

A report by the Higher Education Commission

highereducation
Commission



PROTECTING STUDENTS
ENCOURAGING INNOVATION
ENHANCING EXCELLENCE

REGULATING HIGHER EDUCATION

**THIS REPORT LOOKS AT
REGULATION**

**IT MAKES THE CASE FOR
A NEW, PLURALIST
REGULATORY ARCHITECTURE
FOR HIGHER EDUCATION**

This is the second report by the Higher Education Commission.

Our first report looked at the vital role of postgraduates and postgraduate education in the wider UK economy. This report looks at regulation, and makes the case for a new, pluralist regulatory architecture for higher education.

The higher education sector in England is changing rapidly. We have new players on the scene offering new modes of provision, a new cohort of students paying up to £9,000 per year in fees with high expectations from their investment, and a more marketised system with institutions vying for competitive edge. With this increase in competition, comes greater choice and greater demand on the system, but also a greater risk of failure.

We owe it to students, taxpayers and universities to ensure that our international reputation for providing top-class higher education is protected and enhanced throughout this period of change. We believe that getting the regulatory architecture right is a crucial part of this.

We are extremely grateful to Professor Roger King and Lord Norton of Louth for co-chairing this inquiry, and to the sector for engaging so openly with our ideas.

- The Higher Education Commission

WHAT WE FOUND

This report is the culmination of eight months of research, engagement and evidence gathering, led by prominent figures in the sector.

We spoke to universities, regulators, civil servants, academics, business leaders, student bodies, and government advisors.

We conclude that pluralist risk based regulation is a great enabler, and will allow the higher education sector to flourish and innovate during this period of great change, whilst ensuring students, taxpayers, universities and businesses are protected.

We are not recommending regulation for regulation's sake, or defending mission-creep in the public sector.

We believe that getting the regulatory architecture for higher education right is fundamental to the success and reputation of our sector.

WHY REGULATE?

- 1. To protect students and their investments**

- 2. To encourage investment and innovation**

- 3. To safeguard the reputation of our world-class HE sector**

- 4. To enhance excellence across providers**

WHY NOW?

- 1. The HE sector is going through a period of great change, fundamentally altering the relationships between students, Government, funding and the private sector**
- 2. More freedoms for institutions and more dynamic markets for HE mean a greater risk of universities failing – without the correct regulatory architecture in place, we will not be able to avoid the unthinkable, or have the mechanisms to fix the system if it breaks**

3. With every month that passes, there are new alternative providers offering higher education in England that are not being picked up by the current regulatory regime



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CO-CHAIRS' FOREWORD

This inquiry has focused on regulation in higher education. For some, an interest in regulation appears a rather dry, perhaps even 'geeky' affair, a topic best left to those with rather dull lives and a penchant for examining the fine details of rules and by-laws. Yet, the way in which the sector is regulated is fundamental to its health and success. It can make or break the effectiveness of the institutions that have made the UK a world leader in higher education. In the context of current reforms, the absence of legislation to provide a coherent regulatory architecture for the rapidly changing and increasingly dynamic sector is creating major headaches for its players. It is a situation crying out for urgent rectification by government, a refrain that was a constant throughout the course of the inquiry from those who gave evidence.

The inquiry has been anxious throughout its review to regard regulation as more than simply a matter of compliance and standards. Of course, these are important issues in helping to ensure accountability and provide safeguards for students, for maintaining the high global reputation of the sector, and for protecting the taxpayer. But regulation has a more positive focus. A well-regulated higher education system has strong developmental benefits. It enables investors in higher education, including students, to invest with confidence. In a time of increased marketisation and privatisation, businesses, banks and overseas stakeholders, among others, are encouraged by good regulation to collaborate and to lend or invest on advantageous terms to our colleges and universities.

Higher education regulation has a long and largely successful self-regulatory history. Academic norms and peer review remain bulwarks for maintaining excellence and fairness, as too do the activities of sector-wide representatives and shared service bodies. Governing bodies are also essential self-regulatory features of our system, not least increasingly as risk guardians. Yet external regulation and co-regulation have their parts to play too, in assuring those outside academia that proper accountabilities and transparency are in place.

Our proposals seek to build upon the existing regulatory strengths displayed by the sector and to ensure that more external and formalised external regulatory arrangements work with these. The continuation of pluralism rather than centralisation features in our recommendations although we recognise the need for some element of consolidation in these fiscally-challenged times. Above all, however, we need urgently to address the outstanding requirement for a more systematic and less piecemeal approach to the external regulation of the sector. This can only be achieved by early legislation by Government.

We are very grateful to all our witnesses and contributors. We have learnt a lot and enjoyed much from these discussions. Members of the Higher Education Commission have been unstinting in their time and guidance and we are particularly thankful for their efforts. Jessica Bridgman at Policy Connect, along with her colleagues Thomas Kohut and Simon Kelleher, have worked tirelessly and have been invaluable researchers for the inquiry (as were Joel Mullan and Christopher Hall at an earlier stage).

We have not examined the regulation of research, science and innovation, and the regulation of universities as charities, as our brief in the time available to us did not allow us to move from our primary concern with learning, teaching and broader concerns of sustainability. We also regret that we were not able to look in detail at the varying capabilities of boards and governors across the sector. These may be topics that a future Commission inquiry could take up. Saying that, there is plenty here for Government, the sector, and others to get their teeth into. But action is what we are looking for, and we hope that informed and intelligent debate on the report will allow this to happen sooner rather than later.

The Rt Hon the Lord Norton of Louth
Professor Roger King
Inquiry Co-Chairs

WHAT IS THE HIGHER EDUCATION COMMISSION?

The Higher Education Commission is an independent body made up leaders figures from the education sector, the business community, and the three major political parties.

Established in response to demand from Parliamentarians for a more informed and reflective discourse on higher education issues, the Higher Education Commission examines higher education policy, holds evidence-based inquiries, and produces written reports with recommendations for policymakers.

The Higher Education Commission is co-chaired by Lord Philip Norton, a Conservative peer and academic, and Dr Graham Spittle, Vice President of IBM. The Higher Education Commission's work is generously supported by the University Partnerships Programme and the Higher Education Academy.

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<u>Sir Peter Lampl OBE</u>	<u>Chairman, The Sutton Trust</u> <u>Chairman, Education Endowment</u> <u>Foundation</u>
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<u>Sir David Melville CBE</u>	<u>Chair, Pearson Education Ltd</u> <u>Former Vice Chancellor, Kent University &</u> <u>Middlesex University</u> <u>Former Chief Executive, FE Funding Council</u>
<u>John O'Leary</u>	<u>Editor, <i>Times Higher Education</i> 2002-7</u> <u>Education Editor, <i>The Times</i> 1992-2002</u>
<u>Baroness Sharp of Guildford</u>	<u>Liberal Democrat Member of the House</u> <u>of Lords</u> <u>Former Liberal Democrat Spokesperson for</u> <u>Higher Education</u>
<u>Barry Sheerman MP</u>	<u>Labour Member of Parliament for</u> <u>Huddersfield</u> <u>Chair, House of Commons Education Select</u> <u>Committee 2000-10</u>

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EXECUTIVE SUMMARY

The key objective of this inquiry is to produce a set of policy recommendations to better protect students and the reputation of higher education (HE) in England in the aftermath of substantial reform.

Higher education has experienced dramatic reform since the introduction of the HE white paper, *Higher Education: Students at the Heart of the System*. This aims to create a more financially sustainable sector, improve the student experience and widen access to institutions. It will bring about a fundamental transformation from a supply-led higher education system to a demand-led one. A new funding system, liberalised student number controls and lower barriers to entry for new providers will underscore the biggest shake-up to higher education since tuition fees were first introduced in 1998.

With the change to a demand-led system, a large proportion of the money that funded universities in the form of teaching grants has stopped, and is being replaced with increased tuition fees. The Higher Education Funding Council for England (HEFCE), the quasi-governmental organisation that distributes the teaching grant to institutions, was previously able to attach regulatory conditions to this grant, which universities were required to comply with in order to receive their funding. Now that the teaching grant has been dramatically reduced, the ability to place regulatory conditions on institutions through HEFCE has reduced in turn. Recognising this problem, the Department for Business, Innovation and Skills (BIS) announced plans to give HEFCE the power to designate courses for student support. Put simply: if universities do not comply with HEFCE's requirements, their students will not be able to access student loans. This mechanism may suffice in the interim period, nonetheless, there have been questions raised about the legality of HEFCE placing conditions on money that it has not directly provided (student loans are allocated by the Student Loans Company). For adequate regulation of the sector, a Higher Education Bill will need to be introduced giving the lead regulator the authority to regulate universities regardless of whether or not they receive funding in the form of either student loans or grants.

It is essential that the higher education sector be properly regulated. It is a valuable part of our national infrastructure and we must therefore, ensure that students investing thousands of pounds in their futures are receiving top quality provision, and that the institutions they are attending are financially viable. This assurance also protects the brand of UK higher education as a whole; the excellence of higher education provision in England attracts students from around the world. There is also a strong business case for regulation. Good regulation provides strong assurances for businesses looking to invest, and for banks to lend to institutions on more advantageous terms.

As a result of recent reforms, the landscape of higher education in England is beginning to change, and will continue to change in the months and years to come. More providers are entering the market, with complex corporate structures emerging and online providers gaining traction. Regulation as it sits is not adequately prepared for the diversity of these current and future developments. We are concerned that there

is a growing unregulated sector of higher education that may be offering insufficient provision to students. This has the potential to damage England's reputation as a leading provider of higher education.

The Higher Education Commission has suggested thirteen policy recommendations. If enacted, we believe these recommendations would fill the gaps in the current system without impeding on institutions' autonomy. Throughout the report we also make a number of observations and further suggestions, which we urge readers to consider. We are proposing better regulation of higher education, not more regulation. We recognise that higher education is a unique sector and that there are many elements to the regulation of institutions: external regulators such as HEFCE and the Office For Fair Access (OFFA); sector regulatory bodies such as the Quality Assurance Agency (QAA), Higher Education Statistics Agency (HESA) and Universities and Colleges Admissions Services (UCAS); and self-regulation through academic boards and governors. This creates a highly pluralistic system of regulation that is valued within the sector, and largely successful. We see great value in these individual bodies, and believe that with some consolidation and clarification of relationships, these can be built upon and enhanced to become part of a regulatory architecture that is fit for a higher education sector that leads the world.

We have researched other sectors extensively for models of best practice and believe that our proposal goes some way to striking an effective balance between pluralism and centralism, ensuring that that institutions are given the room to develop and innovate whilst maintaining the highest standards across the board. Particularly, we found the Legal Services Board to be a useful example of regulatory practice and have used this as a model to guide our proposals.

We recommend that HEFCE's remit should be expanded through legislation, and its role as the lead regulator is reflected in a new title, the Council for Higher Education (CHE). The CHE would consolidate within it OFFA, the Office for Student Loans (OSL) (formerly Student Loans Company) and a new, lightly-staffed body, the Office for Competition and Institutional Diversity (OCID). These organisations would maintain their individual structures and purposes. However, it was thought that by incorporating them under an overarching regulator, efficiencies and improved communications could create less duplication in the system and provide the regulatory capacity and steerage that the system requires.

The OCID would be a point of contact within the regulator for alternative providers and would assist with monitoring and encouraging developments in the sector. We argue that the QAA, UCAS, HESA and the Office of the Independent Adjudicator (OIA) should remain outside the CHE, but have contractual relationships to ensure that objectives remain complementary, and that the responsibilities of bodies to each other are identified.

The Higher Education Commission came to the conclusion that the proper regulation of higher education is so essential that all higher education providers in England should be captured. New market entrants are not facing the scrutiny they should, takeovers and complex corporate structures are being used to evade fundamental protections for students, and institutions are facing more pressure than ever to recruit students and crucially, therefore, bring in funding. A new Common Regulatory Framework is proposed which would require all higher education providers with a physical presence in England to be registered with the CHE. This is a development of HEFCE's current project to register certain 'types' of providers. This needs to be expanded, as those outside the current HEFCE register are in many ways those posing the most risk to the system. By creating a risk based regulatory framework, regulation is targeted where the risk is highest and traditional universities would not be expected to face any more external regulation than they currently do.

For the Common Regulatory Framework to be effective, we suggest a two stage process that first seeks to identify different providers and register them as a business. Then, through various 'carrots and sticks', these institutions would be incentivised to enter under further regulation. After a successful QAA review and OIA subscription, providers would receive a CHE kite mark indicating that they are an 'approved provider of higher education'. We see the Common Regulatory Framework as a way to level the playing field between traditional and alternative providers. Whilst it would be inappropriate for these institutions to be measured against the exact same regulations, they would both be subject to the same regulatory framework, which we feel would help assure the quality of all providers.

In this new, reformed higher education landscape, the chances of an institution failing are increased. An institution failing would damage both students and the highly-valued brand of UK higher education. We recommend, therefore, that protections should be put in place in the event of an institution failing, which would minimise the financial and academic ramifications for students and shield the sector as whole. The aim of a collective insurance scheme would not be to bail out failing institutions, but to protect students and the overall reputation of the sector. We have proposed both a sector-wide scheme, modelled on the Civil Aviation Authority's Air Travel Organisers' Licensing (ATOL) scheme, and an individual institution scheme. We have not made a definitive recommendation between the two, although we would lean towards the sector-wide scheme, as it provides more protection for students.

