

# REGULATION

## BRIEFING 1: INTRODUCTION, BURDEN, COST AND OVERLAP

Distinction and Diversity  
in Higher Education

**GuildHE**

**NOVEMBER 2022**



# Introduction

*"Regulations are indispensable to the proper function of economies and societies. They underpin markets, protect the rights and safety of citizens and ensure the delivery of public goods and services."*<sup>1</sup> (OECD, 2011)

Regulation plays an important role in any sector; however this does not come without a cost and it is always important to reflect on the value for money of this cost. The National Audit Office 2017 report noted that there are "around 90 regulatory bodies in the UK. Between them, these regulators had a total expenditure of more than £4 billion in 2015-16. This expenditure covers all regulatory activities as well as general running costs... The full cost of regulation is far higher than the total operating costs of all regulators. This is because compliance brings additional costs to businesses, for example extra resources needed to perform activities such as the monitoring and recording of compliance. In 2005, the Better Regulation Task Force estimated the cost to the UK economy of regulation to be around £100 billion each year"<sup>2</sup> but noted that there can be wider societal benefits to regulation (such as improved safety standards or increased consumer confidence). However, in higher education too much regulation can stifle innovation and divert funding away from frontline teaching and learning.

GuildHE represents over 50 smaller and specialist universities and colleges who focus on professional, vocational and technical education. These two factors - size and type of education they deliver - result in a number of regulatory impacts. This includes the burden and costs - particularly costs per student - for smaller providers, the regulatory overreliance on data and challenge of small datasets in smaller providers resulting in more volatile data. The HE sector is also grappling with the regulatory overlap of multiple regulators in the HE, FE and technical education sectors as well as multiple subject-level Professional Statutory and Regulatory Bodies (PSRBs), and this does not even include the other regulatory burdens on institutions such as those stemming from immigration, health and safety and environmental regulations.

Furthermore, many GuildHE institutions have been at the sharp end of regulation as new entrants to the Office for Students (OfS) Register, changing their fee cap level, applying for university title, registering a change of ownership or applying for Degree Awarding Powers (whether subject-specific, New, Taught or Research DAPs). These processes all have additional regulatory expectations.

Regulation - the burden, costs and overlap - is therefore a fundamental issue for GuildHE members and this briefing forms the start of a wider project during academic year 2022/23 where we will explore a number of core areas, identify key areas of concern and make recommendations for ways in which these could be tackled.

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<sup>1</sup> OECD (2011), "Setting the scene: The importance of regulatory policy", in Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest, OECD Publishing, Paris, <https://doi.org/10.1787/9789264116573-4-en>.

<sup>2</sup> NAO (2017), A Short Guide to Regulation <https://www.nao.org.uk/wp-content/uploads/2017/09/A-Short-Guide-to-Regulation.pdf>



# Key challenges for smaller and specialist universities and colleges

Through our ongoing discussion with members we have identified four key regulatory challenges for smaller universities and colleges on the OfS register:

- Small datasets
- Resources and proportional costs
- Regulatory overlap
- Changing expectations and communications

## Small datasets

Smaller and specialist institutions by their very nature are likely to have much smaller cohort sizes and therefore smaller datasets. This can result in significant fluctuations in the data on a year by year basis, and a handful of students having a very positive or negative experience can disproportionately impact on the data for any particular year. This means that the statistical robustness of the data is likely to be much less reliable. This may not be a bad thing in its own right, but when the regulatory system is overly reliant on data as a way of measuring compliance it results in the regulator needing to have more regular discussions with these institutions and seek additional information and context. This adds additional regulatory burden on smaller providers. Given that the vast majority of the more than 400 providers on the OfS's register are small and/or micro-providers, there should be greater consideration of the way in which they are regulated and whether a one-size-fits-all approach works in such a diverse sector.

## Resources and proportional costs

Smaller providers have fewer resources than larger providers. That may seem like stating the obvious but has significant impacts on smaller providers in demonstrating regulatory compliance where the expectations of the regulator are the same whatever the size of the provider. This means that the proportionate costs of regulation are much higher in smaller providers. Smaller providers also have less money to invest in large compliance teams, highly specialised staff or the latest software to capture the required information. Providers pay to subscribe to the OfS and their fee structure means that small HEIs pay more per head than a large university. This means that the proportionate cost of regulation per student in smaller providers is significantly higher than in larger providers both in terms of actual financial costs and resources.

## Regulatory overlap

GuildHE represents many institutions that deliver a range of qualifications in the professional, vocational and technical sphere. So in addition to meeting the requirements of their subject-level Professional, Statutory and Regulatory Body (PSRB) it means that they are often delivering different types of education - including higher education, degree apprenticeships, further education and other industry specific CPD. They are therefore dealing with a large number of regulators including the OfS, Institute for Apprenticeships and Technical Education (IfATE), Education and Skills Funding Agency (ESFA) and OfSTED.

