REGULATION

BRIEFING 2: REGULATION OF HIGHER EDUCATION IN ENGLAND – IS THERE ANOTHER WAY?

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Introduction

GuildHE is producing a series of briefings throughout 2022/23 looking at different elements of regulation and regulatory burden. This is the second in the series and considers some of the legal dimensions of regulation relating to the main regulator in England, the Office for Students, considering both the Higher Education and Research Act (2017) and the Government's Regulator's Code. The first briefing ***Regulation Briefing 1: Introduction, Burden, Cost and Overlap*** *was published in November 2022 and provided an overview of some of the key issues affecting smaller and specialist universities and colleges and the sector more widely.*

This briefing has been kindly produced for GuildHE by Smita Jamdar, Partner and Head of Education, Shakespeare Martineau.

Given the importance of higher education to the individual, the taxpayer and society, there is no doubt that there needs to be regulation of it. The Higher Education and Research Act 2017 (the Act) established the Office for Students (OfS) as the body tasked with this important role in England and, since 2018, a particular approach to regulation has evolved. It is fair to say that the OfS's approach has prompted disquiet on the part of regulated providers and others. It is therefore worth asking the question whether the OfS's approach is the optimal one, or whether an alternative approach might deliver a better model of regulation in this crucially important, nationally significant sector.

The legal framework

The OfS's primary functions under the Act are to (a) establish a register for those higher education providers who wish to access certain benefits (student loans and student visas) and maintain certain rights (degree awarding and university title); (b) establish the conditions which must be observed by registered providers to ensure that the OfS's published regulatory objectives are met; and (c) take action where there is evidence of non-compliance with those conditions, including deregistration, which could result in loss of university title and with it de facto closure of a provider. The Act therefore confers a large amount of power on the OfS in its dealings with regulated providers. The power is not untrammelled, however, and there are a number of constraints on the exercise of the OfS's powers.

The Act

The Act sets out a range of matters which the OfS must have regard to in discharging these functions and these are the need to protect institutional autonomy, promote quality and choice for students, encourage competition, promote value for money and promote equality of opportunity in access. The OfS must also have regard to the need to use its resources in an efficient, effective and economic way and, so far as relevant, the principles of best regulatory practice, including that its regulatory activities should be –

(i) transparent, accountable, proportionate and consistent, and
(ii) targeted only at cases in which action is needed.

The duty to "have regard"

A duty to have regard to matters leaves a great deal of discretion in the hands of decision-makers, but it is not an unfettered discretion. The decision-maker must be able to demonstrate that it has indeed considered the matters in substance, with rigour and with an open mind, in such a way that it influences the final decision. It may be harder to justify deprioritising some factors over others.

In the context of the OfS it would, for example, be difficult to justify a decision not to use its resources in an efficient, effective or economic way on the basis that one or more of the other factors took priority. Similarly, although the OfS is obliged to take into account regulatory best practice only “so far as is relevant”, it is difficult to conceive of circumstances in which it would be justified in acting unaccountably, inconsistently or disproportionately.

Proportionality

The Act enshrines the concept of proportionality in a number of ways. As stated above, there is the obligation on the OfS to ensure that its regulatory activities are proportionate. Any registration conditions imposed must be proportionate to the regulatory risk posed by each institution. “Regulatory risk” means the risk of the institution failing to comply with regulation by the OfS. The Act permits different registration conditions for different types of providers (distinct from the concept of specific conditions of registration for individual providers), and for particular conditions to be disapplied for individual providers. It is notable that the OfS has proceeded on the basis of a range of universal registration conditions for all providers on the basis that it considers these a baseline requirement for operation in the sector, with a more limited number of specific conditions of registration. Whether this approach can truly be considered “proportionate to the regulatory risk posed by” each institution remains open to debate.

The duty to consult

In setting registration conditions and a broader regulatory framework, the OfS must consult. This duty requires that:

- The consultation must be at a time when proposals are still at a formative stage.
- The consultation must give sufficient reasons for any proposal to allow intelligent consideration and response.
- Adequate time must be given for consideration and response.
- The product of consultation must be conscientiously taken into account in finalising any proposals.

