AHUA Perspectives

Legal updates for the world of higher education

February 2020

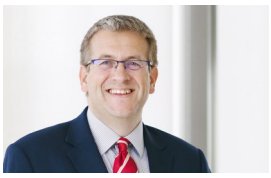
Dear Colleague

Earlier this month when I was in a shopping centre in a city with a large student population in the UK, I was stopped by two young people who explained that they were from a Danish Gymnasium and they asked whether they could they ask me some questions. I agreed, intrigued by what they were interested in. They explained that they were undertaking a project in which they needed to interview some Brits about Brexit. I decided to steer clear of the complexities of the political and constitutional issues, talked a little about the polarising impact on our national life and asked if they had heard about the Erasmus programme. They had not, so we talked a little about the importance of higher education students from across Europe being encouraged and supported to learn from the cultures of different countries, facilitated by a period of study abroad. They hoped that this would still be possible at the end of the transition period. So do I.

After a welcome break from writing about Brexit, this edition of Perspectives picks up the baton again for a special edition following the UK's formal secession as a member state from the European Union on 31 January 2020. Our thanks for their excellent contributions go to Rachel Hewitt at the Higher Education Policy Institute, Alun Thomas at our legal friends Anderson Strathern in Scotland and to our own Robert Renfree, Claire Williams and Alex Russell on some key issues relating to the transition period and beyond.

On 6 February 2020, UCAS published its analysis of data from those who applied for undergraduate courses at a UK institution by the 15 January deadline. A total of 568,330 people applied which is a 1.2% increase on the previous year. Of that total, a new record was set of 73,080 applications from those outside the EU. This included a 33.8% increase in applicants from China and a 32.9% increase from India. Although it is clearly early days, there was a 2% decrease in total applications coming from those across the EU (860 fewer).

On 30 January 2020, the World Health Organisation declared a Public Health Emergency of International Concern for the outbreak of a novel coronavirus in China. Information and guidance has been published by Public Health England on responding to this evolving situation. The Department of Education and Universities UK also issued advice which urged all UK universities to contact their staff and students in China urgently with the latest guidance and to take appropriate measures domestically according to the level of risk. It is important for institutions to continue to monitor the official guidance and to implement proportionate measures to support the welfare of all members of the international higher education community. Our thoughts are with all those who have been affected.



Gary Attle
Partner
+44 (0)1223 222394
gary.attle@mills-reeve.com

In this issue

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Brexit uncertainty

The election of the new Government has brought greater clarity about what Brexit will mean, and the timescale on which it will be delivered. But what exactly will the UK's departure from the European Union mean for universities? The answer is that we still don't know for certain.

One of the key unknowns of Brexit is the number of EU students that will choose to study in the UK. Students from the European Union can currently study here for the same tuition fee cost as students from the UK, currently set at £9,250. It has been assumed that once we have left the European Union they will instead be charged the same fee level as international students, which can be significantly higher.

Economic analysis carried out by London Economics for HEPI and Kaplan explored the factors that impact international demand for UK higher education. The results found that if EU students were to be charged the same level as international students, there would be a decline of 31,000 EU students, which equates to 57% of the current EU student cohort. However other factors, such as the falling pound making UK courses comparatively better value, were estimated to increase enrolments from all other countries by 9% in the first year and 10% from the EU. Taking all these factors into consideration, the UK is estimated to lose around 11,000 students, but gain around £187 million in fee income. However, this cost benefit would not be felt evenly across all universities: Oxford and Cambridge will take around £10 million of this income, while less prestigious universities will lose income.

However, there is a caveat to these economic predictions. Reflecting on historical precedent shows that these forecasts could be too pessimistic. Prior to the 1980s, students from outside what was then the European Economic Community (EEC) received a subsidy to study in the UK. When this was removed, it was predicted that the number of students coming from outside the EEC to study in the UK would significantly decrease. Instead, the opposite happened. The number of international students significantly grew and continues to grow today. Therefore, it is not necessarily the case that students from the European Union would be dissuaded from studying in the UK due to the increase in fees. Like much about Brexit, it is still unknown exactly how EU student numbers will play out.

Recent data from the Higher Education Statistics Agency shows that for the academic year 2018/19, the number of EU students coming to study in the UK has increased by from around 139,000 to 143,000 and the number of first year international students has grown from 319,000 to around 342,000. The then Universities Minister, Chris Skidmore was positive about the increase , citing the government's change to the post-study work visa and desire to grow to 600,000 international students studying in the UK in the next 10 years. However it is likely that we will have to wait until we are out of the transition period to see the real impact.

