THE FUTURE REGULATION OF HIGHER EDUCATION IN ENGLAND

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Introduction

1. The Higher Education Funding Council for England (HEFCE) has recently (July 2013) published an Operating Framework (OF or 'the framework') setting out how the new and more market-based system of higher education in England created by the Coalition Government's reforms will be regulated; it accompanies a Ministerial Statement to Parliament (HEFCE, 2013). This paper gives the background to the new system, describes the new framework, and offers a critique. It argues that, so far from enhancing the value of public and private investment in higher education, the new framework could seriously detract from it. It concludes by outlining an alternative model, better suited to a more market-driven system, that avoids many of the costs, detriments and difficulties of the proposed framework. It should be noted that it does not take account of the recent IPPR and HE Commission reports that bear on this topic.

The background to the new framework

2. The framework has been developed with the advice of a Regulatory Partnership Group (RPG), the minutes of whose meetings are available on the HEFCE website. The main driver is the series of reforms introduced by the Coalition Government since 2010 intended to make the HE system more market-based, and in particular the desire to increase competition in the provision of degrees and diplomas. This is intended to be achieved through a series of interrelated changes:

- A 'voucher' system for funding teaching, so that the state provides its funding for teaching not by giving grants to institutions but by channelling funds through the funding it provides to full-time undergraduate students - the student tuition fee backed by state subsidised income contingent loans through the Student Loans Company (SLC)
- The partial deregulation of funded places, so that there are no limits on the recruitment of highly qualified students (applicants with grades of ABB or better at A Level and equivalent qualifications from 2013-14) together with the removal of places from some

universities and reallocating them to other (generally lower cost) suppliers following an 'auction' (the 'core and margin' scheme)[1]

- Widening the pool of suppliers, not only further education colleges but also private organisations, both 'not for profit' and 'for profit'
- Expanding information for students through a Key Information Set and other means, to enable them to make more informed choices
- Increasing the ways in which institutions are required or encouraged to consider student interests
- Strengthening the ways in which students can obtain attention, action or redress for perceived poor service (Department for Business, Innovation and Skills, 2011a).

3. Underlying these various measures is the view that the best means of securing both quality and sustainability is greater competition between providers where consumers (students and their families and sponsors) are able to make well-informed choices between subjects, courses and institutions. In turn, institutions will improve their teaching or risk losing students and income, thus reducing the need for external regulation of universities and colleges. To quote from the consultation paper on regulation that accompanied the White Paper:

> *Our aim is for a more integrated regulatory framework which promotes opportunity, choice and excellence in higher education...we are committed to decreasing the regulatory burden in several areas while maintaining accountability in the public interest. The new system will adopt the better regulation principles of being transparent, accountable, proportionate, consistent and targeted, as set out by the Better Regulation Executive.* (Department for Business, Innovation and Skills, 2011b, Introduction, paragraphs 3, 7).

4. For the present discussion the most important changes are the introduction of vouchers and the encouragement of non-HEFCE funded providers: 'alternative providers' in the language of the framework. The former means that direct grant funding for teaching from HEFCE is being radically scaled back, with major implications for HEFCE's current role as the sector's de facto regulator (using the power of the purse to secure compliant behaviour). The latter means that the existing regulatory framework is having to be reshaped to embrace providers that have hitherto had no formal relationship with a state funding agency.

5. It should be noted that the Government's original proposal in the 2011 consultation paper was for HEFCE to be the 'independent lead regulator' for the sector with a new, explicit remit to promote the interests of students,

[1] The reallocation of places was done by formula in the second year of operation

including as consumers, with a duty to take competition considerations into account in its funding decisions.

6. As the principal regulator, HEFCE has in the past exercised its role largely by attaching conditions to the grants that it provides to institutions. With HEFCE funding scaled back substantially, and the need now to regulate institutions that are not in receipt of HEFCE funding, new arrangements are needed. The Government originally planned to introduce legislation to accommodate the new circumstances, but the abandonment of the planned legislation means that it has now had to seek to regulate the sector in the new circumstances using existing mechanisms, and the new Operating Framework describes the mechanisms that it proposes to use.