RECOMMENDATIONS

Recommendation 1

The Government should commit to higher education legislation. If time does not allow for a Bill in this Parliament, we recommend that a commitment to new legislation should appear in all three major parties' manifestos. (Chapter 2)

Recommendation 2

A new, overarching regulator building on HEFCE's remit (renamed the Council for Higher Education – CHE) should be formed as a non-departmental public body. The CHE should incorporate OFFA, OSL (formerly SLC) and a new body, OCID (Office for Competition and Institutional Diversity). Responsible for ensuring complementarity of bodies across a pluralist system, the CHE should have contractual relationships with QAA, UCAS, and HESA. (Chapter 4)

Recommendation 3

CHE should be required to submit a report to Parliament annually to demonstrate its independence from government. (Chapter 4)

Recommendation 4

CHE and the QAA should build upon existing HEFCE regional links with institutions for the purposes of regular conversations on quality and other forms of assurance and enhancement. (Chapter 4)

Recommendation 5

HESA should be required to collect annual data returns from alternative providers as part of its responsibilities. (Chapter 5)

Recommendation 6

CHE and the QAA should create robust mutual recognition schemes with international regulators. (Chapter 5)

Recommendation 7

The lead regulator CHE should develop a Common Regulatory Framework that can be applied to a range of providers to varying degrees, dependent on their provision and funding arrangements. The Common Regulatory Framework would create a kite mark to be awarded by the CHE, which institutions would receive once they had undergone a successful QAA review and subscribe to the OIA. (Chapter 6)

Recommendation 8

The lead regulator should set up an information strategy, outlining the information needed from institutions and other bodies for regulatory purposes. The strategy should presume in favour of transparency, in order to keep students at the heart of the system. (Chapter 6)

Recommendation 9

The lead regulator should apply a risk based approach to regulation, assessing providers through the Common Regulatory Framework against clear tests and incorporating the principles of proportionality and appropriateness. (Chapter 7)

Recommendation 10

Research should be commissioned by CHE/QAA on models for predicting institutional and systemic risk, thinking about what changes the sector may experience in the future and how these can be addressed in the regulatory regime. (Chapter 7)

Recommendation 11

QAA Institutional Review teams should undergo broader-based training on finance and governance and the principles of risk based regulatory approaches. (Chapter 7)

Recommendation 12

Risk based regulation should be adopted by OFFA to bring it into harmony with other higher education regulators. (Chapter 7)

Recommendation 13

Institutions need to be better prepared for the possibility of a failure in the sector. Given the potential damage this could inflict on students and the sector as a whole, a 'protection' or 'insurance' scheme coordinated by the lead regulator should be put in place. (Chapter 8)

1. MAKING THE CASE FOR REGULATION

In this chapter we examine the reasons for having regulation in higher education (HE), explain how regulation has emerged as a new form of governance, and how a pluralist, dynamic regulatory architecture is best suited to this sector.

Introduction

A key objective for the inquiry is to produce a set of recommendations that help protect students, and the reputation of higher education in England through a period of reform. We see regulation as a means to achieving this objective – regulation is not an end in itself. To achieve this aim, we have continually sought to propose better rather than more regulation. Ideally, this should pave the way for less intrusive external regulation for universities and colleges in England, and encourage enterprise, diversity, and innovation.

To contextualise what is to come, it is important to situate the regulation of higher education within a shift in the governance of the public sector more broadly, and explain why this sector particularly requires a dynamic and pluralist regulatory architecture, rather than a single monolithic regulator.

Why regulate?

In its broadest sense, regulation may be defined as kind of policymaking that uses a range of rule-based tools for achieving public policy aims (rather than relying on more and more legislation from the centre). In this more devolved system of governance, third parties – the public, companies, and institutions – are active players in the system: they are continually required to comply or adapt, and often to carry or share the costs of policy implementation themselves. Regulation as a style of governance has grown and developed much over the past twenty years, in line with the liberalisation of once state-owned industries and utilities. With the further liberalisation and marketisation of HE already underway, this review of how higher education is regulated is timely.

One key feature of the so-called ‘regulatory state’ is the de-politicisation of decision-making. A benefit of choosing regulation as a tool of public policy is that it is seen by politicians as ‘above politics’. For example, in regulation, standards for behaviour are set, and decisions on sanctions are taken by arms-length bodies, relatively independent from government and from the whim of the electorate. Some might say that the ‘regulatory state’ is a less political, more technocratic form of governance. This view was well-summarised in 2003 by the then Secretary of State for Constitutional Affairs, Lord Falconer:

“What governs our approach is a clear desire to place power where it should be: increasingly not with politicians, but with those best fitted in different ways to deploy it. Interest rates are not set by politicians in the Treasury but

by the Bank of England. Minimum wages are not determined in the DTI, but by the Low Pay Commission. Membership of the House of Lords will be determined not in Downing Street but in an independent Appointments Commission. This depoliticising of key decision-making is a vital element in bringing power closer to the people.”

– Lord Falconer, Secretary of State for Constitutional Affairs, December 2003¹

However, this view underplays the very important role that beliefs and values still play in the development of a regulatory environment, and the potential for conflict and controversy. This is particularly the case when a large amount of the standard setting has been carried out by the regulated themselves, through self-regulation. When those who are instinctively and historically self-regulators find themselves on the receiving end of governmental intrusion, they can view new regulatory mechanisms with considerable hostility. In higher education, for example, steadily increased levels and forms of external scrutiny for universities and colleges have sparked great conflict in the sector worldwide.

UK political institutions and culture in the modern era have sought to distribute power broadly in society, to emphasise the governance and economic advantages of pluralism and constraints on absolutism. In most sectors, political (and hence regulatory) power is rarely vested in a single or totalising institution. Often it is shared by a broader coalescence of groups or plurality of organisations, which are then required to coordinate to achieve collective goals.

In order to secure necessary levels of coordination and strategic drive, effective regulatory governance is about striking a balance between pluralism and inclusiveness on the one hand, with government-endorsed centralisation on the other. This balance helps to guarantee order, improve public services, promote transparency and accountability, and facilitates technological development and innovation (thus aiding the UK's global competitiveness). An effective balance between pluralism and centralisation harnesses the benefits of creative destruction and entrepreneurialism, whilst ensuring that wider democratic goals are achieved.

Regulating the higher education sector

Setting rules and standards is only one function of the regulatory environment. Just as important is how the rules are complied with and enforced, and whether persuasion or the threat of punishment becomes the chief method in achieving behaviour change. When suggesting a new form of regulation, the key question is: how do we achieve compliance from the sector? Regulating the construction industry, where the goal is to ensure buildings stay standing and the public is safe from harm, looks very different to regulating higher education, where the goal is to protect the global reputation of the sector, and the financial and personal interests of students.

¹ Lord Falconer (3 December 2003) 'Department for Constitutional Affairs: Justice, Rights and Democracy' speech to the Institute for Public Policy Research. See also Lord Falconer (8 December 2003) 'Constitutional Reform' Speech at University College London.

Moreover, good regulation is not simply about compliance and protection through the use of enforcement capability. It also has a more developmental connotation, and this must be taken into account when deciding upon the best regulatory environment. This includes, for example, promoting markets and competition by establishing appropriate rules and ensuring the 'level-playing field' conditions that encourage new entrants in to the sector in a responsible manner (see chapter 6). Importantly, regulation is also about encouraging continuous improvement, and the transposition of innovatory and best practices among those being regulated, not simply compliance with threshold standards.

We believe that good regulation in higher education is necessary in order to:

- protect the interests of students
- ensure proper oversight and management of public funding
- protect the national and global reputation of the sector
- facilitate appropriate institutional autonomy, academic freedom, and fair access
- sustain the standards and quality of higher education more generally

This list is not exhaustive and other organisations' views on the 'purposes' of regulation in HE are included in annex (a). Alongside the above, and often missed out, is the strong business case for good regulation in higher education. By helping to uphold the high standards and international reputation of our universities and colleges, good regulation can play a key role in stimulating demand from UK and overseas students, assuring them that their investment is justified. As higher education systems become more privatised and marketised, good regulation encourages businesses and others to invest, and the banks to lend on advantageous terms to institutions. We believe that the current regulatory environment in HE, and the changes that are in-train, are insufficient to achieve this.

So what is it about higher education particularly that we must take into account when developing a new regulatory environment? Higher education is characterised by a multiplicity of regulatory influences that together form its 'regulatory regime'. First, universities and colleges are subject to the many regulations that cover other organisations that provide services to consumers (such as health and safety, and employment). Secondly, they are regulated specifically as higher education suppliers in a way that is complex and multi-faceted. For centuries, academic culture has been a powerful regulator of learning, teaching, and research, manifested particularly in the institutional committees responsible for assuring quality in course programmes and processes. At the highest level, Academic Boards or Senates provide advice to Boards of Governors or Councils, and increasingly to managerial executives, on these core academic functions and their quality. We further discuss the current environment in chapter 3.

In comparison with earlier historical periods, in Britain especially, regulation has come to rely on more formalised or contractualised relationships between various parties, rather than on shared understandings and the normative expectations of much smaller and more informal communities. However, in higher education particularly, ‘contracts’ are never complete and regulation does rest on understanding and working with, if not solely relying on, the important shared beliefs of those being regulated. There is a great deal of regulatory trust within this traditionally autonomous sector. We recognise this characteristic in our recommendations, and emphasise a continuation of regulatory plurality, rather than the development of over-centralised structures. However, through a higher-level ‘oversight’ regulator, we seek to create a coherent path of regulation and contractual protocol, ensuring open communication and agreed goals between bodies.

We propose a Council for Higher Education (CHE) to steer (but not fully consolidate) the regulatory plurality of the higher education system in England, to help ensure the coherence and complementarity of the regulatory set-up. This report seeks to balance centralisation and pluralism in its regulatory recommendations, and shies away from monolithic solutions. Rather than a single totalising regulator for universities and colleges, we prefer to talk of a ‘regulatory architecture’ where a number of entities play their regulatory part. Nonetheless, helping to harmonise such a system requires an agency to facilitate such an outcome to ensure the best and most knowledgeable regulatory results. We recognise that increased efficiencies, effectiveness, and communication can be achieved through amalgamating a number of key functions into an overarching regulatory agency for higher education, not least as an era of governmental fiscal tightening is reducing the resources available for such entities. A full explanation of this new body and its relationship to existing institutions will be found in chapter 4.

State-endorsed regulators, such as the Higher Education Funding Council for England (HEFCE) or the Quality Assurance Agency (QAA) can never have a monopoly of regulatory authority in an English higher education system which has been built on pluralist foundations. They must seek to operate within, as well as shape, this wider regulatory complex. In policy terms, regulatory policy at governmental level is likely to work best when it acknowledges this larger, multifaceted, and inclusive steering environment and the strength of its accumulated path dependency over many years.

However, this does not mean that governments and their regulatory agencies should abdicate responsibility for necessary changes in the context of wider developments. In the following chapter, we outline the Government’s absolutely central role in getting the regulatory architecture right – the need to pass a Higher Education Bill in Parliament.

2. MAKING THE CASE FOR A HIGHER EDUCATION BILL

In the second chapter, we look at the changes to higher education (HE) stemming from the 2011 white paper, *Higher Education: Students at the Heart of the System*. We want to ensure that with the introduction of these reforms, the right protections are in place for students, and the quality of higher education in England is not damaged. A regulatory architecture, with a legislated oversight body would create the desired protections, promote sector competition and sustain the valued reputation of our HE sector.

The reforms to HE are placing pressure on the existing regulatory system. Whilst work is being done to alleviate this pressure, the delay in introducing legislation has resulted in the necessary adjustments to the regulatory structures being fragmented and lacking overall coherence. We believe that this is hampering the efficient regulation of HE, undermining its valuable function, and that a Higher Education Bill should be introduced by this Government to provide coherence. If political timings prevent this, we would like to see a commitment to a Higher Education Bill in the 2015 election manifestos of all three major parties.

Higher education white paper

“Our university sector has a strong history with some world-class institutions attracting students from across the globe. Higher Education is a successful public-private partnership; combining Government funding with institutional autonomy.

“This white paper builds on that record, while doing more than ever to put students in the driving seat. We want to see more investment, greater diversity, including innovative forms of delivery from further education colleges and others, and less centralised control over student numbers. But, in return, we want the sector to be more accountable to students, as well as to the taxpayer.”²

The 2011 white paper – *Higher Education: Students at the heart of the system* – aims to produce a more sustainable HE sector, improve the student experience, and widen access to institutions. It expects these goals to be achieved through a more demand-led model, characterised by a new funding system, liberalised student number controls, and lower barriers to entry for new providers.

Demand for HE continues to outstrip supply and the Government hopes that new ‘alternative providers’ will be able to absorb some of this demand, generating more choice for students and encouraging innovation across the whole sector. In February 2011, Universities Minister David Willetts illustrated this point in a speech to Universities UK. He said, *“The biggest lesson I have learned is that the most powerful*

2 BIS White Paper (June 2011), ‘Higher Education: students at the heart of the system’, pg. 2.

driver of reform is to let new providers into the system. They do things differently in ways none can predict. They drive reform across the sector [...] It's the rising tide that lifts all boats."³ By advocating for new providers to enter the sector, the HE system was effectively changed from a supply-led to a demand-led one – the impact of this change should not be underestimated.

These changes represent the largest systemic shift to the sector since the introduction of tuition fees in 1998. We are concerned that the regulatory structure is not yet equipped to manage the new system of funding, or the increased diversity of providers, and that gaps are forming, which pose a threat to the system. The Quality Assurance Agency (QAA) has welcomed the Government's proposals, but highlighted that, "*it is critical that the same principles for upholding quality and standards in higher education are maintained to protect the good reputation of the sector.*"⁴

Funding: from teaching grants to tuition fees

Under previous funding systems, the Higher Education Funding Council for England's (HEFCE) fundamental regulatory power has rested on its ability to attach conditions to the teaching grants allocated annually to institutions. Financial memoranda contained conditions such as limiting the number of publicly-supported students an institution can recruit, data submission requirements and annual assurances of financial stability.⁵ This amounted to HEFCE having regulatory oversight of institutions in receipt of the grant.

The white paper's funding reforms drastically cut the teaching grant, with institutions instead receiving the majority of their funding through increased student tuition fees. This ultimately shifts HE funding from a grant-based system to a student fee-based one, altering HEFCE's position in the system, and its regulatory capacity.

