

REGULATION

BRIEFING 4: WORLD-CLASS REGULATION



Distinction and Diversity
in Higher Education



APRIL 2023

Introduction

This is the fourth in the [series of briefings on different elements of regulation by GuildHE](#) which have previously looked at questions of burden, cost and overlap in Briefing 1; the legal underpinning and considering whether another approach is possible in Briefing 2; and regulating in the student interest in Briefing 3. This briefing considers world-class regulation and the final briefing will draw together a series of recommendations about the ideal regulatory framework in England on the basis of our reports.

As part of the GuildHE series on regulation we wanted to lift our gaze beyond simply looking at the regulatory landscape in English higher education to draw on some of the experiences from other sectors, other parts of the UK and globally, to seek to identify what world-class regulation looks like.

World-class regulation for a world-class sector

The UK higher education sector is often described as world-class, as demonstrated by the outstanding research undertaken in our universities and the excellent teaching and learning that make it such an attractive destination for both home and international students.

Universities and colleges are highly innovative and agile in identifying and responding to the current and future needs of students, employers and society. This includes developing new courses or qualifications to support the skills needs of employees and the economy as a whole; driving efforts to widen participation to those from all parts of society to act as an engine for social justice; and investing in translational research to ensure that businesses are able to benefit from our blue-skies research.

All of this happens through highly autonomous institutions developing an environment that encourages creativity, innovation and thinking outside the box. This can easily be smothered if regulatory burden starts to impact on the risk-appetite of universities or even just the practical burden of resourcing regulatory compliance instead of investing in other core activities.

This is especially true in smaller and specialist universities and colleges represented by GuildHE which are critically diverse in nature and occupy a special bridging relationship between industry and education. However, they often have far fewer staff and financial resources and consequently we receive comments from institutions about the increasing management and Board time dedicated to navigating an ever growing list of conditions of registration and that they are worried about how the regulator may 'trip them up'.

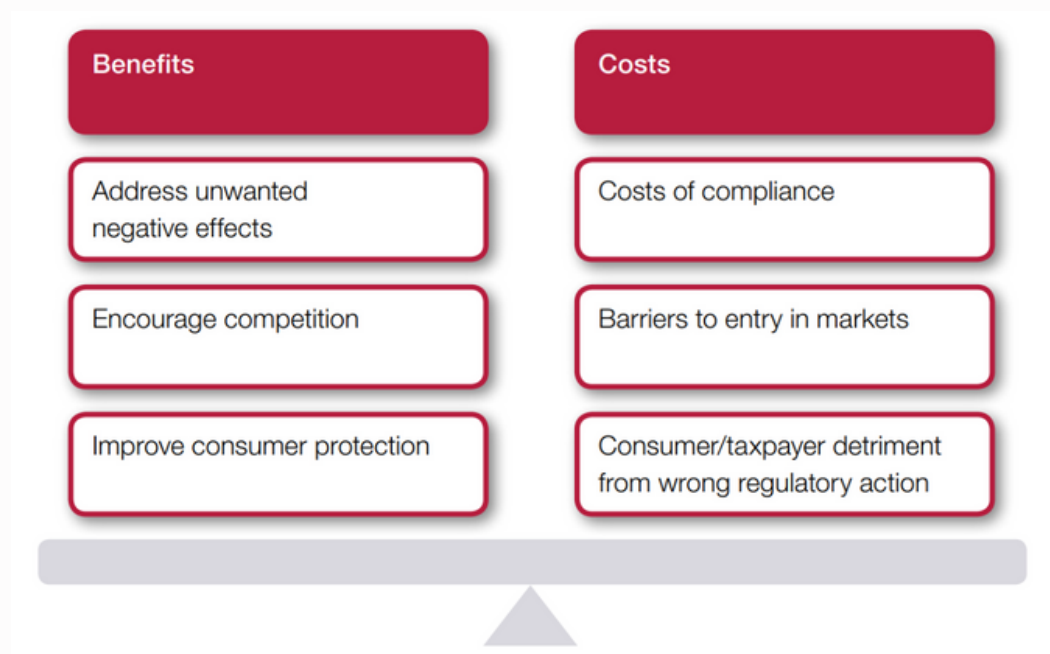
Strong institutional autonomy is a key feature of developing a world-class higher education sector. There is however a real risk that the features that have made our higher education system so successful become stifled by regulatory burden and red tape. We need world-class regulation to support and enable our world-class sector to continue to flourish.