The new framework

7. The OF creates a new category of 'designated provider'. The significance of such designation is that only students at designated providers may access loans and other government support. An institution or organisation can achieve designation in various ways: by obtaining the powers to award degrees; by obtaining a university or university college title; by obtaining permission for its students to access SLC finance; and/or by receiving public grant funding from HEFCE. There is also the route of validation by a recognised awarding body although such provision is 'not subject to the full OF' (Note to Figure1 on page 5). HEFCE will maintain a register of such providers as well as having overall charge of the framework. The Funding Council will also be responsible for regular risk assessments of both existing and new designated providers. A condition of being a 'designated provider' is that such providers will be subject to the requirements of the OF.

8. There are five fields or areas of activity to which the OF will apply: academic standards and quality; access and participation; the provision of information; the student experience, the National Student Survey and dispute resolution; and financial sustainability and good governance. The OF lists the organisations and regulatory functions active in each field. These factual descriptions are accompanied by a series of diagrams that only serve to highlight the complex network of regulatory bodies and their relationships. Finally, the document describes how HEFCE will go about making its risk assessments.

Critique

9. The purposes of the new framework are stated in paragraph 17 of the OF. These are to ensure that:

- Students and others can be confident that designated higher education providers are recognised, autonomous, sustainable organisations
- There is independent assurance of, and information about, the quality of provision and the status of qualifications

- The risk status of each higher education institution and further education college is monitored and assessed. (OF, paragraph 17, page 4).

10. The accompanying Ministerial Statement says:

> *Taken as a whole these...higher education regulatory reforms constitute a package of measures, alongside previous rebalancing of funding, to ensure higher education is placed on a sustainable footing, that a student have* [sic] *a better experience, to promote social mobility and widen participation, and to create a more responsive higher education sector in which funding follows the decisions of learners and where successful institutions will thrive.* (HEFCE, 2013)

11. How far are these purposes likely to be achieved? There are a number of reasons for doubt. The main ones are:

- Complexity
- Coverage
- Powers
- Risks
- Accountability
- Costs and detriments.

12. Before considering these we should just note that the new framework is being introduced at a time when, whatever the size of the future funding envelope for teaching, there is every likelihood that the existing resourcing disparities between institutions, already very considerable, will increase still further; that some providers will be under very severe market and resourcing pressures; and that all providers will be facing much greater uncertainty and instability, which are the inevitable consequences of the greater competitive environment that the government intends to create. These risks of a more differentiated and unequal system were a major conclusion of HEPI's initial critique of the White Paper (Thompson and Bekhradnia, 2011).

Complexity

13. Although the drafters have done their best, the overwhelming impression left by the document is the sheer number of different regulators that will have their fingers in the higher education regulatory 'pie'.

14. First, there are what one might call the 'core' regulators – HEFCE (which acts both on its own account and as an agent for the Charity Commission for those institutions – the great majority – that are 'exempt charities' under the 2006 Charities Act), the SLC (it is still not clear whether the money flowing through the SLC is legally public or private), the Quality Assurance Agency for Higher Education (QAA), the Higher Education Statistics Agency, the Office of the Independent Adjudicator for Student Complaints (OIA), and the Office for Fair Access (covering providers – the vast majority – charging fees of more than £6,000). Sitting behind, or over, these statutory

or semi-statutory bodies are the National Audit Office, the Comptroller and Auditor General, and the House of Commons Public Accounts Committee.

15. Then there are bodies like the Home Office/UK Border Agency (which can almost be seen as a core regulator, given the importance of overseas student recruitment to the sector), the National College for Teaching and Leadership, for teacher education, Health Education England and its local agents, and the research councils, which regulate specific aspects of provision. The various professional and statutory bodies can be considered along with this group. Finally, there are what the document calls the 'co-regulators': the Committee of University Chairs (CUC, currently engaged in a review of the Governance Code of Practice), the Higher Education Academy (HEA - through the UK Professional Standards Framework for teaching and supporting learning), the Universities and Colleges Admissions Service (UCAS), Supporting Professionalism in Admissions (SPA), and Jisc (formerly the Joint Information Systems Committee).