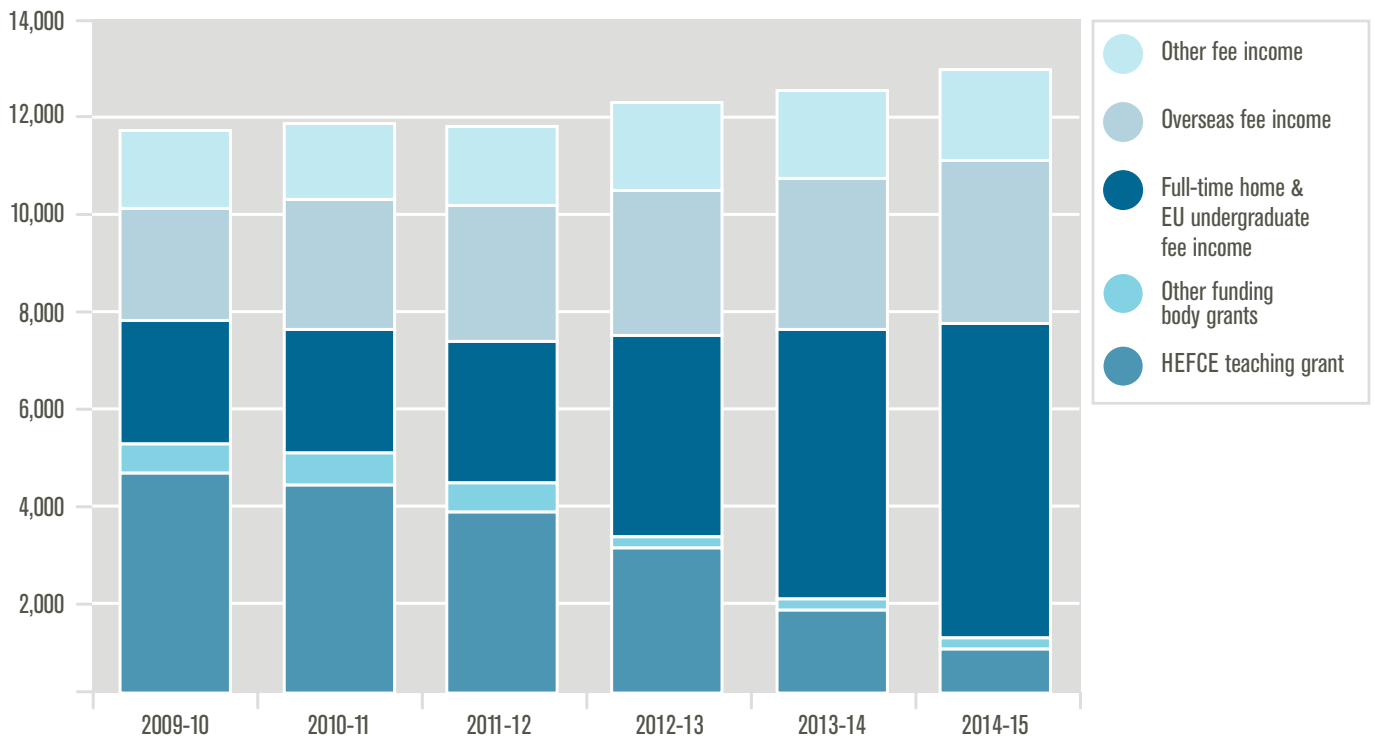
In short, English universities are now filling with cohorts of students paying the higher fees, and the amount of public funding universities receive through the teaching grants is decreasing.

3 D Willetts (25 February 2011), 'Making the higher education system more efficient and diverse', speech to Universities UK Spring Conference. Available at: <https://www.gov.uk/government/speeches/universities-uk-spring-conference-2011>

4 QAA 'Response to BIS Technical Consultation - A New, Fit-For-Purpose Regulatory Framework for the Higher Education Sector'. Available at: http://www.qaa.ac.uk/Newsroom/PressReleases/Documents/BIS_Technical_Consultation_QAA_response.pdf

5 BIS White Paper (June 2011), 'Higher Education: students at the heart of the system', pg. 67.

Figure one: Breakdown of teaching-related income 2009-10 to 2010-11 actual and 2011-12 to 2014-15 forecast⁶



This will reduce the Government's ability to attach conditions to the HEFCE grants as the leverage reduces correspondingly with the reduction of the grant. HEFCE will continue its function as a funding council, but on a much smaller scale, allocating funds for research and strategically important and vulnerable subjects (SIVS). However, using this as a primary mechanism to regulate institutions is unviable. Conditions can still be placed on these smaller grants, and universities continue to accept these, but we believe that the legitimacy of tying regulatory capacities to this funding mechanism will wane as the amount of grant decreases.

The Government has recognised this potential pitfall and made amendments in July 2013 to allow for conditions to be attached to universities and colleges that have courses designated for student loans.⁷ This gives HEFCE the power to decide if students at institutions are able to access student loans and is a method of ensuring regulatory compliance from institutions – albeit more 'stick' than 'carrot'. This may conflict with HEFCE's other new government-designated role of 'student champion', but it should help increase the potency of the regulatory mechanism as it shifts from grant-based to fee-based.

⁶ 'Financial health of the higher education sector 2011-12 to 2014-15 forecasts', HEFCE.

Available at: <http://www.hefce.ac.uk/whatwedo/reg/instfinance/financialhealthofthesector/>

⁷ D Willetts (11 July 2013), 'Written Ministerial Statement Higher Education Regulatory Reforms'.

Available at: http://www.hefce.ac.uk/media/hefce/content/news/news/2013/HE_Regulatory_Reforms_Written_Ministerial_Statement.pdf

The use of administrative instruments such as financial memoranda and ministerial statements (instead of introducing new legislation as originally announced in the white paper) makes it difficult to implement a coherent regulatory environment that can be used for a range of providers. IPPR's report on HE shared this conclusion, saying a Bill, "*is needed to provide a clear and consistent framework for our higher education system.*"⁸

Regulatory Partnership Group (RPG)

In September 2011 the RPG was formed by HEFCE and the Student Loans Company (SLC) to advise the Government on better regulatory practice. The RPG's objective was to create a streamlined regulatory landscape in the absence of legislation. However, the group concluded that legislation would be required in the long-term, commenting, "*The system as it stands may not be fully equipped to function and there is a risk of instability if existing gaps in the system are not filled.*"⁹

The RPG's role has evolved since its inception, becoming itself an instrument of the fragmentary changes to HE. In a letter to the RPG, Vince Cable and David Willetts requested that, "*Operating within the existing legislative framework, we are now asking both of your organisations to work together to ensure the effective implementation of the funding reforms.*"¹⁰

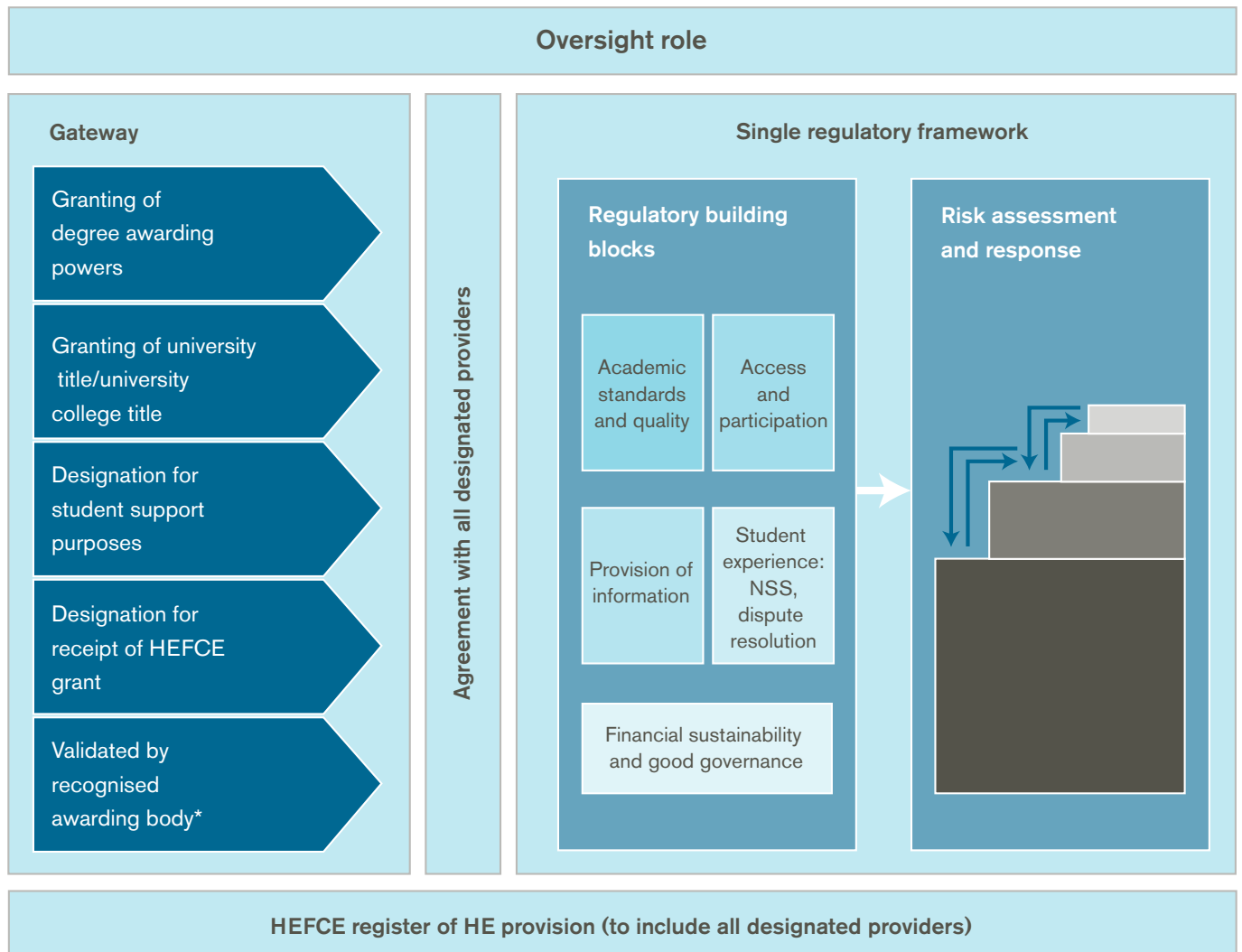
The RPG has developed an 'Operating Framework' – to be coordinated by HEFCE – to set out an encompassing and streamlined approach in the absence of legislation. This document issues guidance on the "*arrangements through which universities, colleges and other organisations which offer designated higher education (HE) in England are held to account and regulated.*"¹¹

8 IPPR Commission on the Future of Higher Education (June 2013), 'A Critical Path Securing the Future of Higher Education in England', pg. 95.

9 J Morgan (17 May 2012), 'Between systems, one dead, one stuck in legislative limbo', THE. Available at: <http://www.timeshighereducation.co.uk/news/between-systems-one-dead-one-stuck-in-legislative-limbo/419955.article>

10 V Cable and D Willetts (13 June 2012), 'Letter: students at the heart of the system: priorities for reforming higher education in England'. Available at: http://www.hefce.ac.uk/media/hefce/content/news/news/2012/consultresponse/VC_DW_letter_june2012.pdf

11 Regulatory Partnership Group (July 2013), 'Operating framework for higher education in England', pg. 6.

Figure two: Summary of the Operating Framework¹²

Circumnavigating legislation has come under criticism for creating processes that are not sufficiently accountable, causing some to comment that this is an assertion of authority that does not duly recognise the plethora of other regulatory influences across HE. A critic of the HE reforms, Professor Roger Brown of Liverpool Hope University, has said, “Given that neither the Government nor HEFCE yet has any [legislated] powers over institutions’ academic standards it seems extraordinary that the sector appears to have accepted this major assertion of Government power with so little objection.”¹³

¹² Regulatory Partnership Group (July 2013), ‘Operating framework for higher education in England’, pg. 5.

¹³ R Brown (2 May 2013), ‘Risk-Based Quality Assurance – The Risks’, HEPI Occasional Report, pg. 11.

The RPG itself has questioned its role and a record of a meeting expressed the view that: *“The requirement to develop a new regulatory system, which takes account of change to funding arrangements by administrative means rather than through legislation means that the provisions of existing legislation are being pushed to the limits.”*¹⁴

Not only is it suggested that legislation has been ‘pushed to the limits’, but there are claims that the new powers devolved to HEFCE to designate courses for student loans (and thus regain regulatory power that is lost with the switch from a grant-based to fee-based system) are not legal. Sir Martin Harris, President of Clare Hall, Cambridge and former Head of the Office For Fair Access (OFFA), first raised the point in a letter to *Times Higher Education* in May 2013. He references the 1992 Further and Higher Education Act which states that HEFCE cannot impose conditions on the use of funding it does not *itself* provide. He adds, *“The (personal) fees now received from undergraduates, albeit in many cases backed by Treasury loans, are not “provided by HEFCE”, indeed are not “public funds”, and therefore any conditions imposed by HEFCE on their use would be unlawful.”*¹⁵ The Government disagrees, arguing the 1992 Act allows powers to be conferred to HEFCE and forms the basis of HEFCE’s revised power to strip universities’ students of access to student loans.

The RPG/HEFCE’s Operating Framework may suffice in the interim period, but the regulatory bodies recognise that this is not a long-term solution and that legislation will be needed. This is demonstrated in HEFCE’s response to the technical consultation, *“As lead regulator, [...] we would need appropriate, proportionate powers to perform these roles effectively. The Government intends both to amend the relevant Education Acts and to create new legislation to reflect our new and revised regulatory responsibilities.”*¹⁶

Liam Burns former President of the NUS told *The Guardian*, *“Without proper legislation you have more financial protection on a holiday to Magaluf than you do taking out a £27k loan and going to university for three years.”*¹⁷

The evidence we collected overwhelmingly agreed that legislation is needed to ensure that the reforms do not create unintended consequences, or reduce the quality of education. This contradicts the results of the Government’s consultation which found, *“A clear message from the consultation was that as we do not know the full effect of the funding changes we have introduced now would not be the time to introduce changes to primary legislation.”*¹⁸

14 RPG Meeting Minutes (20 March 2013), pg. 3.

Available at: http://www.hefce.ac.uk/media/hefce/content/about/introduction/workinginpartnership/rpg/march13/note_march_2013.pdf

15 M Harris (2 May 2013), ‘No purse, no strings’ Letter to THE.

Available at: <http://www.timeshighereducation.co.uk/comment/letters/no-purse-no-strings/2003598.article> ; it is also worth noting that there is some debate on whether students loans are public or private money.

16 HEFCE (October 2011), ‘Response to Department for Business, Innovation and Skills Technical Consultation: ‘A new, fit-for-purpose regulatory framework for the higher education sector’.

Available at: http://www.hefce.ac.uk/media/hefce/content/news/news/2011/hefceresponsetobistechnicalconsultation/HEFCEresponse_BIStechicalconsultation.pdf

17 S Littlemore (30 January 2012), ‘Is shelving the higher education bill good news or bad for students?’ *The Guardian*.

18 V Cable and D Willetts (13 June 2012), ‘Letter: students at the heart of the system: priorities for reforming higher education in England’. | Available at: http://www.hefce.ac.uk/media/hefce/content/news/news/2012/consultresponse/VC_DW_letter_june2012.pdf

Benefits of legislation

We believe that the existing regulatory strategy does not fully reflect the changes in funding from teaching grants to tuition fees, or indeed appreciate the full functions of regulation. Core merits of regulation are lost by consistently attaching regulatory conditions to funding (be it through the depleting teaching grants or access to student loans) for leverage over institutions. The purpose of regulating providers extends beyond whether or not they receive ‘taxpayer funding’ – a point that will be discussed in chapter 4. Perpetuating the notion that regulation should be exchanged for funding does not recognise the other valuable contributions regulation can make to an industry, or the vibrant self-regulation that is already in the sector.

A legislated regulatory framework would better create a more level playing field between traditional and alternative providers, ensure equal application of quality assurances approaches and help protect the UK’s reputation as a world class provider of HE.

We recommend that a Higher Education Bill should be made a priority for government to ensure the protection of both students and the UK’s HE sector. If political timings prevent this we would like to see a commitment to a Higher Education Bill in the 2015 election manifestos of all three major parties.