Principles for good regulation

Universities and colleges welcome good regulation. Effective regulation helps to protect the vulnerable, the environment, as well as furthering social and other objectives. But it must be good regulation, otherwise it can be hugely burdensome with excessive red tape threatening innovation and directing resources away from core activities.


In the National Audit Office's Short Guide to Regulation it outlines that "Regulation is used to protect and benefit people, businesses and the environment and to support economic growth". In a blog on the Office for Students' website, Cathryn Ross, Group Regulatory Affairs Director at the BT Group, outlines that regulation exists where two criteria are fulfilled - firstly that there is power imbalance and second that society cares about the imbalance. So there is clearly an important role for regulation in the higher education sector. The image below from the NAO report highlights the important balancing act of developing effective regulation.

Examples of the benefits and costs of regulation



The Legislative and Regulatory Reform Act 2006 outlined a number of principles relating to those exercising regulatory functions including that "regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent", going on to say that it should be targeted "only at cases in which action is needed".

This is further supported by the Government's 2014 Regulators' Code which seeks to "promote proportionate, consistent and targeted regulatory activity through the development of transparent and effective dialogue and understanding between regulators and those they regulate". It aims to support and enable "regulators to design their service and enforcement policies in a manner that best suits the needs of businesses and other regulated entities". In the foreword the Minister outlined that the government is committed to "reducing regulatory burdens and supporting compliant business growth through the development of an open and constructive relationship between regulators and those they regulate".



There is a difference between principles of regulation and how regulation is delivered in practice through the activities of the regulator. Professor Malcolm Sparrow, an expert in regulatory policy, describes regulation as one of the most demanding areas of public management combining technical knowledge, good judgement and a “sixth sense for reading the political environment”. He summed up some of the pressures of competing demands on regulators:

- be less *intrusive* but more *effective*
- be *kinder* but don't let them get away with anything
- be *quicker* but more *careful*
- deal with important issues but *stay within authority*
- be *responsive* but *don't get captured*

Cristina Cifuentes, Commissioner at the Australian Centre for Corporate Responsibility and the Australian Energy Regulator, in a speech¹ on “What does it mean to be a world-class regulator?” emphasised the importance of trustworthiness as a key feature of world-class regulation. She defined trustworthiness as comprising a number of factors including being independent, having a clear purpose, relevant expertise, effective communication and “above all being transparent and accountable”.

Accountability and service standards

Elaborating further on this point of accountability she stressed that it is usually only achieved through a robust governance structure that encompasses culture, people and processes, and practices that embed the principles of good governance in everyday operations. This accountability should be facing in several directions. Firstly, accountability to those that they regulate for the decisions that they take will ensure that providers are able to challenge these where appropriate. Secondly, there is also a wider accountability of the regulator to the public – through Parliament – for the public spending that they are responsible for both directly and through the institutions that they regulate.

It can be difficult to measure whether the regulator is doing a good job as there are rarely simple metrics to measure this, and some of the success measures may take a long time to become apparent. It is important that key performance indicators are developed, but also that they are not just developed by the regulators themselves so that they aren't setting the grading criteria for their own success measures. There is, however, a balance to ensure that while the regulator should be accountable to these different audiences, it should also be free from interference from them as well, whether that is undue influence from the government or from those that they regulate through regulatory capture.