16. It should be noted that the framework only covers the regulation of higher education institutions as higher education providers: universities and colleges as organisations are of course subject to many other regulations covering such things as health and safety, employment, etc.. They are also subject to the courts in their role of providers of services to customers (Palfreyman, 2012; see also Farrington and Palfreyman, 2012).

Coverage and powers

17. Ironically, in spite of this plethora of regulators, the OF falls well short of being comprehensive. Since this is bound up with the question of powers, it may be as well to consider the two aspects together.

18. The document accepts that the framework will not cover all higher education providers in England, nor will it cover all students. On the first, it will not cover overseas institutions with campuses in England or commercial organisations with no formal designation and no higher education provision validated by a recognised awarding body (paragraph 11 on page 3). There will therefore continue to be an unregulated sector of higher education in England. On the second, students not receiving state financial support (self-funded students, overseas students, most postgraduate students) will not benefit from all aspects of the framework.

19. But there are more serious weaknesses and limitations. Four are of particular significance:

- As pointed out by one of the authors in a recent HEPI report (McClaran and Brown, 2013), current quality assurance arrangements contain a number of significant gaps. Perhaps the most critical is the failure of institutional review to look at governance, management and the use of resources, and especially the way in which decisions on resource allocation and management interact with academic decisions and judgements. Yet in the US regional institutional accreditation looks at these areas as a matter of course, as does the institutional evaluation process run by the European Universities Association (see also, Gibbs 2010a and b and 2012a and b)

- The Government is anxious to make it easier for new providers to enter the sector. To this end it has diluted the rules for university title by lowering to 1,000 the qualifying threshold for the number of Full-Time Equivalent students. It has used the alternative route to a university title in the 2006 Business Names Act to ennoble two private universities. It has also permitted the takeover of two private 'not for profit' providers by 'for profit' companies without fresh scrutiny of the acquiring organisations
- Notwithstanding OFFA's role in ensuring fair access, the university admissions process is largely unregulated. Traditionally, it has relied upon informal agreement about fair practices. However the Director of Supporting Professionalism in Admissions recently voiced concerns that the new competitive market may be putting these practices at risk (Graham, 2013) For example, it has been suggested that some admissions officers are making inflated offers to candidates to secure them (Grove, 2013). In the US, university admissions is an area that is particularly prone to cheating, by applicants and recruiters alike (Callahan, 2004)
- The framework relies on effective institutional self-governance. However existing university governing bodies are too large, inexpert and 'time constrained' to be effective checks on executives. At the same time they are too small, narrow and unrepresentative to be able to command wider support either within the institution or from external stakeholders (Brown, 2011a and b; see also, Gillies, 2011). This is particularly important given the new onus on governing bodies to assure themselves and the Funding Council of their institution's future 'sustainability', not to mention the increased competitive pressures that will almost certainly see many governing bodies having to make some very crucial strategic decisions over the next few years. Yet it does not appear that either the CUC review of the Governance Code or the Funding Council's review of the Financial Memorandum will lead to more than modest changes in the current arrangements.

20. University governance takes us inevitably to powers. In the past, the Funding Council has relied upon its ability to attach conditions to its grants as a means of securing compliance from recalcitrant institutions to heel, with the withdrawal of funding altogether as the ultimate sanction. It is generally accepted that this will be insufficient in future when, quite apart from a growing number of alternative providers that are not in receipt of grants, most institutions – including, ironically, most of the former 'public sector'

polytechnics and higher education colleges - will be receiving little or no grant support for their teaching. Yet as Sir Martin Harris pointed out in a letter to the Times Higher earlier in the year, under the 1992 Further and Higher Education Act HEFCE cannot impose conditions on the use of funding it does not itself provide. Indeed the minutes of the March 2013 RPG meeting specifically state:

> *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* (RPG , 2013, paragraph 11, page 3).