Recommendation 1

The Government should commit to higher education legislation. If time does not allow for a Bill in this Parliament, we recommend that a commitment to new legislation should appear in all three major parties’ manifestos.

3. THE CURRENT REGULATORY FRAMEWORK

This chapter looks at how current regulation works in higher education (HE). We look at both external and internal regulation and how this forms a regulatory architecture across a number of bodies as opposed to a single regulator with the sole responsibility of regulating the sector.

The need for regulation

This inquiry seeks to map the landscape for a sustainable higher education regulatory environment, which reflects the recent reforms to the system and continues to enhance the quality of England's higher education institutions.

Regulation of HE is essential to ensure that quality and standards remain high for both domestic and international students. However, we believe that the system as it currently prevails does not fully recognise the plethora of benefits that fit-for-purpose regulation can bring. The current system places precedence on the financial motives for regulation. It uses conditions on the Higher Education Funding Council for England (HEFCE) teaching grants to regulate HE, creating a system where funding is in effect exchanged for regulation. A recent Department for Business, Innovation and Skills (BIS) announcement stating that HEFCE will regulate universities through new powers to designate courses for student loans from 2014 continues this approach. This neglects to appreciate the other reasons, beyond the financial, for a coherent regulatory system.

Oversight of the way public money is spent is highly necessary and providers should be held to account for how they spend taxpayer money, especially as fiscal restraint continues to tighten the budgets of government departments. However, the requisite to regulate goes beyond accounting for public funds, something that the current mechanisms do not truly recognise. This unbalanced emphasis leaves the system vulnerable to the claim that a decrease in funding should be reciprocated with a decrease in regulation, a view that was expressed to us. Yet, higher education institutions should not be forced to abide by rules and compliance only because they receive taxpayers' money. Higher education holds enough clout in our society to merit the requirement for certain standards to be met, and to protect not only students, but the institutions that operate in our system. For regulation to achieve its many objectives, it must be amenable to those who operate under it. By building upon positive internal regulation where it exists already, and filling in the gaps where necessary, external regulation can respect institutions' autonomy whilst protecting students and the public purse.

Regulation is needed regardless of the amount of funding institutions receive. For the Government's reforms to be successful, a robust regulatory framework must be implemented to support the sector to be sustainable, enhance the student experience, and widen access.

Current external regulators

At present, only the HEFCE and the Office For Fair Access (OFFA) act as independent public sector regulators for HE in England, although BIS also undertakes some regulatory functions such as recent responsibility for course designation for alternative providers (functions passing to HEFCE in 2014). Arguably, this level of external governmental-type regulation is low in comparison with other sectors. HEFCE and OFFA also have more restrictions on their regulatory instruments than many other such agencies. This reflects the successes of self-regulation within the sector, as these bodies have not found it necessary to have strong regulatory instruments over institutions in the past. HEFCE's powers reside in its authority to attach conditions to its distribution of grants to institutions, rather than through broader regulatory capacities to license or impose sanctions. Similarly, OFFA is restricted to monitoring its approved Access Agreements for institutions, aimed at widening the social bases of application, (which an institution must have if they want to charge above the basic level of tuition fees - £6,000) but it is prohibited from interfering in an institution's admissions decisions.

Institutions provide assurances to HEFCE annually on their accountability arrangements, financial health and quality of provision. This is complemented by a five year cycle of one-day institutional visits from HEFCE, to test the reliability of the assurances they receive. This is often described as 'regulating regulation'. If there are particular risks or accountability issues highlighted then a more intensive (but focussed) dialogue with those institutions takes place. In a small number of cases the risk issues may lead to a judgement of 'higher risk' being made, and more intensive engagement, and a support strategy put in place. The intention is that the level of intervention/engagement is proportionate to the risk, a principle in line with Better Regulation Framework Manual and the encouragement of risk based regulation found in the 2011 white paper.¹⁹

Current internal regulators

In addition to the sector's external regulators, there is a multiplicity of self-regulatory influences within the sector, traditional scholarly norms and practices, and also institutional responsibility for quality and financial sustainability. Many of the sector-owned bodies, such as UCAS and HESA, started out as shared service providers, to improve the efficiency and effectiveness of institutions. However, they have evolved over time and been drawn increasingly into the regulatory regime. This has led to a sector composed of self-regulation, co-regulation and external regulation across the organisations outlined above and to the right.

19 BIS (10 July 2013), 'Better regulation framework manual: practical guidance for UK government officials'.

The Quality Assurance Agency (QAA) is contracted by HEFCE to provide assurances of teaching quality in higher education institutions that are funded by HEFCE or have degree awarding powers (DAPs). It reviews higher education institutions and issues reports making recommendations and identifying best practice. It uses a UK Quality Code for Higher Education to set, describe and assure academic standards and operates a Higher Education Review, (to be introduced fully in January 2014 replacing the Institutional Review) which assesses whether a provider is meeting expectations. The QAA's contractual relationship with HEFCE allows for it to work for the English funding council, despite it being a UK-wide body.

The Student Loans Company (SLC) is a company limited by shares that distributes student loans and collects loan repayments. It provides information to HEFCE regarding students in receipt of funds, and the rate of loan repayments.

The Higher Education Statistics Agency (HESA) is a company limited by guarantee and a registered charity, owned by UUK and Guild HE. It collects, analyses and disseminates quantitative data about higher education institutions.

The Universities and College Admissions Service (UCAS) is an independent body, a registered charity and a company limited by guarantee, which provides admissions services for universities and colleges. UCAS provides data and analysis to HEFCE on admissions and universities' finances.

The Office of the Independent Adjudicator (OIA) is a company limited by guarantee, to which all higher education institutions in England and Wales have to subscribe under the 2004 Education Act. It reviews individual and group complaints brought by students against universities after they have progressed through various internal systems. It has no powers to sanction universities, it only makes recommendations and relies on universities' consciences to follow their recommendations.

The Home Office works to ensure that universities that recruit international students attain Highly Trusted Sponsor (HTS) status. This process has recently been strengthened and an institution wishing to receive HTS is now required to have a successful QAA review before it can recruit internationally, formerly a function of the now abolished UKBA.

These bodies all have a role to play in the current regulatory system, and with the many levels and forms of regulation it is easy to see why the system is complex. Fielden and Middlehurst shared an example of a private provider with 39 accrediting bodies involved in its regulation.²⁰ The development of these services into regulatory bodies is causing concern about the volume of ‘micromanagement’ of universities. The volume and complexity of regulation can perversely cause institutions to become more risk-averse, interpreting regulations to be more extensive and stringent than originally intended. External regulatory models for higher education will work best when they take account of the self-regulatory and pluralist history of these institutions. We also feel that a pluralistic approach will account for the future development of these regulatory bodies; the move towards devolution makes a single regulator inappropriate given the UK-wide nature of many of these bodies. By maintaining the individual organisations’ independence and creating contractual relationships between the regulators, regulators will be able to operate effectively across the UK, allowing for the different regulatory structures of the nations to work cohesively.

20 R Middlehurst and J Fielden (5 May 2011), ‘Private Providers in UK Higher Education: Some Policy Options’, HEPI, pg. 30.

4. PROPOSING A NEW REGULATORY ARCHITECTURE

Chapter 4 returns to the functions of regulation, critiquing proposals for a single regulatory body for higher education. We suggest a new overarching regulator for a number of higher education (HE) regulatory entities, which will expand on HEFCE's current remit, becoming the Council for Higher Education (CHE).

Functions of regulation

For a revised regulatory architecture to be successful it is necessary to be clear about the functions we wish regulation to fulfil. The main objectives of a new regulatory system for universities and colleges should be to ensure high quality education, world-class research, a sustainable sector, and appropriate oversight and accountabilities to provide confidence to all stakeholders (including the public and students).²¹

The research produced at our universities is admired around the world and forms an important part of our economic output. Recent research from BIS found that graduate skills contributed to roughly 20% of GDP growth in the UK from 1982–2005.²² In addition to this, the New Economics Foundation quantified the benefits that universities bring to society as a whole. This was calculated as greater political interest, higher interpersonal trust and better health, which was estimated to have a monetary value of £1.31bn.²³

The UK has significant global prestige in the academic world, making up only 1% of the world's population, yet earning 12% of international research citations.²⁴ In 2010–11 there were 381,790 staff employed by UK higher education institutions and approximately 2.5m students enrolled.²⁵ Therefore, HE makes up a significant part of our national infrastructure and as such, it needs regulating irrespective of the amount of funding received. It is in the public interest that our universities maintain a good reputation internationally and that students who attend university in England have a rewarding experience. Liam Burns, former President of the NUS echoed this point, saying that as university participation rates climb towards 50% there becomes a point where the quality assurance of a university education converges with the public interest.²⁶

The white paper set out goals for the HE system to become more competitive, which traditionally translates as a move towards deregulation. Strides have been made to lower barriers to entry for new providers, increasing choice and diversity. Yet the move to more marketised conditions does not necessarily equate to a dramatic reduction of regulation. In fact the UK is already one of the most deregulated nations, and the Government has noted the potential for regulation to create a fruitful environment in its paper on the Principles for Economic Regulation.²⁷ This states, “*Appropriate economic regulation is a critical enabler of infrastructure investment. The existing regulatory regime has facilitated significantly higher levels of investment than that*

21 HEFCE written submission.

22 BIS (August 2013), 'The relationship between graduates and economic growth across countries', pg. 8.

23 New Economics Foundation (15 June 2011), 'Degrees of value: How universities benefit society', pg. 2.

24 'The economic impact of research conducted in Russell Group universities' Russell Group Papers – Issue 1, 2010, pg. 4.

25 Universities UK (December 2012), 'Patterns and Trends in UK Higher Education 2012', pg. 16.

26 Liam Burns evidence session.

27 Frontier Economics (May 2012), 'The Impact Of Regulation On Growth: A Report Prepared For The Department Of Business, Innovation And Skills', pg. 8.

delivered in the period prior to privatisation and has, at the same time, improved efficiency and competitiveness, promoted competition wherever appropriate, improved service quality for business and individual consumers and, in some sectors, enabled social and environmental goals to be met efficiently.”²⁸

With the right conditions in place, institutions can thrive. A fit-for-purpose regulatory system upholds high standards and maintains the international reputation of higher education institutions, stimulating demand both domestically and internationally. Students want to attend the best universities and be assured that their personal investment is well-justified. A robust regulatory system is, therefore, something for our institutions to take advantage of and be proud of. We want universities to use regulation to its full potential, and believe that there would be significant opportunity for universities to incorporate regulation into marketing material and branding as a seal of approval or kite mark of their successful quality assurance reviews. Not only will strong assurances of quality drive demand, but it will also increase the opportunity for collaboration and investment. Robust regulation of universities gives businesses the confidence to invest and banks the inclination to lend on advantageous terms. As the more traditional areas of investment have suffered over the period of economic downturn, the upward trend of businesses and universities collaborating to diversify funding pools is projected to continue. This has numerous advantages for both parties, and a proper regulatory system will help these relationships to flourish.

The change to the funding of universities has also impacted upon the position of students. Before the reforms, students' education was heavily subsidised by the Government. However, now students are funding the majority of their higher education through tuition fees. More choice and a demand-led system have led some to say that students have acquired more of a 'consumer role'. In the words of Universities Minister David Willetts, *“Students are not straightforward consumers and going to university is not like buying a service. But they deserve the same protections as other consumers and, ultimately, the framework of consumer protections can apply to education the same as anything else.”²⁹* Information is the key factor in empowering consumers. This has been enhanced by the Government's new requirements for universities to provide Key Information Sets (KIS) to HESA, empowering students to compare institutions and make informed decisions based on like for like data. We commend these new KIS requirements and hope that these will be extended to incorporate a broader range of providers.

We have been warned, however, that students should not be thought of as consumers, because education should not be regarded as a commodity that can be bought and sold. Just because a student signs up for a course does not mean that they will achieve a qualification at the end, and there is no 'money back guarantee' for those who do not. Universities are acutely aware that a demand-led system creates more choice for students, and inflated marketing budgets are being used to attract students more than

²⁸ BIS(April 2011), 'Principles for Economic Regulation'.

²⁹ D Willetts (2 January 2013), 'Why higher education is getting better by degrees' *The Independent*.

Available at: <http://www.independent.co.uk/news/education/higher/david-willetts-why-higher-education-is-getting-better-by-degrees-8435937.html>

ever. In February 2013 a *Times Higher Education* investigation found that universities spent 22% more on marketing during 2010-2012, jumping from £26.1m to £31.9m.³⁰

We believe that there are many positives to good regulation for institutions, but that the focus should remain on the student. All students in England should have access to basic information about an institution, be able to complain to an independent adjudicator in the event of an incident, and be assured that the degree that they receive is recognised domestically and internationally.

Other proposed regulatory models

There have been two recent proposals for the regulation of HE – the Browne Review (commissioned by the Government) and IPPR’s report *‘A critical path: Securing the future of higher education in England’*.

Both studies advocated a consolidated regulatory body (the Liberal Democrats also voted in favour of this at their 2013 Autumn Party Conference).³¹ The Browne Review recommended the creation of a Higher Education Council, which would absorb HEFCE, QAA, OFFA and the OIA.³² The Government rejected this recommendation, saying, “We see value in maintaining independent organisations for overseeing quality, fair access and student complaints. In any case, some of these bodies play a UK-wide role and are independent of Government so combining them is not feasible.”³³

We agree with many of our witnesses that the Higher Education Council model had significant disadvantages. The primary concern was that a centralised, single regulator would hold too much decision-making power. Additionally, there is a fear that a single regulator, by absorbing the other offices’ valuable functions, would somehow diminish the perceived amount of importance of each of these offices’ individual remits. For example, the fair access agenda, it was argued by Professor Les Ebdon (Head of OFFA), would be damaged if it did not have its own body with the sole responsibility for its promotion. Reducing the status of OFFA, he argued, would go against a core objective of the HE white paper, to widen access to institutions.³⁴ Nonetheless, there remains some scope for consolidation with appropriate safeguards.

IPPR also proposed a centralised structure, which consolidated HEFCE, the QAA and OFFA to reduce bureaucracy and simplify the relationship between universities and government. It gave the new expanded version of HEFCE a wide remit including: student champion, promoting the national interest, and safeguarding the international reputation of the sector. However, the IPPR report did not address all the anomalies the Government found with the Browne Review, namely that the QAA could not be easily absorbed into England’s regulation system as it is a UK-wide body. Another concern was the lack of protection from government or sector capture, which is a greater risk with a single regulator.