¹ <https://www.accc.gov.au/speech/what-does-it-mean-to-be-a-world-class-regulator-speech>

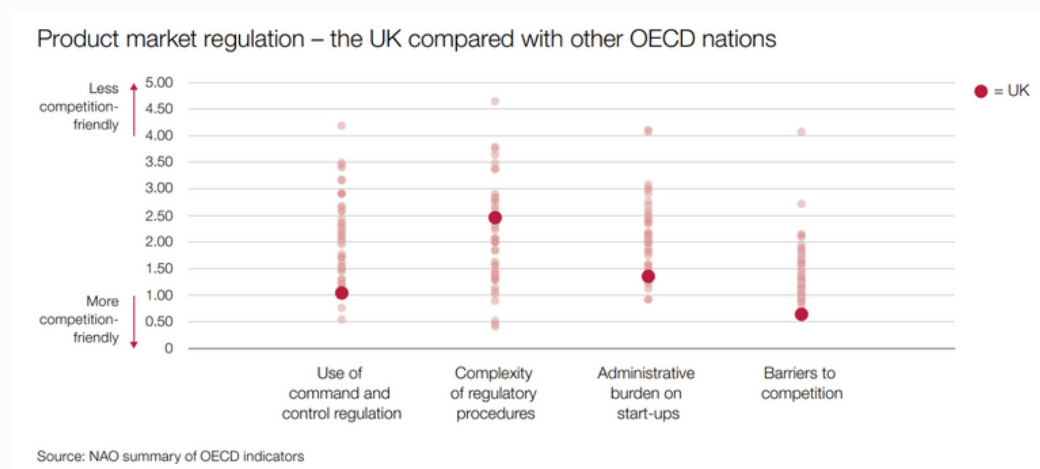
The Office for Students has developed some Key Performance Measures and also a separate set of Operational Measures. We believe that these measures should be reviewed on a regular basis, including through consultation with students and providers, to ensure that they are measuring what they are supposed to measure and that they are fit for purpose. For example, KPM 10 considers student protection and rightly looks at the proportion of students that were able to continue studying following market exit, but it doesn't consider the number of market exits or number of institutions removing themselves from the register. These factors would provide important supplementary information and increase focus on preventative action to reduce market exit rather than mitigating it after it's happened.

We would expect the OfS' KPMs to continue to evolve but it should be noted that at the moment they are heavily skewed towards undergraduate students and the views of final year students through the National Student Survey. The Operational Measures also often report what is currently happening – such as the current time to deal with a notification is 96 days or 53 days for reportable events – rather than setting service standards for how long it should take to resolve and then whether these standards are being met. **We believe that there should be a clear set of service standards for how the OfS operates.**

Many of the KPMs and OMs reflect the General Duties of the Office for Students as outlined in HERA. However, several of the duties are not addressed including S2(1)a protecting institutional autonomy and S2(1)g that regulatory activity should be accountable, proportionate and targeted only at cases in which action is needed. It is important that all the OfS' general duties are covered in the performance measures.

International experiences

The NAO Short Guide to Regulation also draws on data from the OECD (2013) comparing how the UK regulates various sectors. It doesn't include education but the chart below suggests that in most markets the UK has one of the most deregulated sectors when considering criteria such as barriers to entry, the level of public ownership, vertical integration and market structure. However, our regulation is comparatively complex relative to other nations and many involved in running English higher education would recognise this complexity of regulation.



TEQSA: an Australian case study

TEQSA, the independent national quality assurance and regulatory agency for higher education in Australia, regulates over 200 higher education providers from the full range of types of institutions and does so with around 90 staff. Within a couple of years of establishment in 2011-12 there was already significant push back from universities due to an overly burdensome approach, highlighted in the Review of Higher Education Regulation report (Lee Dow-Braithwaite²). The report tackled complaints about the regulator, including what was seen as a one-size-fits-all approach that was onerous on both private colleges and traditional universities alike, but in different ways, as well as concerns about the excessively complex risk framework which created burdensome data collection and reporting requirements. Therefore a different approach was required to rebuild the relationships between the sector and regulator.

One of the first steps was to simplify the risk framework where they moved from over 40 initial indicators to 11. There was an expectation that you shouldn't ask all providers for everything or, if you do, you limit it to a core. This enabled TEQSA to become more focused on their key priorities and for institutions to have a clearer understanding of what they were being judged against. There was also a view that "risk" is usually seen as a pejorative term and so TEQSA started to explore whether there might be a complementary "trust" or "earned autonomy" framework as a way of institutions being able to demonstrate their compliance and therefore face a reduced regulatory burden.