21. The Government's 'solution' to this problem is to use another provision of the 1992 Act to confer additional functions on HEFCE to give the Funding Council the power of designating courses for student support. This would enable HEFCE to withdraw support from courses, and effectively institutions, that fail to comply.

22. The legal advice on which this intention, announced in the Ministerial Statement, is based is not available. There was no prior consultation with the sector. But already doubts are being raised about both the legality and the feasibility of this move, with several experts considering that it could be draconian and – ironically, in view of the aim of the reforms being to put students 'at the heart of the system', to refer to the title of the White Paper – unfair to the students involved (Morgan, 2013). The recent case of London Metropolitan University and the UKBA, where enormous efforts had to be made to protect the students involved when Highly Trusted status was withdrawn, illustrates the point.

23. One particular issue that arises in this context is institutional failure. There is a general expectation that with increasing competitive pressures there is a far greater risk of institutional failure than in the past. But the question of who protects students and other stakeholder interests in these circumstances, and how it is resourced, has never been squarely addressed; this is partly because hitherto such failures have been relatively rare, and HEFCE has always been there as a backstop. There has certainly been discussion, for example in the RPG, about the possibility of a collective insurance scheme on the lines of ABTA in the travel industry. But given the erosion of collegiality and sense of common purpose within UK higher education, it is very difficult to imagine a Russell Group university being willing to see its funds used to protect students at a neighbouring ex-polytechnic. This would suggest that any such scheme would need to be mandatory, and probably statutory, if it is to be effective.

Risk-based approaches

24. As already noted, one of the key features of the new framework is that HEFCE will make risk assessments of designated providers so as to assure itself and the public of their likely future viability. The QAA's new institutional

review method is also 'risk-based'. However the dangers of such approaches are well known, and were set out in another HEPI report by Professor Roger King (King, 2011). This pointed to the need for robust criteria for distinguishing between providers; the risk of challenge from 'high risk' institutions; the need for continued risk monitoring; and the need for a rapid response when problems arise. There is also the issue of how the regulatory agency remains 'connected' with 'trusted' or 'low risk' providers (one of the many problems with the new funding methodology is that HEFCE will no longer be in regular contact with most institutions). However the main difficulty with risk-based approaches is that past performance can never be a guide to future conduct especially, and ironically, at a time when the Government has significantly, and intentionally, increased the risks faced by most HE providers.

Accountability

25. Next, and again ironically, there are questions about accountability. There are two issues here: ownership and independence.

26. 'Ownership' is really the question of who takes responsibility when issues are raised about what might be called the 'health' of the sector. A recently published account of the marketisation of UK higher education (Brown with Carasso, 2013) draws attention to a number of cases where the sector's response to well documented quality issues was tardy, defensive and inadequate. A good example is the finding, in successive HEPI reports going back to 2006 (Bekhradnia, 2006, 2007, 2009, 2012, 2013), which have been independently validated, of significant and hard to explain variations in the amount of study time, not only between subjects but within subjects between providers. Whilst the QAA has recognised this as an issue, it is not yet clear what is being done about it, or where the responsibility for a sectoral response actually lies; this lack of focus was also raised as an issue by the former House of Commons Innovation, Universities, Science and Skills Committee in its 2009 report; assessment and feedback is another long running area of weakness (Brown, 2010).

27. The second issue is independence. This has several aspects. The Government has given HEFCE an oversight and coordination role. But HEFCE is not an independent agency, and it never can be as long as it is an agency of government. There can be little doubt that there are many areas where HEFCE has acted to modify or improve government policy in what it sees as the interests of the sector. But this is the same funding agency that, at the then Chancellor's insistence, tried to compel Oxford and Cambridge to change their governance arrangements so as to have a majority of lay members on their governing council (Brown, 2012; see also, Evans, 2007 and 2009). The OF and the Ministerial Statement talk about institutional autonomy, but what autonomy is there for the OF?