30 D Matthews (7 February 2013), ‘University student marketing spend up 22%’, THE.

Available at: <http://www.timeshighereducation.co.uk/news/university-student-marketing-spend-up-22/2001356.article>

31 Liberal Democrats 2013 Autumn Party Conference (15 September 2013), ‘Learning for Life (Education and Skills from Upper Secondary to Lifelong Learning Policy Paper’. Available at: <http://www.libdems.org.uk/siteFiles/resources/docs/conference/2013%20Autumn/Policy/F16.pdf>

32 Lord Browne (12 October 2010), ‘Securing a sustainable future for higher education’, pg.45.

33 BIS (June 2011), ‘The Government’s response to Lord Browne’s Review’, pg. 4.

Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32400/11-1046-government-response-to-browne-review.pdf

34 Professor Les Ebdon evidence session.

We incline towards a less totalising and more distributed solution than Browne or IPPR, yet one that is still coherent and authoritative. A more pluralistic approach, with oversight by one regulator, would keep some of the consolidated benefits of the Browne model, whilst maintaining the relative independence of the current bodies (and their legitimacy), which form a crucial part of the regulatory regime.

We looked outside the sector for successful models of regulation and well-regarded regulatory bodies, from which HE could learn lessons. We observed examples of both centralistic regulation (as is in the health service) and more pluralistic examples. We found that the Legal Services Board (LSB) provides a good example and that the similarities between the two sectors facilitate transfer of some of its key features to higher education.

LEGAL SERVICES BOARD

CASE STUDY

The LSB was created by the 2007 Legal Services Act to be a powerful, overarching, but non-centralised regulator for legal services in England and Wales. It exists to create competition and maintain standards, with a mandate to ensure that regulation in the legal services sector is carried out in the public interest, and that the ‘interests of consumers are placed at the heart of the system.’³⁵

Its main objectives include:

- protecting and promoting the public interest
- supporting the constitutional principle of the rule of law
- improving access to justice
- protecting and promoting the interests of consumers
- promoting competition in the provision of services in the legal sector
- encouraging an independent, strong, diverse and effective legal profession
- increasing public understanding of citizens’ legal rights and duties
- promoting and maintaining adherence to the professional principles of independence and integrity; proper standards of work; observing the best interests of the client and the duty to the court; and maintaining client confidentiality³⁶

The legal services sector has a number of similarities to the HE sector. They are both longstanding, autonomous professions with many self-regulatory bodies, which are being encouraged to innovate in a more competitive system, whilst keeping the service-user ‘at the heart of the system’. There are ten approved regulators which have ‘first line regulator’ status with the LSB in an oversight role. As with the Browne Review in HE, a fully consolidated body for the legal profession was recommended in the 2004 Clementi Report, a model that was ultimately rejected for being too monolithic and vulnerable to government capture. We feel that the principles and architecture of the LSB could be used as an example regulatory body on which to draw up a revised architecture of HE regulation.

³⁵ Legal Services Board, available at: http://www.legalservicesboard.org.uk/about_us/index.htm

³⁶ Ibid.

Our proposed new architecture

We believe that there is a need to design a new regulatory system which will achieve equilibrium between regulatory objectives. New regulatory architecture should seek to avoid duplication and administrative ‘red tape’, reduce the chances of ‘capture’ and manage the conflicting objectives of the different regulatory bodies and sector interests.

We propose a new regulatory model that incorporates the benefits of a more consolidated approach, as advocated by Browne, but which maintains the pluralism provided by existing regulatory bodies. This new, legislated, Council for Higher Education (CHE) would be an expanded version of the newly-reformed HEFCE and would include the Office For Fair Access (OFFA), Office of Student Loans (OSL) (previously the Student Loans Company), and a new body the Office for Competition and Institutional Diversity (OCID). The CHE would seek to exercise overarching regulatory and supervisory powers over other bodies, (through contracted protocol) whilst maintaining the funding power it had as HEFCE. The new CHE would operate a Common Regulatory Framework to be applied to all HE providers in England (to be discussed in chapter 6).

The CHE’s responsibilities would include:

- approve rules and assist in standard-setting in regulation
- approve new activities to be regulated
- approve changes to activities covered by regulators
- approve new regulators
- be able to take a range of disciplinary actions against other regulators

The last three functions would be subject to parliamentary or ministerial approval.

We heard from a number of witnesses that HEFCE had become too close to government. IPPR’s report commented on this, saying, “*at times in the last decade they [HEFCE] have been too closely directed by government and insufficiently protective of institutional autonomy.*”³⁷ We recommend that the CHE should submit an annual report to Parliament to demonstrate its independence, and avoid the risk of regulatory ‘capture’ by government. This could also be presented to the Select Committee on Business, Innovation and Skills with the suggestion that they hold an annual or biennial evidence-taking session with the head of the CHE, to further ensure the organisation’s independence. The CHE should also incorporate a number of ‘non-executive directors’ on its board to help maintain independence from both the sector and government.

We see benefits to incorporating OFFA and the OSL (formerly SLC) under an overarching regulator, and hope that an increase in efficiency and communication could help streamline some of the processes in HE regulation, and perhaps produce some financial savings. The SLC is an organisation which we feel would be particularly susceptible to capture by government, given the strong interest from the Treasury.

37 IPPR Commission on the Future of Higher Education (June 2013), ‘A Critical Path Securing the Future of Higher Education in England’, pg. 108.

By incorporating it into the CHE it would be accountable to the board of CHE and therefore Parliament in its entirety. As the CHE and OSL would both have a role in funding, there may be some room to increase the efficiency of the organisation, ensuring that institutions with access to student funding are being incorporated to the Common Regulatory Framework (discussed in chapter 6). We note that in the Welsh HE system, the funding council has responsibility for the fair access agenda. We propose that this provides an opportunity to streamline the ‘widening participation’ agendas of both HEFCE and OFFA. The fair access agenda receives a large proportion of media attention and is a core component of the white paper; therefore, we believe that OFFA should retain its advisory board and that its head should report directly to the CHE Chief Executive.

The new Office for Competition and Institutional Diversity (OCID) would be a lightly-staffed body focussing on alternative providers. This would include private institutions, new entrants from outside the UK, and new corporate structures that traditional universities are producing (such as at Coventry). The main purpose of OCID would be to encourage innovation and institutional diversity by providing broader network and policy links for alternative providers (including encouraging a ‘trade body’ for alternative providers). This would give the providers more legitimacy and a voice, and help the regulator to monitor developments and new structures – including online provision and MOOCs. It is hoped that this function will help HESA collect data on what has previously been an undocumented part of the sector.

Unlike the Browne Review, which saw regulatory bodies consolidated into one ‘Higher Education Council’, the CHE would not include: QAA, UCAS, HESA or the OIA. The QAA, with its responsibilities for quality assurance and enhancement, needs independence (not least from funding allocations) for its legitimacy, which would be compromised if it was absorbed into the CHE. The QAA should remain outside the CHE as a first line regulator with a contractual relationship with the CHE (as is its current relationship with HEFCE). Independent quality assurance agencies around the world must assure their independence and legitimacy, and it is a requirement of the Bologna Process (a European-wide agreement that the UK is party to) that funding and quality assurance remain separate.

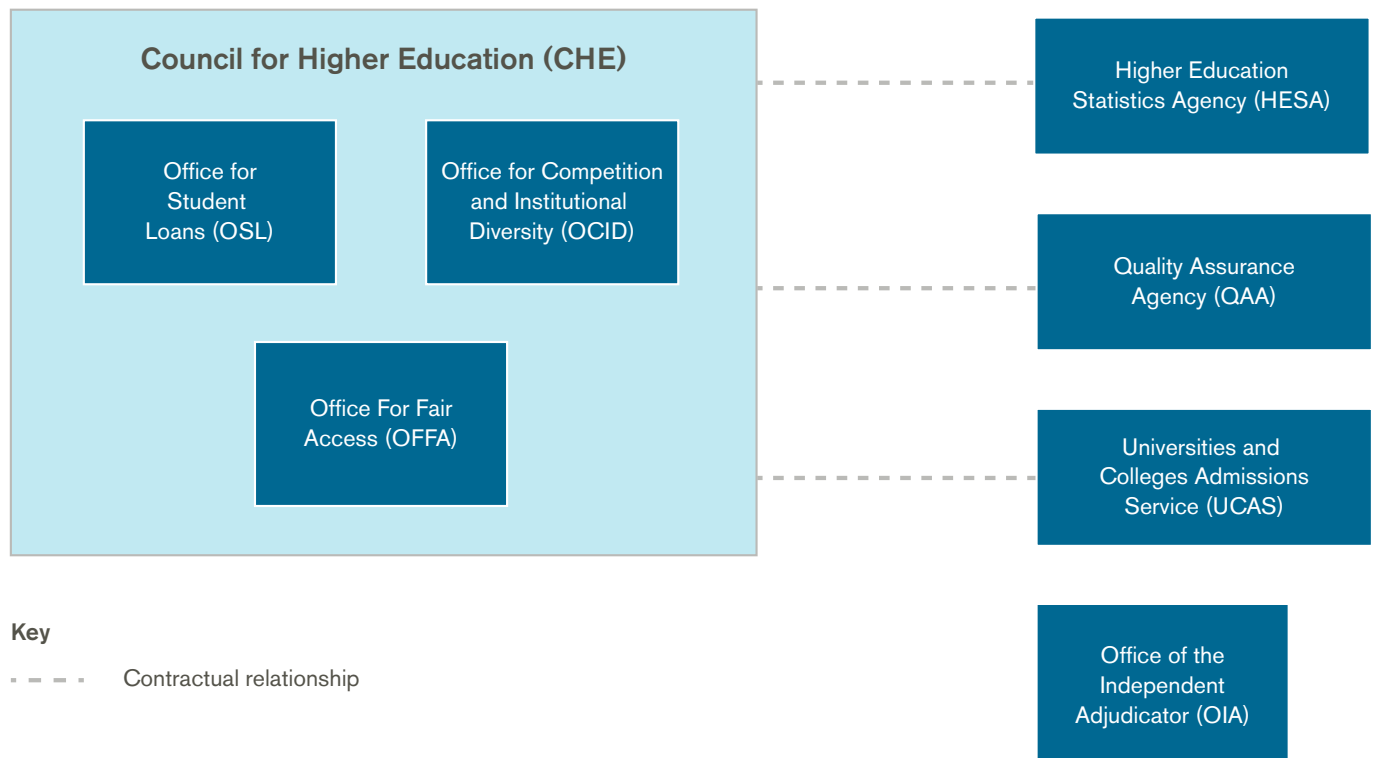
UCAS is a sector-owned shared entity, and while it does have some regulatory functions especially with regards to data, there are no explicit benefits to consolidating it into the CHE. Clearly the CHE would have to create a protocol of sorts to ensure that the necessary regulatory data from UCAS was available.

Data supply and broader intelligence on the sector is likely to grow in importance. Consequently, we feel that there is a strong case for HESA to become a statutory body; however, this needs further research and scrutiny. Regardless, central to its objectives should be communication with the sector to reduce the burden of data collection for

higher education institutions. We believe that it would be beneficial for some of HESA's functions to expand, and think that it should be responsible for collecting more data from alternative providers and begin to develop an 'intelligence unit' giving more value to the data it produces.

In speaking with the Higher Education Commission, the Chief of the OIA, Rob Behrens, reiterated widespread criticisms that the Browne Review suggested the inclusion of the OIA into a consolidated regulator. We agree that the OIA needs to be a separate entity, but given that its independence has been upheld in the courts and by the Ombudsman Association we do not feel that it needs to be statutory in the current regulatory environment. The OIA and the QAA have recently signed memoranda of understanding, establishing an information sharing agreement. This is a commendable step towards greater communication between regulators and we hope that this will help the QAA's Concerns Scheme and perhaps increase the quality of institutions' internal complaints procedures. We have heard some concerns over the nomination process of OIA board members and recommend that public and student confidence could be enhanced if the nominations for these independent members were organised by CHE, as currently happens in the Legal Services Board.

The Higher Education Commission's Proposed Regulatory Architecture



Recommendation 2

A new, overarching regulator building on HEFCE's remit (renamed the Council for Higher Education – CHE) should be formed as a non-departmental public body. The CHE should incorporate OFFA, OSL (formerly SLC) and a new body, OCID (Office for Competition and Institutional Diversity). Responsible for ensuring complementarity of bodies across a pluralist system, the CHE should have contractual relationships with QAA, UCAS, and HESA.

Recommendation 3

CHE should be required to submit a report to Parliament annually to demonstrate its independence from government.

Recommendation 4

CHE and the QAA should build upon existing HEFCE regional links with institutions for the purposes of regular conversations on quality and other forms of assurance and enhancement.

5. REGULATING A DIVERSE EDUCATION SECTOR

Higher education (HE) provision is continuing to diversify and this chapter discusses how far regulatory bodies should be able to exert their reach.

The higher education white paper has facilitated the introduction of new providers into the HE sector. Indeed, recent BIS research found that 23.7% of alternative providers have been operating for less than five years.³⁸ Regulating the quality of HE provision in these institutions is challenging, due to the fact that regulation is currently tied to receipt of funding, which few of these alternative providers receive.

Who is currently regulated?

A key element of this inquiry's evidence gathering process has been to examine the extent and reach of regulation. We have tried to be far-reaching and forward-looking in our approach.

The Operating Framework, discussed in chapter 2, is the most up to date policy on current regulation and aims to set out a coherent, streamlined approach in the absence of legislation. It holds information on entering and operating in the system, the requirements that need to be satisfied, and possible sanctions if they are not. The Operating Framework is coordinated by the lead regulator HEFCE, with the support of SLC, QAA, HESA, OFFA and the OIA.

In 2013-14, HEFCE aims to establish a comprehensive list of HE providers in England into a publicly accessible database. Those on the register will be operating 'within the framework' and required to abide by it. These include:

- Higher education institutions –
 - Universities (and university colleges) that are grant funded by HEFCE. These are usually chartered bodies, higher education corporations, or companies limited by guarantee
 - Colleges of higher education that are grant funded by HEFCE
- Further education colleges that offer higher education (and are grant funded by HEFCE). This provision may be 'franchised' from another university or college
- Alternative providers with degree awarding powers (DAP) (which may have university or university college title), with courses designated for student support purposes.
- Alternative providers with DAP, with no courses designated for student support purposes
- Alternative providers with no DAP, with courses designated for student support purposes
- Alternative providers with no DAP, but with courses validated by a recognised awarding body

38 BIS (June 2013), 'Privately funded providers of higher education in the UK', pg. 45.

- Other alternative providers whose students on certain courses study for recognised degrees validated by higher education providers with DAP and other qualifications (including HNCs and HNDs) but are not designated for student support purposes³⁹

This is a commendable attempt at a comprehensive list of HE providers. However, we are interested in those institutions that the HEFCE register is not covering, operating ‘outside the framework’. Those outside the framework will comprise mainly of commercial and overseas organisations that have not sought public grant, student support funding, degree awarding powers, or university title. Therefore, an unregulated sector of HE will continue to exist. It has been suggested that these organisations are posing the greatest risk to the reputation of the sector as they have the least amount of contact with regulators, making it hard to confirm their legitimacy and quality of provision.