Of course, it's not just student numbers that will be affected by Brexit. Recent weeks have seen much speculation around the UK's future as part of the Erasmus programme, which supports student exchange across Europe. Boris Johnson has committed to full Erasmus membership, but the House of Commons voted down a Liberal Democrat amendment which would have incorporated this within the Brexit withdrawal agreement. Similarly the Government, whose election pitch included significant focus on research, are keen to explore 'an association as full as possible in the Horizon 2020 programme', which provides research grants.

It is clear that for universities, much is still unknown about how exactly Brexit will affect them, including student numbers and access to research funding. Many of these aspects should become clearer over the next year, as negotiations progress. It will be important for the higher education sector to maintain pressure on Government, to ensure these important issues are not lost as part of the wider attempts to secure a deal. Now we are no longer wrapped up in questions around leave or remain, universities have a role to play in fighting for the parts of our current relationship with the European Union we want to retain.

Rachel Hewitt
Director of Policy and Advocacy
Higher Education Policy Institute
r.hewitt@hepi.ac.uk

hepi
Higher Education Policy Institute

A View From The North
Dissensus - The State We Are In

The last year has been one characterised by division in many areas of public life; whether that be in politics, workplaces, social media or in our communities. A few weeks ago in reading one of our Scottish national newspapers I came across a word which I think describes it very well, it is dissensus.

It's not that dissensus is a new word, it's been around since the ancient Romans and describes the state of things when consensus or mutual agreement cannot be attained. I think it's going to be a useful concept for us to hold onto when the ways in which we deal with the divisions in our society seem inadequate and when we risk just accepting that these divisions and the barriers they create are part of the way the world is now. That acceptance simply serves to foster the division, reinforce the differences and does nothing to heal the corrosion that they bring about. That corrosion is not good for any of us. An ability to deal with difference, conflict and disagreement is also an opportunity to learn, reflect and even change.

We saw from the results of the UK general election last year that there is a clear dissensus between Scotland and the rest of UK. The divisions on Brexit still run deep no matter whether Prime Minister Johnson is actually able to get Brexit done. We need to be looking at ways to manage that dissensus rather than butting the heads of the opposing beliefs together and seeing what the clash brings, or even if it brings anything other than the hardening of those beliefs. Managing that dissensus constructively would allow us to explore creatively what the possibilities are and what might work as a mutual way forward. I have been in many situations where people in seemingly intractable disagreement have managed, through respectful acceptance of the inevitability of opposing views, to find some common ground, and, as result, a better way of working or living together.

As part of Brexit the UK government will want to establish new relationships with the rest of the European Union, similarly, as part of their plans for independence the Scottish Government will want to establish new relationships with the rest of the UK. It seems to me that the best way of building those new relationships will come from a respectful approach which involves a good deal of listening, some creative thinking and which perhaps might even involve an element of compromise.

This isn't all about big politics either. We have seen in Scotland from things like the Sturrock report into NHS Highland that where we deal with disagreement badly it creates a culture that affects the whole organisation, and the report's recommendations for a new way of building confidence and relationships lay the path for a better way.

Good things are happening too in places like our Scottish playgrounds. Scottish Mediation's Young Talk project has allowed some of our young people to learn that there is a different way to deal with conflict. Molly from Croftfoot Primary in Glasgow at the Young Talk conference in September said that 'My playground is a happier place since Peer Mediation was introduced'. In an outcome focussed world that's a measure that says it all.

In June Scottish Mediation published a report Bringing Mediation into the Mainstream which suggests some radical changes to the way in which Scotland deals with its civil justice system. On 12th December the Scottish Government responded positively with some real practical steps to take forward the ideas that came from the expert group. That will form a part of what happens in 2020. But that's only a part of it.

2020 will be a big year for a whole number of reasons and that's why Scottish Mediation decided to say that 2020 is the Year of Mediation. They launched their Mediation Charter in January encouraging groups and organisations to join the ever increasing number of folk who agree that there are better ways of dealing with their problems. The Year of Mediation will also allow them to celebrate the breadth and scope of mediation activity in Scotland. That will range from formal symposia of world class experts to events down the pub where we share stories and songs about getting things sorted. We want to be able to say when we look back this time next year that we had the 2020 vision and that it was a good one.