28. Moreover, whilst the QAA is constitutionally independent, it has effectively become an agency of an agency of government (not only HEFCE

and BIS, but also the UKBA and the Home Office), as its former Chief Executive has confirmed (Williams, 2009). The QAA's lack of real independence was raised as an issue by the House of Commons Committee in 2009; it was also commented on in the review of the agency by the European Association for Quality Assurance in Higher Education (ENQA) in the same year (this is a particular irony given the extent to which the development of quality assurance in Europe has followed British practice). To take a recent example, it appears that neither QAA nor HEFCE was given a choice in the case of a risk-based approach to quality assurance.

29. This leads to an even more fundamental point. It may be worth recalling that the Government's original regulatory proposals (paragraph 5 above) would have involved the continued combination of responsibilities for funding and regulation. Yet these are usually kept separate, as in the Health Service. This is on the basis that judgements about quality, performance and the use of resources should not be influenced by views about the level and adequacy of resources (it is difficult for allocators of resources to come to the position that the level of resourcing may be sub-optimal). As Professor Roger King has written:

> *...combining funding and regulatory responsibilities is a tricky mix, carrying with it the risk that market-based decisions could become embroiled with what ought to be separate judgements about institutional quality and standards.*(King, 2012).

Costs and detriments

30. In spite of the advice given regularly to institutions and others about the desirability of conducting regular risk assessments when new policies are contemplated, no such analysis accompanies the new framework. Nor is there any attempt to measure or identify the associated benefits, costs and detriments. In the short run at least, the need to constrain costs and adjust to the new system will increase managerial and administrative effort in institutions, and is indeed already doing so. The longer term position is uncertain. We return to this below.

The new framework: an assessment and an alternative

31. Despite acknowledging that legislation is needed to put in place a regulatory framework that will be effective in the new environment that it has created – and having previously expressed a desire to legislate - the government has decided not to do so. Having decided against legislation, the government has a problem putting in place a regulatory framework that will be effective in the new environment that it has created. There are major difficulties with the OF as a way of instilling full stakeholder confidence in the quality and viability of English higher education: there are a large number of regulators and yet the framework has some glaring gaps in its coverage, not least the reliance on a flawed system of institutional governance. There are significant uncertainties over the regulators' powers to ensure that the framework is effective. Nor does the reliance on a risk-based approach in a fast changing competitive environment inspire great confidence. There are

also major issues over accountability for the framework and regulatory independence, the latter principle extolled in another recent HEPI report (Behrens, 2013). Finally, there is no statement of the benefits, costs and detriments. Is there a better alternative?

32. As the government recognised when it proposed a new higher education act, a statutory framework is required. Without it, it has created a new environment fraught with risks and one that urgently needs regulation, but one that is in danger of being unregulated or at best badly regulated. In the space available it is possible only to sketch out a regulatory model that would be both more effective and more economical than the current one, and perhaps closer to what the government would have proposed had it introduced the regulation that it planned. The main proposals are:

- The separation of responsibility for regulation from responsibility for funding
- The creation of two separate agencies. The new funding agency would take over the funding responsibilities of HEFCE and the SLC, as proposed by Sir Howard Newby as long ago as 2006 (Elliot Major, 2006). The new regulatory agency would discharge the functions being carried out by or on behalf of the main current regulators
- Whilst the funding agency would continue to be appointed by and report to the Government, the regulatory agency (the Office for Higher Education or OFHE) would be appointed by and report to Parliament, on the model of the Comptroller and Auditor General's office
- OFHE would have the power to accredit all HE providers in England, whether or not they receive public funding in any form. This would extend to provision abroad where the English-based institution takes final responsibility for the award
- Accreditation would be reviewed at intervals of seven to ten years but with annual monitoring. All providers would be reviewed on the same basis. Ad hoc reviews could be triggered by special concerns raised. A change of ownership would automatically trigger a requirement for reaccreditation. As well as the suspension or withdrawal of accreditation, a 'notice of intention to suspend or withdraw accreditation' would be a means of getting a provider back up to scratch. The OFHE would also have a power to issue directions to providers if this was judged to be necessary. In cases where the suspension or withdrawal of accreditation caused difficulties for students at the institution, OFHE would have a duty to act to protect those interests, for instance by enabling them to continue with their studies, until the situation was restored. This could include placing them at other institutions if judged absolutely necessary