The Operating Framework describes those outside the register as:

- Those providers not funded by HEFCE
- Those providers whose courses are not designated for student support purposes
- Those providers who do not hold university college or university title in the UK
- Those providers who do not have degree awarding powers in the UK
- Those providers who are not a further education college
- Those providers whose provision is not validated by a UK higher education institution or other recognised awarding body⁴⁰

Latest BIS research gives more accurate figures on the number of unregulated providers than was previously available, but truthfully, in England, we do not know for certain how many providers of HE there are. HESA should be asked to continue the work started by BIS collecting data annually on such providers. We received evidence from many witnesses concerned about the potential impact of small, under-regulated institutions and the threat to the whole sector they could pose by providing poor quality provision. Middlehurst and Fielden stated, “*Policy makers are largely in the dark at present about the size and shape of the private sector.*”⁴¹ David Willetts recently confirmed in *The Daily Telegraph* that before 2010 little was known about these private institutions. He said, “*Now we have introduced clear universal guidance which says that no higher education course can be designated for student support unless the provider has met rigorous new standards on quality assurance, financial sustainability, management and governance.*”⁴² We commend the additional regulation for institutions in receipt of support, but there are still large numbers of providers with no designation and minimal regulation.

In July 2013, BIS published research on private providers in the UK and found that

39 Regulatory Partnership Group (July 2013), ‘Operating framework for higher education in England’, pg. 7.

40 Ibid.

41 R Middlehurst and J Fielden (5 May 2011), ‘Private Providers in UK Higher Education: Some Policy Options’, HEPI, pg. 34.

42 D Willetts (24 July 2013), ‘Our privately funded university revolution’ *The Daily Telegraph*.

Available at: <http://www.telegraph.co.uk/education/universityeducation/10198076/David-Willetts-our-privately-funded-university-revolution.html>

there were 674 privately-funded institutions operating last year with a total of 160,000 students enrolled.⁴³ This confirmed our speculation that individually these institutions would not amount to a large threat – with 49.1% of private providers having less than 100 students – but collectively they represent a significant portion of the student population.⁴⁴ In giving evidence, traditional universities argued that in the HE sector, the smaller providers pose the most risk to the sector. This is in contrast to other sectors, such as banking, where the largest institutions tend to pose greater risk. The lack of regulation of some private providers means students cannot be assured of the quality of their provision and have limited means of redress in the event of failure.

We concluded that there is a need to expand the remit of the HEFCE register, agreeing that ‘breadth’ should be prioritised over ‘depth’. Some have argued to us that regulating all types of HE provision in England would put too great a burden on regulators. To avoid unnecessary regulation, it is recommended that the QAA’s delineation of HE and non-HE providers is used as guidance.⁴⁵ We recognise an expanded register may infer some unwarranted sense of legitimacy on some small providers (something that was a concern to some in the established HE sector) and agree that this approach should be taken with caution.

Through the new Council for Higher Education (CHE), we would like to see a Common Regulatory Framework introduced, expanding the Operating Framework to include *all* HE providers in England. We think that this will also account for the growing number of different ‘corporate structures’ being developed in HE and FE, capturing the organisations and ensuring that all their elements are scrutinised and subject to regulation. This will be discussed in chapter 6.

International providers

The proposed HEFCE register does not cover international institutions teaching students based in the UK. There is a strong case for arguing that existing campuses of foreign universities and any foreign university wishing to establish itself in England (outside the UK Qualifications Framework) should be required to register to operate. If such providers plan to enrol UK/EU citizens, they should be subject to the same accreditation and review processes as domestic providers. In short, such organisations should appear on the HEFCE register.

Building relationships with international quality assurance agencies would reduce some of the regulatory burden which this could present. We believe that the QAA should work towards establishing robust mutual recognition agreements with regulatory bodies internationally, which could ease the regulatory burden in the future. The QAA has a number of Memoranda of Understanding with partner organisations to help disseminate information about quality assurances in other countries – these should be expanded into firmer mutual recognition schemes.

43 BIS (June 2013), ‘Privately funded providers of higher education in the UK’, pg. 7.

44 BIS (June 2013), ‘Privately funded providers of higher education in the UK’, pg. 29.

45 QAA, ‘Joint statement: educational oversight of Tier 4 sponsors’

Available at: <http://www.qaa.ac.uk/InstitutionReports/types-of-review/tier-4/Pages/joint-statement-QAA-ISI.aspx>

We recommend that the newly formed CHE should ask the QAA to explore the possibilities of robust mutual recognition schemes with similar agencies abroad.

Online providers

The move towards online-based education has been slow in the UK, with some claiming it is a ‘fad’.⁴⁶ This is in contrast to the United States, whose institutions have offered sophisticated online provision for a number of years. Massive Open Online Courses (MOOCs) have received most of the attention, with media claims that they are, “scaring the wits out of traditional universities.”⁴⁷

We acknowledge that the potential for MOOCs to expand is legitimate, but are sceptical that they are a threat to the traditional university experience. The expansion of MOOCs has been substantial, but they have yet to find a viable business model, have extremely high dropout rates, and crucially have not had their value tested by employer acceptability.

MOOCs in the UK are predominately run by mainstream higher education institutions through established online learning platforms. They are mainly designed to supplement enrolled students’ learning, and give prospective students a chance to sample how courses at a certain university will be taught.⁴⁸

We heard from the University of Edinburgh and the University of Southampton, two universities who are developing MOOCs through FutureLearn and Coursera. They both regarded their MOOCs as merely a different style of provision, designed for greater outreach, especially to lifelong learners, and also to attract potential students to the university. Emphasis was placed on the early development of MOOCs and both institutions were concerned that a rush to regulate them too soon would hamper development.

Both institutions had invested time, staff resources and money into development, and reported that MOOCs needed to be of high-quality if they were going to be successful as a recruitment tool. Their MOOCs were subject to internal quality assurances and substantial data collection (market analysis) which was felt to be sufficient assurance by the institutions. The MOOCs in question are also free, and do not bear credit. If this situation changed (i.e. if they became credit bearing or transferrable) then quality assurances arrangements would have to be revisited. Additionally, it would be concerning if employers started to accept certificates of completion of a MOOC as a qualification, although there is little sign to date of this occurring.

We believe MOOCs that are not credit-bearing and operate through a UK higher education institution should be given the opportunity to develop, and do not need further regulation at this point. If MOOCs become credit-bearing and transferable,

46 K Toyama (April 2013), ‘MOOCs Will Come and Mostly Go Like Other EduTech Fads’ Educational Technology Debate. Available at: <https://edutechdebate.org/massive-open-online-courses/moocs-will-come-and-mostly-go-like-other-edutech-fads/>

47 (20 July 2013), ‘The attack of the MOOCs’ The Economist.

Available at: <http://www.economist.com/news/business/21582001-army-new-online-courses-scaring-wits-out-traditional-universities-can-they>

48 Edinburgh and Southampton University oral evidence.

the approach will need to be readdressed. Further research is needed on the quality assurance of those MOOCs that are not linked to a UK higher education institution.

Recommendation 5

HESA should be required to collect annual data returns from alternative providers as part of its responsibilities.

Recommendation 6

CHE and the QAA should create robust mutual recognition schemes with international regulators.

6. ACHIEVING A COMMON REGULATORY FRAMEWORK – FROM A ‘LEVEL PLAYING FIELD’ TO AN ‘EQUITABLE PLAYING FIELD’

In the previous chapter we looked at the diverse range of higher education (HE) providers entering the market. Here, we analyse the difference in the application of regulation and how this should be altered to make a more equitable playing field, encompassing all providers. We propose that this is accomplished through our Common Regulatory Framework.

The Government’s higher education white paper stated that, “*all higher education providers, whatever type of course they offer, must be able to compete on a level playing field.*” We believe that for this to be realised traditional universities and alternative providers should be subject to the same regulatory framework.

The Government has made significant progress to place traditional institutions and alternative providers on a more ‘level’ footing. Instead of a ‘one size fits all’ criteria, proportionate regulatory requirements are applied to institutions based on the status of the institution and whether it has courses designated for student loans. David Willetts has said that this will create a “*genuinely open system that encourages real student choice and exciting institutional competition should only be seen as a race to the top.*”⁴⁹

Regulatory framework proposed by the white paper

Following the white paper, a technical consultation was published by government on the proposed new regulatory framework. It outlined a road map towards a coherent regulatory approach for all providers. This allowed for differential regulatory applications to institutions, based on the nature of the funding received and the status of different providers. It tiered institutions by those with Degree Awarding Powers (DAPs), those that are designated for student support, and those that are designated for student support *and* receive a HEFCE teaching grant.

49 D Willetts (24 July 2013), ‘Our privately funded university revolution’ The Daily Telegraph. Available at: <http://www.telegraph.co.uk/education/universityeducation/10198076/David-Willetts-our-privately-funded-university-revolution.html>

Application of the proposed regulatory framework

Bodies holding taught degree awarding powers must comply with requirements on:

- Quality
- Dispute resolution

Institutions designated for student support must comply with requirements on:

- Quality
- Dispute resolution
- Information
- Access (if charging over the basic tuition charge)
- Financial sustainability
- Reformed student number controls
- Tuition charge caps

Institutions in receipt of teaching grants must comply with:

- Any conditions specific to the grant over and above conditions of designation for student support⁵⁰

New requirements on alternative providers

The alternative HE sector is a rather undocumented area. Without any requirements for data submissions, such as the Key Information Sets (KIS) required by HESA of HEFCE-funded institutions, it is unclear what type of provision is on offer at these alternative providers, and who is enrolled. This has been highlighted by the BIS report mentioned in the previous chapter, which found that 674 privately-funded institutions were operating last year with a total of 160,000 students enrolled – previous estimates placed the number between 500-600 providers.⁵¹

In June 2013 BIS issued new guidance for alternative providers seeking subject-specific designation for student loan funding.⁵² The document outlined the following requirements:

- A recent, successful QAA review is a pre-requisite for an application for specific course designation. Providers will also need to demonstrate a commitment to maintaining their relationship with the QAA (by paying a subscription or the annual maintenance fee).
- As part of Financial Sustainability, Management and Governance (FSMG) checks providers must provide externally audited copies of accounts for the last three years.
- Student Number Controls (SNCs) will be introduced in 2014/15 for full-time undergraduate courses and set on an annual basis. Specific SNCs will be set for each provider.⁵³
- Some providers will be required to submit data to the Higher Education

50 BIS White Paper (June 2011), ‘Higher Education: students at the heart of the system’, pg. 69.

51 BIS (June 2013), ‘Privately funded providers of higher education in the UK’, pg. 11.

52 BIS (June 2013), ‘Alternative Providers: Specific Course Designation, Guidance for Providers: Criteria and Conditions’.

53 BIS (June 2013), ‘Alternative Providers: Specific Course Designation, Guidance for Providers: Criteria and Conditions’, pg. 18.

Statistical Agency (HESA). They will need to pay a subscription to the agency to meet this requirement.

- The course itself must be eligible for designation.⁵⁴

Professor Geoffrey Alderman, an inquiry witness, has argued that the private sector would accept more regulation in return for access to public funding, stating that they would, “*take the pain to get the gain.*”⁵⁵ He thought this should go further, calling for the Government to allow alternative providers to receive blanket designation as with traditional providers, rather than having to apply for designation on a course by course basis – a costly process.

Problems with a level playing field

In giving evidence on the ‘level playing field’, representatives from both traditional universities and alternative providers have said that they would like to see this improved. It is apparent that both perceive elements of the other’s current regulatory arrangements as unfair.

It has been questioned whether the ‘level playing field’ could be truly level without legislation. HEFCE, in a written submission to the inquiry said, “*A single regulatory system which protects students and the public interest in HE, and which will be fair and equitable for all HE providers, cannot be delivered without new legislation.*”⁵⁶ Indeed, we argue the case for legislation in greater depth in chapter 1.

Fielden and Middlehurst, in their paper for HEPI, identified a list of current exceptions to the notion of the ‘level playing field’:

- Access to public funding and resources
- Treatment with regard to Degree Awarding Powers which have to be reviewed only for private sector providers after 6 years
- Some differences in the processes used to approve private providers from those used for public applications.
- Treatment with regard to University title
- Requirements associated with widening participation
- Requirements concerning data collection, public information and public reporting (with regard to finance and quality)
- UKBA [now Home Office] ‘mind-set’ regarding the automatic award of Highly Trusted Sponsor Status to publicly funded institutions, while private providers have to follow a lengthy application process⁵⁷

54 BIS (June 2013), ‘Alternative Providers: Specific Course Designation, Guidance for Providers: Criteria and Conditions’, pg. 14.

55 Professor Geoffrey Alderman (in his personal capacity) evidence session.

56 HEFCE written submission.

57 R Middlehurst and J Fielden (5 May 2011), ‘Private Providers in UK Higher Education: Some Policy Options’, HEPI, pg. 33.

We have identified further areas as ‘uneven’:

Office of the Independent Adjudicator (OIA)

BIS suggests that alternative providers voluntarily subscribe to the OIA. Rob Behrens, Independent Adjudicator and Chief Executive of the OIA, told us that legislation should be introduced so that all students could have access to an independent appeals and complaints procedure, whatever type of institution they attend. This would level the playing field and prevent alternative providers from charging students who wanted to submit a complaint (a risk highlighted to this inquiry).