Any expressions of interest in what we are up to Up North will be welcome and reciprocated.

Alun Thomas
Partner
Anderson Strathern
Alun.Thomas@andersonstrathern.co.uk
+44 (0)131 625 7245

Anderson Strathern

Navigating the UK's EU transition period and beyond

"Exit day" finally arrived at 11pm on 31 January 2020. The Withdrawal Agreement has been ratified by the UK and EU and supporting legislation passed by the UK Parliament. The UK is no longer a member state of the European Union. But what has changed from a legal perspective?

A short answer

In the short term someone might say "not much".

Broadly speaking, during the transition period agreed with the EU, until 11pm on 31 December 2020 the UK will retain most of the benefits and obligations it had when it was a member state and UK citizens will still have most of the same rights. During the transition period, for most practical purposes the UK will continue to implement and be subject to EU law and judgments of the Court of Justice of the European Union.

After the transition period, UK law may begin to diverge further from EU law. How much it does so will depend on the stance of the current and future governments and the nature of any agreements on trade and future relationships that the UK reaches with the EU and/or its member states, and with other countries, including the US.

How has the underlying legal framework changed?

The underpinning legal framework necessary to achieve the above is far from simple. The UK has been embedding EU law into its domestic legal regime ever since the European Communities Act 1972 came into force. EU law emanates from a wide range of sources including EU treaties, legislation, case law and other legislative measures. Some of those laws have been directly enforceable in the UK; others have been implemented or supplemented through a huge range of domestic legislation.

The legal framework applicable during the transition period has been achieved through implementing, interlocking, amending, suspending and/or repurposing various different legal frameworks including:

- The European Communities Act 1972 (ECA)
- A wide range of EU law in force at the end of the transition period ("retained EU law"), along with numerous UK laws that have implemented EU law.
- The European Union Withdrawal Act 2018 (EUWA 2018)
- The EU Withdrawal Agreement (WA)
- The EU Withdrawal Agreement Act 2020 (EUWAA 2020)
- Hundreds of pieces of secondary legislation made under EUWA 2018 before exit day. These cover such diverse topics as the 'Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019' and the 'Zoonotic Disease Eradication and Control (Amendment) (EU Exit) Regulations 2019'.

Under the legal framework the Queen's Printer (a title held by the Chief Executive of the National Archives) has the unenviable task of ensuring that a wide range of EU legislation in force at the end of the transition period is published and available to UK citizens. This process has been ongoing in the run up to exit day and will continue throughout the transition period.

The UK's relations with a number of non-EU European states were also linked with its EU membership. EUWAA 2020 also implements a separate withdrawal agreement between the UK and the EEA EFTA states (Iceland, Liechtenstein and Norway), largely mirroring the EU/UK withdrawal arrangements. EUWAA 2020 also implements an agreement between Switzerland and the UK on citizens' rights.

EUWAA2020 also implemented the mass suspension of secondary legislation passed under EUWA 2018. These laws have been deferred until the end of the implementation period, and could be further amended in the interim under wide ranging powers in EUWA 2018 allowing ministers to further amend the legal framework in various respects.

After the transition period?

The coming months will see negotiations over the post-transition period relationship develop. The Prime Minister's written statement on 3 February outlined in broad terms the Government's proposed approach to negotiations with the EU over the future relationship. The Government intends to seek a free trade agreement without requirements of EU/UK regulatory alignment, without the Court of Justice of the European Union having jurisdiction over UK laws, or other supranational control in any area, including over UK borders and immigration policy.

The Government concludes this approach tends to suggest a suite of agreements with the EU will be required, whilst also taking the view that future cooperation in some areas need not be based on an international treaty. Such areas include immigration, data protection, procurement, environmental protection, social policy, competition and state aid.

From a higher education perspective, the Prime Minister has said "*The UK is ready to consider participation in certain EU programmes, once the EU has agreed the baseline in its 2021-2027 Multiannual Financial Framework, and taking into account the overall value to the UK of doing so*." The sector will be keen to hear whether Erasmus and Horizon Europe participation has been secured.

The Government has also said it will seek agreement on areas including cross-border trade in services and investment, the mutual recognition of professional qualifications and arrangements for short-term business trips to supply services.