However, this usually doesn't just mean reporting for some students to one regulator and other students to another. For example, for degree apprentice students these have to be reported to both the OfS and IfATE and in significantly different ways. One provider told us that they have two different data teams, one for reporting to the OfS and another for reporting to IfATE as the reporting processes and information are so different. The Regulators Code outlines the principle that *"Regulators should collectively follow the principle of 'collect once, use many times' when requesting information from those they regulate" and that regulators should share information with each other "to help target resources and activities and minimise duplication."* The fact that this does not happen places additional, avoidable burdens on institutions and tends to undermine the government's policy objectives for post-18 education and training.



## Changing expectations and communications

Having a stable regulatory framework that doesn't constantly change will result in better compliance and prevent wasted resources. With so many regulators and government departments involved in the regulation of HE, there is an inevitability that policies will change and new strategic priorities will emerge. However, the timeframes expected for this change to happen are often very tight, and HE institutions are increasingly expected to provide consultation feedback or respond to requests for evidence very quickly. This places a huge strain on small provider resources.

In our experience policy making rarely takes account of the impact on smaller providers and the unintended consequences of a specific regulatory approach, so it is vital that they have an equitable opportunity to contribute to policy discussions. Furthermore, and perhaps due to the current political climate and a global pandemic, regulators and government have been very slow to respond to challenges or policy directions which leaves HE providers exposed to very fast paced changes in some areas of regulation and in others are left not knowing how to plan for future change. This matters because small institutions have very limited resources and therefore must plan scrupulously to ensure they cover regulatory risk. Learning the new rules of engagement also takes time and resources.

## Key questions

The Regulators Code provides a helpful framework within which to consider some of these points. For example, in paragraph 1.1 it outlines that *"Regulators should avoid imposing unnecessary regulatory burdens through their regulatory activities and should assess whether similar social, environmental and economic outcomes could be achieved by less burdensome means. Regulators should choose proportionate approaches to those they regulate, based on relevant factors including, for example, business size and capacity."*<sup>3</sup>

This consideration of business size and capacity is something that the regulators in higher education need to give greater regard to.

The then Universities Minister, Michelle Donelan, established a **data reduction taskforce in March 2022; this group should be re-started** and given wider responsibilities to look at better regulation across tertiary education.

A couple of initial key questions that we would want to consider:

- Is an over-reliance on data-driven regulatory approach the most appropriate approach to a sector where almost three-quarters of providers are small or micro-providers?
- What might a more risk-based approach to regulation look like for smaller providers? Recent OfS investigations into course quality make a virtue of focusing on larger student populations to maximise the potential benefits of regulatory action. Could a similar approach, in reverse, allow lighter touch regulation for smaller providers?
- How can we ensure greater regulatory coherence between different regulators?

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<sup>3</sup> BEIS (2014), Regulators' Code  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/913510/14-705-regulators-code.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913510/14-705-regulators-code.pdf)



# Specific organisational challenges with the Office for Students

In future briefings we will look more closely at the impact of other regulators but we wanted to start by focusing on the main higher education regulator in England, the Office for Students. The OfS has now been running since 1st January 2018 and as it reaches its fifth birthday it is important to take a step back and reflect on how it is working and how it could work better.

Overly-legalistic language in communications, delays in meeting their own deadlines, short consultation periods, consultations' outcomes that rarely listen to the views of those consulted and political capture are just some of the complaints that we regularly hear from our members. Furthermore, there are still a number of processes and practices which have been slow to materialise such as changes to approved provider status or in relation to regulatory investigations. Whilst some of these issues may be teething problems of a new regulator we wouldn't want these to become embedded in working practices going forward. The OfS have also been subject to a recent National Audit Office (NAO) report in March 2022 considering how they regulate the financial sustainability of HE providers which suggested that *"the OfS have not yet been successful in achieving a good understanding among providers of why the OfS collects all the data it does, and how it uses it."*<sup>4</sup>. We therefore need to reflect on how the OfS returns to its strategic aim to *"minimise the regulatory burden it places on providers, while ensuring action is effective in meeting its goals and regulatory objectives"*<sup>5</sup>.

