**Jon Baskerville, Partner in the Eversheds Sutherland Education Sector team**



Jon, you joined Eversheds Sutherland last May, so could you tell us a little bit about what you do and your background?

I am a partner in the firm's corporate education practice. I specialise in international higher education projects and have a particular expertise in cross-border transactions in the education sector, transnational education delivery, private equity finance in higher education and the use of public private partnerships in the delivery of university international strategies.

Before joining the firm in May I acted as General Counsel of INTO, the public/private higher education partnering organisation and international student recruiter. Over that 12 years I worked on all its partnerships around the world as it grew into the multinational globally recognized major player in the pathway sector that it is today – an amazing journey to be part of. Now, in some ways I have come full circle as I was in private practice for a decade before that – indeed, I recall doing an interview just like this one back in 2007 about that transition from private practice!



What experience and knowledge has your time in house given you?

On a professional level, the last 12 years has given me fantastic experience of cross-border transactions in the UK, the USA and across Asia, transnational education and the transformational potential of well planned, structured and implemented public-private partnerships in higher education. All of those experiences (and the skills I have developed as a result) translate directly to my new role here at Eversheds Sutherland. But it has also given me a deep understanding of public sector higher education institutions too – I am a firm believer that you can't work with universities, either as a commercial partner or for that matter an adviser, unless you understand them and the highly regulated world in which they operate.



Why return to private practice?

In a word, "opportunity". It was a tremendous opportunity that took me in-house and similarly one which brings me back. The Eversheds merger with Sutherlands, the structure and focus of the firm on the education sector together with its global reach provides a unique match to those skills and a fantastic opportunity. The firm is already rightly recognised as the leader in the corporate education space and ranked number one in this area but has tremendous ambition to do more – it is going to be very exciting to be part of that.





What do you consider are the key challenges facing higher education?

The challenges are numerous – demographics, capital constraints and political change to name just three. The higher education sector continues to be asked to do more with less whilst permanently under public scrutiny and operating in a complex regulatory environment. But the seismic shift I think is the globalisation seen over the last 20 years. Students are international citizens and consumers with choice. It cannot be assumed that the flow of international students which historically have been seen will continue in the medium to long term.

Last year was a positive one for the UK with changes in government policy, a weak pound and the US/China trade war driving students here but those institutions whose international strategy is reliant solely on an assumption of ever increasing international student enrolments or even the status quo will potentially in future find themselves exposed when global and macro-economic factors change. Providers, public or private, must be able to adapt to changes in demand and genuinely position themselves as similarly truly international in an ever more competitive global market.



The participation of private providers and private capital in higher education is not universally welcomed – indeed, whilst many would agree with the challenges you describe, some might also include what they regard as the privatisation of higher education as also a challenge. What is your view?

It is a concern I understand and one which rightly reflects the importance of the sector and the need to preserve academic standards but there are also potentially huge positives in terms of access to capital and global reach. The education sector will I believe continue to open up to the private sector – global and fiscal pressures make this perhaps inevitable.

That leads to genuine opportunities for the creation and growth of a balanced sector where public and private are not seen as distinct alternative models of provision but rather where capital investment provides capacity/resource to grow and meet the challenges of the future. The key as I said earlier is a deep understanding of the education sector. Those who work with those who genuinely have that understanding will be significantly more likely to meet the challenges ahead.



If we were doing this interview in five years' time, what do you think will have been the biggest changes that universities will have experienced in the international higher education space?

That's a tricky one – the world today is a difficult and dangerous place to make long-term or even medium-term predictions about, but two things I would feel reasonably confident saying: first, the increasing involvement and role of private capital and the private sector will continue and, secondly, institutions will have to embrace change and adapt their international strategies to thrive in a world of ever-increasing competition.



Jon Baskerville, thank you very much.



# Unconscious bias – what is it and what should institutions be doing?

**I**n 1998, a team of psychologists from the University of Washington and Yale published the “Implicit Association Test” which introduced the concept of unconscious bias, offering an explanation as to why businesses continued to face obstacles in developing individuals from different backgrounds. In this article, we explore the meaning of unconscious bias, its implications for education institutions and how it may be overcome.

## What is unconscious bias?

Unconscious bias is a term which describes different assumptions and prejudices people hold which influence decisions, opinions and preconceptions about others. Bias is defined as a prejudice one may have against a person or group compared with another in a way that is generally considered as unfair and unjust.

Unconscious bias occurs when, for example, people favour those who either look like them or share their values and opinions. They are social stereotypes about certain people or groups of people from outside one’s own conscious awareness. Research has suggested that people instinctively categorise others using easily observed criteria, which can lead to flawed or erroneous assumptions.

As ACAS explains, “Unconscious bias occurs when people favour others who look like them and/or share their values. For example a person may be drawn to someone with a similar educational background, from the same area, or who is the same colour or ethnicity as them”.

When unconscious bias occurs, the “invisible” factors often shape decision-making or influence behaviours. Each individual will have their own respective set of unconscious biases which, in spite of being involuntary, may influence decisions in recruitment, promotion and development which could potentially lead to a less diverse organisation. Despite unconscious bias often being innate and unintended, it can have a profound effect on decision-making.