What if there's no deal at the end of the transition period?

The timetable for reaching agreements with the EU on the matters outlined in the Prime Minister's statement is challenging and it remains to be seen what agreements can be reached with the EU27 in the next few months, given also that any agreements will need to be ratified before they take effect.

The Government has signalled and set out in law its intention not to extend the transition arrangements beyond 31 December. It remains to be seen whether that stance may change during negotiations.

The "no-deal" scenario on 31 December 2020 would be different in certain respects to the potential no-deal scenarios envisaged prior to the ratification of the Withdrawal Agreement.

The Withdrawal Agreement contains provisions relating to citizens' rights, Northern Ireland and the UK's financial settlement with the EU which would remain in place even if the UK and EU fail to reach an agreement by the end of the transition period. It also contains certain protections for the processing of personal data of data subjects outside the UK where either that data is processed under EU law before the end of the transition period, or is processed in the UK after that time pursuant to the withdrawal agreement. Those data protection provisions do not apply if the UK is granted an "adequacy decision", a topic which is covered in Claire Williams' article on page 6.

Subject to those points of difference, in a no-deal scenario the legal mechanisms laid down in EUWA 2018 and the supporting no-deal secondary legislation enacted over the course of the last two years would come into effect at the end of the transition period, to ensure that the UK has a functioning statute book at the end of the transition period. And from a practical perspective, institutions will still need to keep their no-deal plans under review.

Robert Renfree
Professional Support Lawyer
Tel: +44 (0)1223 222212
robert.renfree@mills-reeve.com

Cross-border data transfers after 31 December 2020: The need for an adequate response

The free and (relatively) unimpeded flow of data between the UK and European Union member states is critical for the continued smooth functioning of the UK economy, research projects, charitable endeavours and a host of other activities. Under the General Data Protection Regulation ("EU GDPR"), cross border transfers of personal data from an organisation in the EEA to one in a third party country – which is what the UK will be once the Brexit transition period ends – are restricted regardless of size, frequency or type. A transfer may take place using hard copy documents or electronically, including by putting personal data on a website for someone in a different state to access, and may only take place if certain conditions are met.

To further complicate matters, the UK is incorporating GDPR into UK law, with adjustments applying after 31 December that will mirror the EU GDPR but from the perspective of protecting personal data within the UK from being transferred outside the UK. For ease of reference, we will refer to the post 31 December UK version as "UK GDPR". As with EU GDPR, the UK GDPR requires that certain conditions are met before a data transfer can occur.

Adequacy decisions

Under both regimes, the ideal scenario is for there to be an 'adequacy decision' in favour of the recipient country. An adequacy decision is a finding that the legal framework in place within the recipient country provides 'adequate' protection for the rights and freedoms of individuals.

There is no adequacy decision in place which will allow the free transfer of personal data from EEA countries to the UK after the end of the transition period on 11pm 31 December 2020. While it might be expected that a finding that the UK's data protection regime is adequate would be rapidly made, given that EU GDPR is already applicable in the UK, the UK and the EU have a history of conflict in relation to the UK's treatment of personal data. UK legislation concerning investigatory powers has been subject to successful challenge before the European Court of Justice, and has been subject to significant criticism across the EU. Recently the European parliament's justice and home affairs committee was informed that a leaked EU report revealed "deliberate violations and abuse" of the Schengen Information System by the UK, which stands accused of unlawfully copying the highly sensitive database. The current level of distrust, combined with comments from the European Data Protection Supervisor about allowing the UK to effectively jump the queue for an adequacy decision (a process taking around 3 years on average), are not encouraging.

Political expediency may well trump other considerations. The Political Declaration agreed by the UK and EU, which sets out the parties' intentions as regarding their future relationship, includes a commitment to a high level of data protection to facilitate data flows. It provides that both the UK and the EU will start making adequacy assessments of the other as soon as possible after 31 January 2020, and will endeavour to "adopt decisions by the end of 2020". Given the multi-stage process involved, it is unlikely that an adequacy decision (if one is forthcoming) would be made until very close to the end of the year. There may be a period in 2021 or afterwards during which a final decision remains outstanding.