## Consultations

The burden of major consultations from the OfS should not be underestimated. Providers want to respond well to these consultations but it can take significant resources to be able to do so effectively and gather all the relevant information, especially in smaller providers where there are fewer staff to respond to them - most falling on the desk of one or two senior staff who also have full time jobs within the institution. Over the last year there have been a number of significant consultations at the same time and also major consultations run with very short consultation response periods. For example, quality and standards (B3), TEF and underpinning data consultations all ran at the same time, with these consultations and the supporting documents running to over 700 pages. Whilst in some ways there were interconnected issues, the sector had just eight weeks to respond to them all.

We have also seen a number of other short consultations, well below the Government expected 12-week<sup>6</sup> response period. The five-week consultation on major reforms to the National Student Survey over August 2022, when students are on holiday as are many university staff, is not good regulatory practice and this has recently been followed by another 5-week consultation in October 2022, this time on Equality of Opportunity and Access and Participation. We recognise that there may be rare occasions when it is necessary for a shortened consultation period, but the OfS should commit to meeting the expected 12 week consultation period as the standard, and ensure that they only run a limited number of major consultations in any given period. We also think there **should be an annual published programme of when major consultations** will be happening to allow institutions to prepare for these in advance and manage their resources more effectively.

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<sup>4</sup> NAO (2022), Regulating the financial sustainability of higher education providers in England <https://www.nao.org.uk/wp-content/uploads/2022/03/Regulating-the-financial-sustainability-of-higher-education-providers-in-England-Summary.pdf>

<sup>5</sup> OfS blog (2022), Reducing burden makes for good governance <https://www.officeforstudents.org.uk/news-blog-and-events/blog/reducing-burden-makes-for-good-governance/>

<sup>6</sup> HM Government (2008), Code of Practice on Consultation [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/100807/file47158.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/100807/file47158.pdf)



### Asymmetrical regulation

There is an asymmetrical regulatory relationship with the OfS making ever more urgent demands on providers for information whilst at the same time regularly missing their own deadlines. This lack of timely action has had a fundamental impact on smaller HEIs on how they operate (for example delays in granting DAPs limiting development of new courses or increasing validation costs). The last five years has therefore been challenging for smaller providers who have less resources to deal with changing expectations or providing feedback to the OfS and have been waiting for the OfS to finally put in place processes which support their business stability and growth.

Furthermore, the regulatory burden of the existing OfS regulatory framework is significant but this is further compounded by the OfS introducing additional conditions of registrations, such as the proposed new condition on harassment and sexual misconduct. There should be a principle of **one-in one-out for new conditions of registration** so that there is not an ever increasing burden on providers.

Later in the briefing series we will also look in more detail at OfS's Operational Measures and ways in which the sector can contribute to performance measurement. This will include **considering their value for money measure, OM9, which should include a measure tracking providers' perceptions of the value for money from the OfS**, which as highlighted in the NAO report *"the OfS does not routinely ask providers and sector stakeholders for feedback on its own performance as a regulator"*<sup>7</sup>. Also, when tracking registration or DAPs applications to the OfS, OM3 and OM4, this might be better reflected in the length of time taken to assess applications.

In addition to questions of their operational accountability there is also a wider question of how they are held to account, such as by the DfE - its sponsor Department - the Education Select Committee, or further reviews by the NAO. **We believe that there should be an independent review of the OfS** - in line with the post-legislative review of the Higher Education and Research Act (2017) - to consider whether it is delivering value for money for the higher education sector - including the additional costs of regulation within providers - and make recommendations on closer alignments to the principles of the Regulators Code.

## Conclusion

This briefing provides an overview of some of the key issues that we will explore in more detail over the coming months in our series of briefings. This briefing has started to highlight some of the key areas and some possible recommendations that we will elaborate on further through future briefings. Over the series we will look at issues including regulatory burden; good regulation and the differences between regulation, co-regulation and self-regulation; data in regulation; regulatory burden in research and knowledge exchange; and student engagement in regulation.

Going forward, we will make a series of recommendations for good regulation from the view of smaller and specialist institutions in the sector. Our work will focus both specifically on our members' experiences of regulators including the Office for Students, but will also take account of the wider regulatory environment so that we can set out our vision for an effective, efficient and proportionate regulatory approach for the HE sector.

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<sup>7</sup> NAO (2022), Regulating the financial sustainability of higher education providers in England <https://www.nao.org.uk/wp-content/uploads/2022/03/Regulating-the-financial-sustainability-of-higher-education-providers-in-England-Summary.pdf>



## About GuildHE:

*GuildHE is an officially recognised representative body for UK Higher Education. Our members are universities, university colleges and other institutions, each with a distinctive mission and priorities. They work closely with industries and professions and include major providers in technical and professional subject areas such as art, design and media, music and the performing arts; agriculture, food and the natural environment; the built environment; education; law; health and sports. Many are global organisations engaged in significant partnerships and producing locally relevant and world-leading research.*

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