The OfS consults frequently and at length. In the period since January 2020 it has consulted on 25 separate occasions on a range of issues with varying degrees of complexity. On the face of it, therefore, it complies with the duty. However, concerns have been expressed that the length of the consultations can make it difficult to engage in “intelligent consideration and response”, that (in part because of the length of consultation documents) the time allowed for response is not adequate and, perhaps most crucially, there is no real evidence that consultation responses are conscientiously taken into account in finalising the proposals, with even near universal objections to proposals being ignored by the OfS in favour of its own preferred position.

Public law

Public law constrains a public body in a number of ways:

(a) Legality - a decision-maker must not misdirect itself in law, exercise a power wrongly or for ulterior purposes or act ultra vires by purporting to exercise a power that it does not have. For example, there may be a question over whether the recent decision to refocus access and participation plans on raising attainment in schools is a proper exercise of the power to require such plans.

(b) Rationality - where the courts will interfere if a decision is outside the range of reasonable responses of a public authority (sometimes phrased as being "so unreasonable that no reasonable authority could ever have come to it"). Findings of irrationality are very rare, as the court tends to defer to the expertise and judgement of the relevant decision-maker. Alternatively, and more commonly, the decision-maker may have taken into account irrelevant considerations or failed to take into account relevant matters, or indeed blinded itself to the need to take any considerations into account at all. For example, the OfS’s

approach of not distinguishing between (i) providers' different characteristics; and (ii) the regulatory risk posed by providers in determining conditions of registration or in determining how to intervene when there are concerns could be considered a failure to take into account relevant considerations.

(c) Procedural unfairness - where a decision-maker has not properly observed its published procedures, wider principles of fairness (such as a duty to give reasons) or the principles of natural justice. For example, a procedure that does not allow providers to understand what has triggered enforcement activity could be considered procedurally unfair.

(d) Legitimate expectation - a public body may be required to act in a certain way because it has created, by its own statements or conduct, a legitimate expectation as to the way in which it will act in a particular situation.

The Regulators' Code

The Regulators' Code was introduced in 2014 and, according to its foreword, is intended to provide "a flexible, principles based framework for regulatory delivery that supports and enables regulators to design their service and enforcement policies in a manner that best suits the needs of businesses and other regulated entities". The OfS must have regard to the Regulators' Code when developing the policies and operational procedures that guide its regulatory activities. If the OfS concludes, on the basis of material evidence, that a specific provision of the Code is not applicable or is outweighed by another relevant consideration, it is not bound to follow that provision, but should record that decision and the reasons for it. It is submitted that, in accordance with the broad expectation of transparency that underpins the Code it should also be willing to explain its reasons for disapplying parts of the Code to inspire confidence in its compliance with the Code.

The Code sets out a range of expectations on regulators, such as:

- Regulatory activities should support growth and compliance;
- There should be clear mechanisms for engagement with regulated providers;
- Regulation should be risk-based;
- There should be clear information, advice and guidance for regulated providers; and
- Regulated activities should be transparent.

As stated above, there is significant disquiet in the sector as to whether these expectations are being met. There is some external triangulation for this too: the National Audit Office and Public Accounts Committee both expressed concern earlier this year about whether the OfS properly understood risks in the sector, effectively engaged with the sector and, in relation to international recruitment, was adequately supporting growth in the sector. It is no use the OfS merely asserting, as it regularly does, that it has had regard to the Code, when the regulatory framework it has implemented is experienced by regulated providers and perceived by external scrutineers as deficient in key respects.

It is of course also the case that the Regulators' Code is another thing that the OfS must have regard to, rather than slavishly follow, but its requirements represent unobjectionable and constructive steps to ensure that any regulatory framework delivers for end users without unduly burdening those who are regulated. One would therefore generally expect there to be compliance, both in the design of the regulatory architecture and also in how it is interpreted operationally by OfS staff.

Is there another way?