Data collection

As a result of being answerable to a greater number of regulators and service providers, traditional universities currently are subject to many more data requirements than alternative providers. HESA told the inquiry that all HE providers should be required to submit basic information, and said *“By excluding some providers there is an increased risk that the reputation of HE in the UK could be damaged through lack of visibility and awareness of provision and an inability to address the student interest.”*⁵⁸ We note that locating alternative providers has proved difficult in the past, let alone collecting data from them. HEFCE also suggested that more information on alternative providers should be available for students through Key Information Sets (KIS).⁵⁹

We recognise the need for data collection to be proportionate and flexible. A number of smaller and alternative providers reported they were administratively penalised by the standard formats used in data collection because of the types of provision they offered. The College for Estate Management was particularly concerned about the KIS data requirements on accommodation costs, Student Union Feedback, Student Satisfaction, and Future Employment Prospects – they do not offer accommodation, have no student union, do not participate in National Student Survey and most of their students are already in employment.⁶⁰

Student Number Controls (SNC)

In March 2013, it was announced that SNCs would be applied to alternative providers with designated courses in 2014/15 based on 2011/2012 recruitment figures. As more alternative providers become eligible for student loans the need to restrict the fiscal impact on the Treasury increases, especially when a comparatively larger numbers of students at alternative providers do not pay off their loans. Whilst the loans given to students are not considered public money, the amount of money that will never be paid back to the Treasury – estimated at 34% – is public money.⁶¹ Alison Wheaton, from private provider GSM recently said that SNCs on private providers were unfair because it hampered growth in an area the Government claims it is keen to expand. She points out that traditional universities are allowed unrestricted recruitment of students who achieve ABB+ and can charge over £6,000 in tuition fees, whereas alternative

58 HESA written submission.

59 HEFCE written submission.

60 CEM written submission.

61 IPPR Commission on the Future of Higher Education (June 2013), ‘A Critical Path Securing the Future of Higher Education in England’, pg.124.

providers currently cannot.⁶² The Government has recently amended this, announcing that such providers will, in the future, have the ABB+ SNC freedoms currently enjoyed by the publicly-funded sector.

Office For Fair Access (OFFA)

As alternative providers cannot charge more than £6,000 they are not required to have an Access Agreement with OFFA. As a result of the lack of data collected from many alternative providers, not much is known about the make-up and background of students in attendance. Nor is it clear the extent to which such providers contribute to the Government’s widening participation strategies. However, we understand that the flexible provision offered by private providers tends to appeal to students who live locally and have additional responsibilities outside of studying. In a recent article in *The Daily Telegraph*, GSM stated “8 in 10 of GSM London’s students come from a ten-mile radius of our campuses, the majority of whom are the first in their family to attend university.”⁶³ Widening access is one of the white paper’s three main ambitions, and given the alternative providers’ propensity towards recruiting from disadvantaged groups, to exempt them from such access data and other requirements appears to be counter-productive.

A new Common Regulatory Framework

In order to strengthen the moves towards a level playing field we recommend that the CHE should create a ‘Common Regulatory Framework’ promoting an *equitable* playing field as opposed to a level playing field.⁶⁴ This will recognise the differences between types of providers, ensuring they are subject to the same regulatory framework, if not necessarily exactly the same regulatory requirements.

We believe that under-regulated alternative and private providers entering the HE market pose a substantial risk to the reputation of all higher education institutions in England. Therefore, we recommend that new legislation should be introduced requiring all HE providers in England, regardless of their awarding capabilities or funding arrangements, to register to operate.

Under a newly formed CHE, a Common Regulatory Framework should incorporate *all* providers with a ‘physical presence’⁶⁵ in England to ensure that students and the reputation of HE are protected. We recognise that this would only apply to institutions in England; however, we would encourage the Scottish Parliament, NI Assembly and Welsh Assembly to consider adopting the framework to protect the reputation of the whole UK.

62 A Wheaton (25 July 2013), ‘David Willetts’s support for private higher education doesn’t go far enough’ *The Daily Telegraph*. Available at: <http://www.telegraph.co.uk/education/educationopinion/10202026/David-Willetts-support-for-private-higher-education-doesnt-go-far-enough.html>

63 Ibid.

64 R Middlehurst and J Fielden (5 May 2011), ‘Private Providers in UK Higher Education: Some Policy Options’, HEPI, pg. 36.

65 A ‘physical presence’ would be defined as an address, PO Box, IP Address or ‘companies house’ registration in England

We suggest a two stage process to achieve this:

1. All higher education institutions in England (public, private, international or online with an address in England) would be required to register under the CHE’s Common Regulatory Framework.
2. Once registered, if institutions wanted to recruit UK/EU students and/or wanted to teach recognised degrees they would have to comply with further quality assurances and data submissions.

After an HE provider registers, they would be put on a path that incentivises movement towards more oversight through data collection and quality assurance reviews.

Registration is purely an exercise to track what institutions are operating where. This registration does not indicate the authenticity of an institution, nor is it to be regarded as a ‘kite mark’ of approval. This is not an indicator of quality.

Under the new Common Regulatory Framework alternative providers would be given one year to register with the CHE, with a penalty imposed if they failed to do so. If a provider again fails to register, they would face closure for non-compliance. As providers register and move further within the Common Regulatory Framework, they would be incentivised to collaborate with the CHE through the various opportunities available such as college/university title, DAPs and data analysis. It is hoped that this method will capture the entrance of new providers into the market as well as the different corporate structures that are forming.

A certificate of quality would come after an institution has registered under the Common Regulatory Framework, had a successful QAA review, and subscribed to the OIA. After this, the institution will receive a seal of approval from the CHE, indicating that it has been scrutinised by the regulator and is compliant with the regulatory regime. This kite mark should be displayed by institutions on their literature and used as a demonstration of their quality assurance.

This approach is crucial to ensure that England’s reputation as a first class provider of HE worldwide is maintained.

A new data collection strategy

Good information is the key to good regulation and accountability. Consequently, as private data becomes public data, the ownership of such information becomes an increasingly salient policy matter. Universities and their representative entities have begun to regard data as increasingly sensitive and commercially confidential. In a written submission, HESA said that the increase in diversity and competition “requires inclusivity and openness rather than a partial and closed shop approach, which supports the need for a true level playing field with regards, at least, base line data.”⁶⁶

Although these bodies generally supply data to HEFCE easily, we are concerned by signs that this situation could change in the future. In 2013, for example, UCAS refused to release to HEFCE data on individual institutions’ admissions applications, deeming it to be too sensitive for public disclosure. If this sets a precedent, it could result in reduced oversight capacity for the lead regulator, including in calculating levels of systemic risk in the sector.

A data strategy should be introduced to reduce duplication and red tape. We believe that greater sharing and dissemination of information could significantly aid the CHE in identifying systemic risks. This data strategy should help create agreements between HESA and organisations like UCAS and the OSL (SLC) to ensure that the data needed for regulation is not refused. The data strategy should make the presumption that transparency is in the interest of students and this would be the default position for data under question.

Recent data from BIS on alternative providers shows how many providers are still operating with no data collected on them. We would like to see HESA update this data on an annual basis. We feel that HESA has the experience and capability to find these providers and aid in bringing them within the Common Regulatory Framework.

We recommend that a data strategy or protocol should be introduced. This should set out clear data requirements for effective regulation, in parallel with the Common Regulatory Framework and what data would need to be reported to the lead regulator to ensure that proper oversight is given.

Recommendation 7

The lead regulator CHE should develop a Common Regulatory Framework that can be applied to a range of providers to varying degrees, dependent on their provision and funding arrangements. The Common Regulatory Framework would create a kite mark to be awarded by the CHE, which institutions would receive once they had undergone a successful QAA review and subscribe to the OIA.

Recommendation 8

The lead regulator should set up an information strategy, outlining the information needed from institutions and other bodies for regulatory purposes. The strategy should presume in favour of transparency, in order to keep students at the heart of the system.

7. EXPANDING AND EMBEDDING RISK BASED REGULATION IN HIGHER EDUCATION

This chapter discusses risk based regulation in higher education (HE), looking to Australia for lessons and making recommendations on how to use the mechanism most effectively.

“Regulatory regimes need to be flexible enough to be appropriate to the different stages of development of regulated bodies and dynamic enough to recognise that even the best performers can deteriorate over time.”⁶⁷

In the past decade, risk based regulation has become more prevalent in public bodies, as well as in the private sector, following encouragement from the Treasury, the 2005 Hampton Review and governmental initiatives such as ‘Modernising Government’ and ‘Better Regulation’.⁶⁸ Risk based regulation allows for companies and organisations to work more effectively in globalised and competitive environments. Government departments have followed the private sector’s precedent, and started to adopt the model reflecting the trend towards ‘better’ regulation.

There are two dimensions to regulating risk: first, to provide consumer protection against risk and secondly, to encourage enterprise to take and effectively manage risks.⁶⁹ With this approach the notion of ‘risk’ needs to be reframed to shake away the negative connotations and reflect the opportunity that can come with well-managed risk taking.

The HE white paper strongly advocated the move towards risk based regulation, having it as one of the key principles for the revamped regulatory regime.⁷⁰ The core idea behind risk based regulation is to focus regulatory efforts where the risks are highest. The money and time saved on administration by organisations is consequently free to invest and improve the quality of the services provided. We are not advocating a regulatory objective of attaining a totally risk-free environment. Attempts to do so are probably futile, would be costly and highly intrusive to institutions, and would deter entrepreneurialism. However, a regulatory system that seeks to control and deter both institutional and systemic risk is to be supported.

Therefore, in a risk based system risks are not to be avoided, but assessed and managed properly. This applies at both an institutional and a systemic level. In HE, institutions are now assessed for their ‘risk level’ and most providers tend to fall into the ‘low risk’ category. However, this may change in a more competitive and diverse sector. Lower risk institutions under the new regime will face fewer regulatory review visits and lower

67 S Bundred (June 2006), ‘The future of regulation in the public sector’ Public Money & Management, Vol. 26, No. 3, pp. 181-188.

68 R King (9 November 2011), ‘The risks of risk-based regulation: the regulatory challenges of the higher education White Paper for England’ HEPI, pg. 2.

69 Ibid.

70 BIS White Paper (June 2011), ‘Higher Education: students at the heart of the system’, pg. 66.

intensity of external scrutiny than corresponding higher risk institutions.

We were pleased to see that the original white paper implication that some low risk institutions could be exempt entirely from QAA reviews has been revised. It remains important for even low risk institutions to undergo review, albeit less intensely and frequently, to ensure that best practice can be spread across the sector. Exempting low risk institutions would hamper the quality enhancement objectives of regulation and undermine knowledge of systemic risk.

We support the move to a more risk based model, and believe that proportionate, explicit and targeted regulation can be applied through the Common Regulatory Framework as discussed in chapter 6. This approach ensures that all institutions are up to certain standards of provision and avoids burdensome ‘one size fits all’ requirements, allowing for focussed resources where the institutional risk is highest, whilst maintaining oversight of potential systemic risks.

Risk based regulation in higher education

The HE landscape in England is diversifying and more marketisation and competition means risk can arise quickly. New collaborations, changes to management and governance can all have an impact on the viability of an institution. The QAA is introducing a Higher Education Review (HER) in January 2014 to review institutions every four or six years, depending on regulatory track records and other material factors.⁷¹ This may not capture signs of ‘intra-cycle risk incubation’ in institutions or wider in the system. This method is largely retrospective and lacks the forward-looking approach which TEQSA (despite its faults) achieved (see Case Study overleaf). The QAA’s ‘Concerns Scheme’, a trigger mechanism in the quality assurance system, has gone some way to address this problem. If an issue is raised this can prompt an out-of-cycle review with recommendations and an action plan. Considerable pressure has been put on the QAA’s Concerns Scheme and according to Anthony McClaran, Chief Executive of QAA, there has been increased uptake since the introduction of a more risk based system.⁷² We can see that the Concerns Scheme has many benefits, allowing flexibility for the regime and for concerns about academic standards or quality to be addressed. Yet it is essentially reactive and lacks a robust basis for the identification of both institutional and systemic risk. Further research is needed to aid such developments and the Commission recommends that QAA contracts this as a matter of urgency.

However, the relatively open and generally non-circumscribed approach to regulatory interventions by the QAA between cyclical reviews – rather than documenting a specific list of risk factors – balances well the requirements of external accountability with the need to not impose unnecessary administrative burdens on institutions. More formalised risk based regulation would require a highly sophisticated, but onerous, information strategy that would have led to sector reluctance to comply, as seen in Australia.

71 For the full list of factors see: Higher Education Review: A handbook for providers.

Available at: <http://www.qaa.ac.uk/Publications/InformationAndGuidance/Documents/HER-handbook-13.pdf>

72 Anthony McClaran evidence session.

AUSTRALIA'S 'TEQSA'

CASE STUDY

In February 2012, Australia established a new regulatory risk framework. The Tertiary Education Quality and Standards Agency (TEQSA) was introduced as the new overall regulator and began to exercise the most comprehensive example of risk based regulation and quality assurance yet found in HE.

Created by the TEQSA Act (2011) the Agency abides by three principles: regulatory necessity, proportionate regulation, and regulating by risk.⁷³ It was expected that such an approach would lead to regulatory resources being used more efficiently and effectively. The primary focus for scrutiny would be on institutions judged to pose the greatest risk – although all providers are covered by the TEQSA framework and experience cyclical visits. Less 'risky' universities and colleges would over time encounter less intrusion, and institutions would only receive the external administrative and regulatory intervention that was essential. At the same time, the quality of regulation itself is intended to rise by becoming more targeted.

TEQSA relies on sets of external threshold standards for universities and colleges, which are used to construct forty-six risk indicators. These are then weighted by the regulators to help determine the 'risk profiles' of institutions, including a 'traffic light' warning system (red/amber/green) that is applied to all. This system was designed to be 'forward-looking' when it comes to risk, as opposed to the English system, which proposes using an institution's track record.

However, in recent months, TEQSA has come under criticism from the sector. The introduction of the new system has resulted in an increase in data collection, placing an unanticipated burden on all institutions, regardless of the risk level. Providers complained about the duplication within the system: 50% of higher education providers regulated by TEQSA are also regulated by the Australian Skills Quality Agency (ASQA) for their vocational education and training (VET) delivery.⁷⁴ The complaints from providers caused the Australian Federal Government to review the system just two years after its inception. The result of the review, published in August 2013, recommended the reduction of TEQSA's remit to regulating the 'core activities' of universities, and encourages more self-regulation in the system.⁷⁵

The example set by Australia provides a good lesson as we look to adopt the principles of risk based regulation in UK HE. The Australian risk indicator approach was initially commended for its ability to look forward at potential future risks, but the indicators became too prescriptive and left little flexibility for institutions to innovate in the way risk based regulation intends. By using an institution's track record rather than highly formalised and scoped risk indicators it is hoped the English system will avoid these issues. Nonetheless, as of yet there is little indication that HEFCE/QAA has developed sufficient indicators of 'risk incubation' to detect looming troubles in even previously 'low risk' institutions.

73 TEQSA (February 2012), 'Regulatory Risk Framework', pg. 3.

74 (12 August 2013), 'Australia: TEQSA remit likely to be reduced' The Pie News.

Available at: <http://thepienews.com/news/review-calls-for-australia-to-reel-inteqsa-authority/>

75 K Lee Dow and V Braithwaite (5 August 2013), 'Review of Higher Education Regulation' Australian Government. Available at: <http://www.innovation.gov.au/HigherEducation/Policy/HEAssuringQuality/Pages/default.aspx>

As a part of the QAA's HER, we understand that there will be an increased need to regulate finance and governance aspects of institutions, not just the quality and academic standards. More alternative providers are entering the market with different governance structures and reviewing these and their impact on quality and standards will become a critical part of assessment. The peer review system used by the QAA might not yet be fully designed for this particular purpose.