For a long time TEQSA was mainly funded by the government and so that acted as a brake on increasing their costs, as they were subject to the same restrictions on growing their budget as any other government department.

The exercise of TEQSA's regulatory powers are subject to significant layers of accountability. TEQSA have three regulatory principles: reflecting risk, regulatory necessity and proportionate regulation, and any regulatory activity has to be tested against these principles. There are four TEQSA Commissioners, separate from the agency's executive staff, who oversee testing proposed decisions by TEQSA against these regulatory principles. All decisions are challengeable, first by internal appeal and then by merits-based review in the Commonwealth Administrative Appeals Tribunal which adds in another layer of accountability before the level of Judicial Review. This accountability is supported by thrice-yearly scrutiny by an all-party Senate Committee in the Australian parliament.

Finally, TEQSA also developed a number of good practice guides as a way of helping providers to comply with their frameworks. These principles of simplification, accountability, focus on risk and supporting compliance are lessons that could be learnt in the English sector. All regulators in the UK are typically accountable to Parliament, either directly or through their sponsor minister. In the case of the OfS this is usually done through discussion with the DfE rather than the level of direct public accountability through Parliament that happens routinely in the Australian system.

² <http://hdl.voced.edu.au/10707/263626>



Proportionate regulatory burden

The TEQSA example highlights both simplification and focus on risk. In their Short Guide to Regulation the NAO highlights several government initiatives around reducing the burden of regulation including the “The Red Tape Challenge” which aimed to reduce the overall burden of regulation by taking a crowd-sourcing approach to identifying areas of potentially excessive regulation and secondly the “One-In, One-Out” which aimed that for each £1 of costs introduced by new regulation, £1 (and later £2) of regulatory costs had to be removed from other changes. This principle of one-in, one-out would be a good principle for OfS conditions of registration.


This approach to reducing regulatory burden recognises the value of freeing up largely compliant sectors. Since its establishment in 2018 the OfS has made several amendments to the regulatory framework over time covering the TEF, quality and standards, approach to data collection and the use of algorithms, student outcomes, student protection, the publication of information and reportable events. We are concerned that in general, the OfS has added regulatory conditions rather than reduced them.

The regulatory framework says “HERA allows the OfS to decide that one or more of the general ongoing conditions of registration may be disapplied for an individual provider when the provider is first registered or thereafter.The expectation is that ongoing conditions will seldom be disapplied, as they are all closely aligned with protecting students”.

We think that this expectation is contrary to the intent of S7 HERA which requires the OfS to ensure these conditions are proportionate to the risk posed by individual providers and to keep the conditions applied under review. The OfS presumption against disapplying ongoing conditions effectively prevents it from reducing regulatory costs and burden for individual providers presenting lower levels of risk. During the pandemic the OfS suspended certain regulatory requirements, reducing reporting in several areas including reportable events, student protection plans and public interest governance among others. The circumstances of the pandemic were, clearly, exceptional, but we would encourage the OfS to use the learning from that time to look again at the scope for meeting the intent of S7 more fully by reducing conditions for individual providers based on assessed risk.

Regulating a tertiary sector

Across England there is a blurring between different post-compulsory education sectors with increasing numbers of providers delivering qualifications across the further, higher and skills education landscape. This is likely to be further accelerated over the course of the next Parliament with the introduction of the recent Lifelong Loan Entitlement Bill. This will result in funding by credit and is aiming to enable more flexible use of credit to support upskilling and reskilling as well as the stacking of credit and therefore encouraging learners to take more bite-sized chunks of learning at different points in their careers. It will also require a rethink of how the OfS considers questions of successful student outcomes and how these are measured.



The blurring of lines between the education offered by different providers has resulted in significant regulatory duplication and increased burden with providers needing to report for the same students to different regulators. For example, degree apprentice students have to be reported to both the OfS and IfATE and in significantly different ways. As we highlighted in our first Regulation Briefing, this results in significant additional regulatory burden, sometimes having to create different staff teams for different data returns as they can be 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.” As the OfS expands their regulatory reach into other areas of level 4-6 provision currently overseen by OfQual as a consequence of the new LLE, it will be increasingly important to create better synergies between the regulatory approaches.