## Types of unconscious bias

Unconscious bias comes in many guises and it is important to recognise these when making decisions about others. Affinity bias describes the tendency to warm to someone who you feel is similar to you; the halo effect is defined by assuming everything about someone is good because you like them; with perception bias you believe something about a group of people based on stereotypes and assumptions; confirmation bias leads you to confirm pre-existing ideas and assumptions about a group of people; and “group think” indicates a tendency to try too hard to fit into an existing culture which may result in loss of identity.



## Impact

Unconscious bias can result in discrimination if the bias impacts the decisions made or how individuals are treated and the bias relates to a protected characteristic. Discrimination arising from unconscious bias can occur in many areas in the workplace. Members of staff could be more friendly to some colleagues and not others, decisions on performance could be influenced and investigators' opinions on who is more believable could be impacted.

Research has found that unconscious bias can be particularly influential in relation to recruitment and selection decisions. This is because, when considering applicants, there is a tendency for recruiters to make assumptions about applicants based on their own life experiences. This can result in unconscious associations about applicants' attitudes, decision-making abilities and behaviours.

This was identified in a study undertaken in the US, where a group of laboratory managers were given identical CVs which were randomly accredited to male and female applicants. Despite the fact that all the CVs were identical, where the CV was assigned with a male name, the managers determined that the applicant was "significantly more competent and hireable".

Employment tribunals and courts have been alert to the possibility of unconscious bias influencing how employees are treated for a number of years. In the case of *Nagarajan v London Regional Transport and others*, 1999, the House of Lords confirmed that in a case of discrimination it was unnecessary to distinguish between "conscious and subconscious motivation".

The risk of not recognising unconscious bias and not addressing it could potentially have a significant financial and reputational impact on education institutions. In the recent case of *Hastings v Kings College Hospital NHS Foundation Trust*, 2017, Mr Hastings brought claims for unfair dismissal and race discrimination against Kings College Hospital. The Employment Tribunal found that Mr Hastings had been subject to racial abuse and that, during the investigation process, he had been subject to unconscious bias.

The Tribunal found that the allegations that he had been subjected to racial abuse were ignored and that the presumption that he was "the aggressor" throughout the disciplinary process was based on preconceptions that the disciplinary panel had of him due to him being a black male. The Tribunal therefore concluded that the investigation process was tainted by the unconscious bias of the investigators. Having lost the claim, the Trust was ordered to pay damages of £1 million to Mr Hastings.

## Overcoming unconscious bias

Education institutions must take steps to address unconscious bias to ensure that their staff and students are not unwittingly discriminated against. It is important to not only ensure members of staff are aware of unconscious bias, but that they are also provided with the understanding of how to overcome such bias.

To this end, the first step education institutions should take is to provide appropriate training to its members of staff. In February 2016, the Government appointed Baroness McGregor-Smith to lead a review into the issues and obstacles faced by business in developing black and minority ethnic talent. One of the recommendations was that unconscious bias training should be mandatory with all employers ensuring that staff at all levels of the organisation should undertake such training.

Institutions should consider providing training on unconscious bias not only when members of staff first join the organisation but also at fairly regular intervals thereafter. The training should help members of staff to understand what unconscious bias is and also provide guidance on how to reduce the possibility of unconscious bias impacting how they treat others. For example, employees should take time to consider their decisions and the reasons behind why they are making their decisions. Employees should also rely upon evidence when making decisions and clearly record why they have made those decisions. Institutions should also encourage members of staff to work with a wide range of people, to get to know them thoroughly and to focus on positive behaviour and not the stereotypes.

Baroness McGregor-Smith's review also emphasised that senior management teams and individuals involved in recruitment should be undertaking more detailed training workshops. Discussions around unconscious bias can assist employees to identify their unconscious biases and work through examples of how to overcome those biases. Such workshops will also allow the institutions to understand the general culture of its organisation and therefore where unconscious bias is most likely to arise.



Institutions also need to develop policies and procedures which limit the influence of individual preferences. For example, in recruitment exercises, information which provides details of the applicant's personal background, including their name and gender, should be redacted from CVs where possible. Further, decisions regarding recruitment should be made by at least two individuals and, ideally, the panel should be diverse as possible. A scripted interview, which focuses on competency-based questions, will also help reduce the unconscious bias affecting decisions.

Performance management procedures should be structured to ensure that employees are assessed equally, using standardised criteria which can be measured by reviewing evidence rather than on assumptions. Those undertaking investigations should be given clear guidance on how to fairly balance evidence and assess whether someone is being honest rather than relying on their instincts. These are just a few of the many steps which can be implemented to help reduce unconscious bias resulting in unjust decisions.

### Conclusion

Unconscious bias is still a major issue today. Examining where the unconscious bias lies will enable institutions to look at the reasoning behind the bias in order to challenge these problems. There are a number of positive steps that can be taken to effectively tackle unconscious bias. Senior leaders must take ownership of these steps and lead by example. This will allow the institution to demonstrate to its staff the importance of overcoming unconscious bias.

By exploring all aspects of unconscious bias and how to address adequately the issues surrounding them, institutions will be taking steps to minimise their own risks of claims against them and increase both the diversity and the productivity of their staff.

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