We recommend that the QAA should reassess the skills-set of the assessors (including more recruits from business, and from across the public sector where risk based regulation is more advanced). Similarly, the training of all assessors at the outset in risk based principles (outlining the key objectives of such approaches) and not simply a focus on the mechanics, would be highly desirable.

The move to risk based regulation often requires changes to the regulator. These include greater centralisation of risk based judgements away from field assessors to more senior managers in the agency. This is to enable a corporate evaluation of institutions, based on holistic models of risk and the incorporation of broader indicators. As a result, there is an attendant danger of missing the local and behavioural malfunctions that often underlie organisational failures, and which pose considerable risk to stakeholders in the organisation.

We recommend that strong links should be forged between QAA auditors and teams at the new CHE to allow them to keep in regular and informal contact with institutions. This should ensure that the fullest intelligence (not simply data) is available on an institution. The continued use and influence of assessors in the field will help regulators engage in more knowledgeable regulatory conversations with institutions than 'meta-regulation' and highly formalised risk based audit approaches often allow.

Implementation of risk based regulation

HEFCE is already operating a risk based system and the QAA's new HER process will be more risk based than its predecessor the Institutional Review. We believe that the HER should be extended under the Common Regulatory Framework (discussed in chapter 6) to include all HE providers.

OFFA told us that it would like to explore the ways it might benefit from the extension of risk based regulation to its own methodology. For example, it felt that if monitoring information and assurance are strong enough, then the OFFA review cycle could range from one to three years, dependent on institutions success rate at fulfilling their Access Agreements. OFFA felt that this approach could allow more focus and concentration of resources on targeting groups that remained underrepresented. Given that widening access is a core component of the higher education white paper, we believe that this approach could have a positive impact on OFFA's work and reduce the burden on those successfully recruiting a diverse range of students.

Recommendation 9

The lead regulator should apply a risk based approach to regulation, assessing providers through the Common Regulatory Framework against clear tests and incorporating the principles of proportionality and appropriateness.

Recommendation 10

Research should be commissioned by CHE/QAA on models for predicting institutional and systemic risk, thinking about what changes the sector may experience in the future and how these can be addressed in the regulatory regime.

Recommendation 11

QAA Institutional Review teams should undergo broader-based training on finance and governance and the principles of risk based regulatory approaches.

Recommendation 12

Risk based regulation should be adopted by OFFA to bring it into harmony with other higher education regulators.

8. PREVENTING INSTITUTIONAL FAILURE

With the introduction of a new funding regime and a more competitive culture in the sector, the likelihood of an institution failing is increased. We recommend that a strategy should be put in place to protect students and the reputation of higher education (HE) in England in the event of such failures.

Risk based regulation aims to effectively manage risk – targeting, monitoring, and supporting where it is deemed to be most necessary. However, there is always a chance that an institution could fail.

In chapter 7, we explored risk based regulation and the rhetoric around risk, acknowledging that some risks – where managed – are tolerable. Under risk based regulation the increased opportunity for institutions to innovate is counterbalanced by the increased chance of an institution failing. Institutional failure (whether it is a public or private entity) would have a significant impact on the UK's higher education ecosystem. Therefore, it is extremely important to have a sector-wide strategy in place that allows for an institution to exit the market in an orderly manner, with the right levels of protection in place for students.

It is crucial that these mechanisms are in place, as scandal or failure can quickly turn stakeholders away from risk based regulation and back towards more a uniform and standardised compliance model.⁷⁶

Protecting students and reputation

Institutional failure would have a huge impact: students would have to move universities, transfer their loans, and change accommodation – significant upheaval that would mar their impression of UK HE, whether they are domestic or international students.

A more robust Credit Transfer Scheme would ensure that students could continue with their degree at an alternative institution with minimal interruption. As defined by the Open University, 1 credit equals 10 hours of notional learning; this system allows students to easily resume study at another UK institution.⁷⁷ There would obviously be interruption to a student's degree nonetheless – the same course or modules may not be available, for example – and an institution's internal mitigations processes should adequately reflect the disruptions.

Students could also suffer financially because of institutional failure, and steps should be taken to ensure that they do not lose out. We recommend that serious consideration should be given to allowing the transfer of student loans (accounting for any differences in tuition fee costs) and accommodation costs (many students would be tied into 12 month contracts which would need to be broken). Universities should be encouraged to accept students from failed institutions and should not have these numbers included under their SNC cap.

⁷⁶ R King (9 November 2011), 'The risks of risk-based regulation: the regulatory challenges of the higher education White Paper for England' HEP1, pg. 2.

⁷⁷ 'Credit transfer', Open University.
Available at: <http://www.open.ac.uk/study/credit-transfer/faqs/what-are-cats-points-or-credits>

HEFCE has previously assisted with institutions experiencing trouble. For example, when London Metropolitan University's Highly Trusted Sponsor status was revoked, HEFCE stepped in to assist and established a London Metropolitan University Task Force. This Task Force was granted a fund to help students pay for new visas, make up any differences in tuition fees, and cover additional expenses such as accommodation.⁷⁸ HEFCE should be praised for the swiftness and effectiveness with which this situation was handled. However, we do question whether in the future HEFCE will have the resources to manage a similar situation, and if the shift from financier to regulator would impede its ability to act.

The protection of the UK's reputation as a first-class HE provider would also be a foremost concern in the event of an institution failing. With such high risks to students and the UK's reputation, would government ministers allow a provider to fail in the face of what is certain to be extreme media furore and local pressure? Both Vince Cable and David Willetts seem uneasy about letting a provider fail, with the former saying at the HEFCE Annual Conference in April 2011 that, "*We would rather avoid institutional failure,*" and the latter indicating that he hopes in the event of institutional failure that private providers could assist financially and manage a takeover.⁷⁹ Witnesses to the inquiry were dubious as to whether this stage would be reached.

Preventing failure

Good governance, proper scrutiny – especially when awarding DAPs and partnerships – and mechanisms for early intervention should reduce the chances of failure. However, greater attention is needed on what happens when an institution *does* fail. The previous chapter discussed the importance of reviewers and auditors being aware of finance and governance arrangements in institutions, yet, much like in schools, hospitals and banks, overall responsibility for the finances and standards in universities lies with Governors. Liam Burns told the Higher Education Commission that Governors should remain the primary focus of accountability and that they should take a 'helicopter' approach, with overall strategic oversight and the ability to identify key elements of concern.⁸⁰

We commend the Government's recent revisions to the criteria for alternative providers applying for DAPs. The need for a QAA review, submission of Financial Sustainability, Management and Governance checks, and data submissions to HESA all go some way in minimising the risk of failure for alternative providers.

78 'London Metropolitan University task force', HEFCE. Available at: <http://www.hefce.ac.uk/lmu/>

79 V Cable (6 April 2011), 'Speech to HEFCE Annual Conference 2011'.

Available at: <https://www.gov.uk/government/speeches/hefce-annual-conference-2011>

80 Liam Burns evidence session.

The QAA's Concerns Scheme, discussed in the previous chapter, is a good tool for preventing institutional failure. The QAA investigates a range of issues through this scheme including:

- misleading information about the accreditation of the course
- inadequate support of placement learning
- failure to follow assessment regulations
- failure of providers to make aims and outcomes of a course available online
- failure of an assessment to be robust, valid and reliable⁸¹

Anyone can raise a concern with the QAA. It will then investigate the concern and, if validated, a report with a plan of action is published. This can result in a reclassification to a 'higher risk' level with a more intense review at the next cycle.

We also see potential for the Office for Competition and Institutional Diversity (OCID), under the new CHE, to take on some responsibilities for ensuring that institutions entering the market have good preventative measures in place, particularly with regards to governance. Having well-qualified governors and independent (non-executive) directors could help to prevent risk incubation and ultimately failure.

Proposed failure regime

Following recommendations from a range of witnesses, we agreed that there is a distinct need for a failure regime in HE. Others have also come to this conclusion, including IPPR who in their report stated, "*There is a legitimate role for government, through the regulator, in facilitating mergers or collaborative federations between stronger and weaker institutions to enable the weaker institutions to survive and thrive.*"⁸² There is evidence that the Government wishes to move in this direction, seen in a recent recommendation from BIS which stated: "*As well as ensuring quality, government should consider how any new regulatory framework might deal with provider failure (including any appropriate redress for students), as well as ensuring access to student loan financing is appropriately robust.*"⁸³ There is clearly consensus that the Government does have a role in intervention. However, we believe that a failure regime should be coordinated by the sector, with government intervening only at the last possible moment.

On the suggestion of HEFCE, the Higher Education Commission looked at the travel insurance industry, which participates in a sector-wide scheme to protect air passengers. The Civil Aviation Authority started the Air Travel Organisers' Licensing (ATOL) scheme in 1973 after a series of failures had left British citizens stranded abroad. By law, every travel company in the UK is required to participate in the scheme. Travel agents pay £2.50 into a fund for each passenger who books through them. This then pays out in the event of a failure.⁸⁴ This scheme collectivises the risk of the travel industry, providing protection for passengers, and for the travel industry's reputation.

81 'Concerns about providers', QAA. Available at: <http://www.qaa.ac.uk/complaints/concerns/Pages/default.aspx>

82 IPPR Commission on the Future of Higher Education (June 2013), 'A Critical Path Securing the Future of Higher Education in England', pg. 106.

83 BIS (June 2013), 'Privately funded providers of higher education in the UK', pg.116.

84 'ATOL - Protecting holidaymakers since 1973' Civil Aviation Authority. Available at: <http://www.caa.co.uk/default.aspx?catid=1080&pagetype=90&pageid=6494>

We believe that this model could be applied to the HE sector, with a requirement for institutions to sign up and pay a sum per student into a fund which would cover costs in the event of a failure. Regulators we spoke with seemed open to this scheme. However, HE providers said this would place unfair costs on traditional universities which are least likely to fail, but which would have to pay for the privilege of assisting new, dubious providers. It was commented that in HE, smaller providers tend to pose a greater threat to the whole system than the bigger institutions. One representative said that their members would probably be open to a scheme like this on a smaller scale if it was only confined to other 'low risk' universities. We felt that this would not properly cover the sector, and that for this type of scheme to work, it should be inclusive of all higher education institutions under our proposed Common Regulatory Framework. We believe that there are a variety of options which could overcome these issues that traditional institutions had: providers rated as a 'higher risk' could pay a higher rate per student; rates could be dependent on whether institutions are designated for student support or in receipt of teaching grants; institutions could be grouped regionally as it is likely that students of a failed institution will relocate within the area.

Another university group suggested that perhaps institutions could set up their own individual funds that, in the event of failure, would pay out to students. This suggestion does overcome the issues of collectivised risk which some were against, yet, it still leaves students at smaller institutions more vulnerable.

We believe that these two options – a sector-wide scheme or an individual institutional protection scheme – need to be further explored. If alternative providers were brought under the Common Regulatory Framework, perhaps they would pose less of a threat, meaning a sector-wide scheme could work? We note the appetite in the sector for this discussion. Indeed, Universities UK were pleased to see this in our objectives and said that, "*a discourse on the area, informed by a better understanding of what the potential benefits and drawbacks of such an approach might be, would be useful.*"⁸⁵

Recommendation 13

Institutions need to be better prepared for the possibility of a failure in the sector. Given the potential damage this could inflict on students and the sector as a whole, a 'protection' or 'insurance' scheme coordinated by the lead regulator should be put in place.



ANNEX

Objectives of regulation

Below are various objectives for regulation as described by important sector bodies. It is clear that the goals are not identical, but all extend beyond monitoring the expenditure of the HEFCE grant.

The BIS technical consultation listed its aims for regulatory reform:

- To create an open, dynamic and affordable higher education system, with more competition and innovation, and a level playing field for new providers
- To maintain the highest quality of higher education, safeguarding the strong international reputation of English universities
- To reduce the regulatory and administrative burden, adopting a risk based approach while improving accountability to students

Higher Education Better Regulation Group (HEBRG) listed its principles for regulation:

- Regulation should encourage and support efficiency and effectiveness in institutional management and governance
- Regulation should have a clear purpose that is justified in a transparent manner
- Regulation depends on reliable, transparent data that is collected and made available to stakeholders efficiently and in a timely manner
- Regulation assessing quality and standards should be co-ordinated, transparent and proportionate
- Regulation should ensure that the interests of students and taxpayers are safeguarded and promoted as higher education operates in a more competitive environment
- Alternatives to regulation should be considered where appropriate

IPPR's HE paper said that reformed regulation:

- Should be simpler, involving fewer organisations and transactions
- Should better judge quality by assessing outcomes on the ground, rather than simply whether procedures are in the place
- Should protect the autonomy of the sector from excessive interference from government
- Should be more robust

Browne Review said that a reformed regulatory body should:

- identify and invest in high-priority courses and evaluate value for money with the aim of protecting students' interests
- set and enforce minimum quality levels across the whole sector
- ensure that measurable progress is made on admitting qualified students from disadvantaged backgrounds
- ensure that students benefit from more competition through the publication of data and proper regulation of new providers entering the system
- adjudicate on disputes that cannot be solved internally at an institution and produce a binding outcome

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ACRONYMS

ASQA	Australian Skills Quality Agency
ATOL	Air Travel Organisers' Licensing
BIS	Department for Business, Innovation and Skills
CHE	Council for Higher Education
DAPs	Degree Awarding Powers
FE	Further Education
FSMG	Financial Sustainability, Management and Governance
GDP	Gross Domestic Product
HE	Higher Education
HEFCE	Higher Education Funding Council for England
HEI	Higher Education Institution
HER	Higher Education Review
HESA	Higher Education Statistics Agency
HNC	Higher National Certificate
HND	Higher National Diploma
HTS	Highly Trusted Sponsor
IPPR	Institute for Public Policy Research
KIS	Key Information Sets
LSB	Legal Services Board
MOOC	Massive Open Online Course
NSS	National Student Survey
NUS	National Union of Students
OCID	Office for Competition and Institutional Diversity
OFFA	Office For Fair Access
OIA	Office of the Independent Adjudicator
OSL	Office for Student Loans
QAA	Quality Assurance Agency
RPG	Regulatory Partnership Group
SIVS	Strategically Important and Vulnerable Subjects
SLC	Student Loans Company
SNC	Student Number Control
TEQSA	Tertiary Education Quality and Standards Agency
UCAS	Universities and Colleges Admissions Service
UKBA	UK Border Agency
VET	Vocational Education and Training

SECRETARIAT

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