We would argue that there is therefore a strong case to be made for much greater regulatory coherence around the reporting mechanisms and data requirements of those regulating in the tertiary sector in England.


There are already examples across the UK of alternative approaches to ensuring this regulatory coherence across different education sectors. Scotland, for example, established the Scottish Funding Council in 2005, with responsibility for all post-compulsory education and Wales is making similar moves.

The Scottish Funding Council was established following the 2005 Act and resulted from the merger of the Scottish Further Education and Higher Education Funding Councils to prevent the anomaly of funding being allocated based on institution type rather than courses taught and sought to encourage further collaboration between institutions. In the almost two decades since then there have been steps towards better coherence and understanding between the sectors as well as more proportionate regulation. There is, however, progress still to be made. In 2021 the Scottish Funding Council published the outcomes of a review³ into coherent provision and sustainability and highlighted a number of factors that they could further develop. This included the need to develop a clear strategic, long term vision and intent for the future of tertiary education and the need to build capacity and bring a more systematic approach to the way they collectively plan coherent tertiary provision and skills provision and investment.

It is notable that Wales are following the Scottish lead and are currently establishing their own Commission for Tertiary Education and Research (CTER) following the Tertiary Education and Research (Wales) Act 2022. CTER will bring together further and higher education as well as adult education and apprenticeships and training. It is described as a single public body with responsibility for the funding, oversight and regulation of tertiary education and research in Wales.

It is important to note that this approach is likely to need to be based on a quite different philosophical approach to education. It will need to be based on collaboration between providers and education sectors, and potentially a more state-planned approach, compared to the more market driven approach in England. This can result in other benefits of not just being able to tackle questions of coherence across education sectors but also take a more joined up approach to questions around sustainability and, for example, the UN SDGs. It is however worth noting that a more state-planned approach can have downsides too - notably reducing the sector’s autonomy

³ <https://www.sfc.ac.uk/review/review.aspx>



to develop its own responses to particular circumstances and can impact on institutions' ability to be innovative. So whilst the system may not yet be perfect, the fact that they are able to look at regulatory coherence between the post-compulsory sectors has a number of benefits. However, it is not yet clear whether the policy changes in train in England require the sort of scale of disruptive change required to deliver this in practice.

We believe that the DfE should commit to English tertiary regulators developing clearer protocols for how they work together and to develop joint targets to reduce burden, better alignment on data reporting and removing regulatory duplication.

Conclusions

We would therefore argue that a world-class higher education system needs world-class regulation. There are many lessons that can be learned from other sectors and regulators across the UK and globally. We believe that there are many features of a world-class regulator, including:

- **Simplification** - reduction in the bureaucratic burden and complexity of regulation and the regulatory framework so that the focus is on key priorities.
- **Accountability** - this should include clear methods of accountability to understand the views of both those that they regulate and those that they regulate on behalf of. This should include KPMs and new service standards that are tested with these groups.
- **Risk-based** - regulation should be risk-based and more focus should be given to where the risk is highest rather than a one-size-fits-all approach.
- **Supporting compliance** - good regulators support those that they regulate to become more compliant.

Additionally, we believe there needs to be much greater regulatory coherence across regulators and their reporting and data requirements in the tertiary space to ensure that there isn't duplication.

This is the fourth in the series of briefings on different elements of regulation by GuildHE and the final briefing will be drawing a series of recommendations about the ideal regulatory framework in England on the basis of our reports.

References

NAO. (2017) Short Guide to Regulation

<https://www.nao.org.uk/wp-content/uploads/2017/09/A-Short-Guide-to-Regulation.pdf>

About GuildHE:

GuildHE is an officially recognised representative body for UK Higher Education, championing distinction and diversity in the sector. Our 60+ members include universities, university colleges, further education colleges and specialist institutions, representing over 150,000 students. Member institutions include some major providers in professional subject areas including 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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