Alternatives

In the absence of a concrete finding of adequacy, higher education institutions need to consider their data flows and identify those which may be disrupted in the event that an adequacy decision is not forthcoming. Where disruption is likely, steps to prevent interruptions to data flows can be put in place. Options available at present include:

1. Legal instruments can be put in place between two public authorities or bodies, provided that they provide appropriate safeguards (including enforceable rights and effective remedies) for the rights of the individuals whose personal data is being transferred.
2. Binding corporate rules ("BCRs") are an internal code of conduct operating within a multinational group. BCRs must be submitted to an EEA supervisory authority in an EEA country where one of the companies is based, for approval.
3. Standard contractual clauses can be put in place between senders and recipients of data, which contain contractual obligations on the data exporter and the data importer, and rights for the individuals whose personal data is transferred. Standard contractual clauses have been designed and adopted by the European Commission and must be used in their entirety and without amendment.

Given that the European Union (Withdrawal Agreement) Act 2020 is now in place, and there is limited political desire to extend the transition period, decisions regarding how to handle potential problems with data transfers can no longer be avoided. The majority of UK institutions have already completed reviews of their processing, including full data audits, and will know or be able to identify where problems lie. To the extent that any institution has not completed that work, it needs to be done on an urgent basis.

Claire Williams
Principal Associate
Tel: +44 (0) 1223 222555
Claire.Williams@Mills-Reeve.com

Skilled immigration – what next?

The Johnson Government has indicated that it is committed to ending EU freedom of movement, following the end of the Brexit transition period on 31 December 2020. Until recently, however, details of what the new immigration system will look like have been in short supply.

Recent Government announcements have referred to a desire to implement 'a new Australian-style points-based immigration system' that would deliver a single global immigration system based on people's skills, with consistent rules for all potential migrants irrespective of nationality. This seems to mark a desire to break with some of the May era policies. The report of the Migration Advisory Committee (MAC), published on 28 January 2020, together with the announcement of the Global Talent Visa, provides some clues about the possible future direction of travel.

So what can we learn from the Australian experience, the MAC report, and other recent developments?

Learning from Australia

The Australian independent skilled migration program is built on a points system where applicants are awarded points based on a combination of their age, English language skills, employment experience, education qualifications and partner's skill. Additional points are awarded to those who have studied in Australia. In addition to the points, the Australian government releases a list of occupations which complement the planning strategy for the country.

Potential applicants are expected to achieve a minimum pass score of 65 to submit an 'Expression of Interest' (EOI). The EOI's are assessed every month and those who score the highest in their occupation are issued an invitation to submit a visa application. They have to submit their application within 60 days of receiving the invitation. By doing this, the Australian government controls the intake numbers by limiting the number of invitations it issues. As an example, accountants and engineers are required to score at least 100 to secure an invitation, due to the large number professionals applying under this category.

The UK perspective - the MAC report

The Immigration White Paper, published by the May Government in December 2018, proposed implementing a single immigration system where the skills of a worker – rather than their nationality – would be the deciding factor in granting visas. The stated aim was to attract talent to the UK, with a focus on skills the country needs and a view to keep net migration at a 'sustainable' level.

The MAC report was commissioned by the Johnson Government to further inform the implementation of the post-Brexit immigration system, following a renewed interest in an 'Australian-style' points-based system.

The MAC's proposals build on the content of the White Paper and recommend a skilled worker route with a job offer (ie, sponsored employment of the migrant by a UK based employer) with a salary threshold of £25,600 (and a new entrant rate of £17,900). The existing Tier 2 skilled worker visa framework and fixed eligibility criteria would be retained. The MAC recommends abolishing the resident labour market test and monthly visa cap and extending the lists of eligible occupations to those at RQF Level 3 and above. It also suggests the Government should consider flexibility for visa holders switching to part-time work. These 'liberalising' changes would be welcomed by UKVI compliance teams across the sector, but it is debatable how politically sustainable are if the route is to be expanded to RQF Level 3 roles.

The MAC has expressed scepticism about the case for a 'tradeable' points based system. If the Government wishes to implement such a system, it has recommended a skilled worker route without a job offer. This would incorporate a 'tradeable' points based system aspect, taking into account best practice from other countries. The MAC has reviewed the immigration systems of several other countries, including Australia, New Zealand, Canada and Austria, as well as the UK's Tier 1 (Exceptional Talent) category. It suggests the following:

- There should be an 'expression of interest' system through which those who want to come to the UK can register their interest, and a monthly invitation to apply drawn from that pool, subject to an annual cap

- The selection could use a tradeable points based system, and the Government might want to consider assigning points to characteristics such as age, qualifications, having studied in the UK, and priority areas such as STEM and creative skills
- Language skills should be an essential requirement

In general, the MAC has recommended there should be no regional salary variation. It has suggested there should be a pilot to deal with the particular problems faced by remote areas, whilst falling short of making specific recommendations.