There are three specific areas where a different, and better, approach is possible:

1. Encouraging compliance rather than focussing on enforcement

Many other regulators see their role in supporting compliance as important as their enforcement role. For example, the Information Commissioner sought to support and work with organisations for a significant period after the data-protection and freedom of information regimes came into force. Even now, it seeks informal resolutions for concerns raised before it engages in regulatory action. By way of contrast, the current regulatory framework does little to encourage compliance, which is strange given that the conditions of registration are intended to reflect what the OfS considers to be necessary to safeguard the interests of students. Therefore, encouraging and supporting providers to be compliant rather than punishing non-compliance would seem to be better for students. In addition, public enforcement action against a provider is likely to have significant consequences for students and graduates of the institution, and so should not be embarked on lightly. It would be preferable, if the OfS is concerned that a provider is not compliant, for it to explain clearly why, seek and monitor the implementation of an action plan, offer advice on whether the plan is sufficient and only if these steps fail, consider enforcement action. At a sector level, the OfS should assist providers in complying with any new requirements it introduces, rather than proceeding immediately to enforcement. It was notable that it announced its investigation into business and management courses under its new quality and standards conditions within a few days of those conditions coming into force, based, presumably, on regulatory intelligence that significantly pre-dates the coming into force of the conditions. In such a situation, sharing the intelligence and inviting constructive engagement with providers would be likely to achieve swifter and more effective outcomes and fewer risks for students than an adversarial and punitive enforcement process.

2. Resetting relations with the sector

It was perhaps understandable that the OfS's initial concern was to establish that it was "not HEFCE", a relatively benign funder, and to dispel any perception of sector capture. However, there can hardly be any risk of that now. Therefore, the OfS should take steps to engage more constructively with the sector about its regulatory requirements, given that (as it regularly itself says) this is a largely compliant sector with high standards. If the sector, or parts of the sector, respond overwhelmingly with concern to a proposal, that should demonstrably carry some weight with the regulator. Generally but especially in areas such as quality and standards, academic freedom and freedom of speech, the OfS should look to return to a co-regulatory model, recognising the important role the sector itself has played in building the world-leading reputation the OfS (and the government) say they wish to protect. In setting its regulatory approach, there should be a demonstrable acceptance by the OfS of the value of "earned" trust between the regulator and the regulated. It should seek to understand the negative impact of its regulation on providers and to assess the cost and burden of compliance. It should expressly revisit the various provisions of the Act that support a proportionate and differentiated approach to regulation, and ask itself whether more could be done to ensure that its approach appropriately reflects the regulatory risk posed by different institutions. This would help it to avoid perverse and onerous requirements, such as the requirement that records of the assessed work of all students on all courses need to be kept for five years by all providers, even where providers are easily exceeding all benchmark requirements.

3. More transparency and reflection from the OfS

There are a number of ways that the OfS could be more transparent with the sector, and demonstrate a capacity for self-reflection and continual improvement. It could publish a clear set of service standards setting out what the sector can expect from it. It could be much clearer about its approach to enforcement, setting out clear escalation routes. It could provide

opportunities for the sector to provide feedback, as well as clear routes to complain and appeal against its decisions and conduct, and publish data about all of these. It could publish anonymised case studies of where it has intervened and what providers have done to address its concerns. All of this would inspire confidence in its regulation without in any way undermining its ability to regulate robustly in the sector.

Conclusion

The current system of regulation in higher education has created considerable burden and anxiety in the sector, which inevitably has a knock-on effect on students. The relationship between the regulator and the regulated could be considerably improved in a way that better promotes proportionate and effective compliance and thus better protects the interests of students and taxpayers. To live up to its potential for intelligent, risk-based regulation, the OfS should take stock of its position and the concerns that have been expressed from multiple sources and ask itself: is there another way?

About GuildHE:

GuildHE is an officially recognised representative body for UK Higher Education, championing distinction and diversity in the sector. Our 55+ members include universities, university colleges, further education colleges and specialist institutions. 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 and food, education, business and law, theology, the built environment, health and sports. Many are global organisations engaged in significant partnerships and producing locally relevant and world-leading research.

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