In addition, the MAC's view is that the current UK system regarding settlement is insufficiently flexible and has reviewed how a 'tradeable' points based system is used for settlement in other countries. This recognises the difficulties that some Tier 2 sponsored migrants, including those in research roles, have encountered in qualifying for settlement. The MAC has recommended a pause to the planned increases in the Tier 2 (General) settlement income threshold, and a review of the requirements for settlement, which may recommend more flexible paths to settlement and accelerated routes for some migrants.

Overall, the MAC does not recommend a widespread revamp of the current system. Rather, the recommendations are essentially incremental in nature, building on the existing immigration infrastructure. Interestingly, the modelling done by the MAC estimates that its recommendations would result in a lower level of immigration and a lower rate of growth of population. Reassuringly, the report emphasises the importance of data and evidence based policy.

Global Talent Visa

The day before the publication of the MAC report, the Government announced the creation of the new Global Talent Visa. It seems this announcement may not have been anticipated by the MAC. The Global Talent Visa creates a new route for researchers to work and live in the UK from 20 February 2020 and is effectively an expansion and re-branding of the Tier 1 (Exceptional Talent) category. It introduces a new uncapped fast-track endorsement for researchers and specialists whose name or job title is specified in a successful grant application from a recognised funder. It will be the first time that applicants in scientific and research fields will be endorsed by UK Research and Innovation and marks a continuation of the trend for visa routes to be managed by expert bodies, rather than the Home Office. It has understandably been welcomed by the higher education sector and research institutes as signalling the UK's commitment to remain at the cutting edge of science and research.

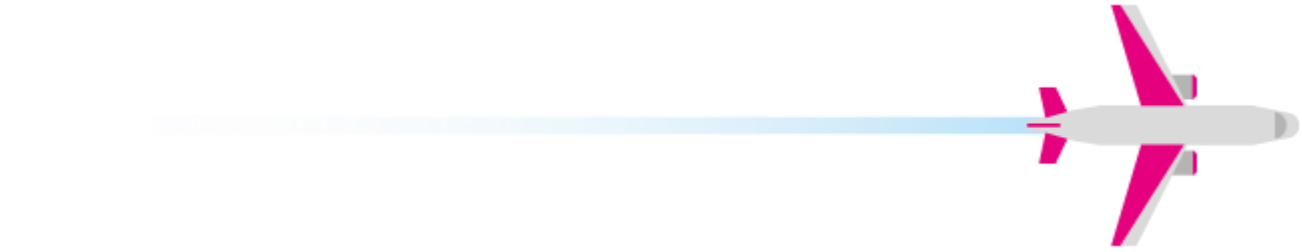
Unanswered questions

There continues to be a lack of clarity around lower skilled migrants (ie, below RQF Level 3), who would not be eligible for entry to work under recommendations made to date. Provision may be made via a temporary worker route (which was proposed in the 2018 Immigration White Paper), or via sector-based schemes (mentioned in the Immigration and Social Security Co-ordination (EU Withdrawal Bill), as included in the Queen's Speech on 19 December 2019). However, it seems likely that the ability of many employers to rely on unskilled EU labour will draw to an end from 2021.

It is not clear whether the Government will implement changes on a transitional basis from 1 January 2021, or adopt a 'cliff-edge' approach. Due to the complexity of introducing a new system, and taking into account the Government approach in introducing the Global Talent Visa at short notice, it seems likely that changes will be introduced on a phased basis. Details on the financial costs associated with employing migrants also remain unclear, although it seems likely that PhD level roles (which cover most academic and research roles) will continue to be treated more favourably than less skilled roles.

The MAC report is only advisory and is currently being considered by the Government. A further White Paper is expected in March 2020 with full details of the new system the Government intends to implement. Further details are also awaited of the student routes for those arriving in the UK after 31 December 2020, and of the two year post-study "Graduate Route", the latter expected to be launched in summer 2021.

Alex Russell
Principal Associate
Tel: +44 (0) 1603 693469
Alex.Russell@Mills-Reeve.com



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