- Accreditation would cover all aspects of institutional activity relevant to student education. It would ensure that institutions met common minimum standards of quality, viability and good governance. The accreditation criteria would be set out in a single comprehensive framework that would be applied in a consistent and fair manner across all providers, levels and categories of provision
- OFHE would have a duty to report to Parliament regularly on the extent to which, and the way in which, the taxpayer, students and other stakeholders were receiving value from their investment in English higher education. This would include regular review of developments that might pose a threat to quality and value such as resource costs and restraints
- OFHE would be funded through a levy on all providers pro rata to institutional turnover
- Each agency would be placed under a duty to cooperate with the other
- Both the new agencies would be subject to a meta-review by Parliament five years after commencing operations, and then after every ten years. The purpose would be to check how far Parliament's purposes in establishing them had been achieved, and what changes might be needed to their constitution, terms of reference or modus operandi to enable those purposes to be fulfilled more effectively.

33. Such a system would have the following principal advantages over the OF:

- By having one agency responsible for funding higher education and another responsible for evaluating the value from that investment, it both clarifies and simplifies the key state responsibilities for higher education
- It avoids the role conflicts inherent in the Government's original proposals
- It streamlines regulatory functions and responsibilities
- By making the regulator independent of the Government, it protects institutional autonomy and lessens the risk of Government interference in the university curriculum
- It is comprehensive
- By being non-selective, it avoids the risks inherent in a risk-based approach
- It is effective: there are no doubts about the responsibilities or the powers of the regulator

- It is more efficient. Institutions would have only one funding agency and one regulator to deal with
- It is also much more transparent, comprehensible and accessible to third parties
- It is more in line with the arrangements for regulating other major publicly funded services.

34. Many will see disadvantages in the proposed new arrangements, and no doubt the details – such as the precise requirements for accreditation – could be reviewed. The critical thing though will be to put in place a mechanism to ensure the adequate regulation of the whole new and expanding sector, and to ensure separation of the duty to regulate and the duty to fund.

Conclusion

35. In broad terms, there are three main ways in which a professional service can be regulated: through state oversight, market competition or group processes (what Burton Clark {1983} called 'academic oligarchy', and Hood et al., {2004} called 'mutuality'). In practice, because of the degree of public interest involved, the regulation of professional services in an advanced industrial economy nearly always consists of some combination of modes. Traditionally, in UK higher education, mutuality has been the dominant form, with subsidiary but growing roles for the state and the market since 1992 (Brown, in preparation).

36. Even with the recent reforms, English higher education still falls well short of a classical economist's market. Yet it is already exhibiting a good deal of market-like behaviour, as an economist like William Baumol (1982) would have predicted, and this is beginning to weaken the sector's capacity for self-regulation. The Government believes, or at least hopes, that greater competition will reduce the need for the present level of external regulation. However there are limits to the extent that students and others can make effective judgements and choices, the main problem being the difficulty of finding valid, reliable, universal and accessible indicators on which to base their judgements (for the full argument, see Brown, 2007). Since there appears to be little prospect of an early return to a more balanced funding regime, even the present moves towards a more market-oriented system will almost certainly require an enhanced level of state oversight if the future quality and viability of English higher education is to be protected. The Operating Framework falls well short of what will be required; and in introducing its funding and other changes without securing a robust regulatory environment the government has left the sector vulnerable and itself unable to maintain the proper oversight needed to protect the public interest.

37. As a final footnote, we observe that neither the Operating Framework nor the alternative proposed here are adequate to regulate such entirely

radical and disruptive new forms of provision as massive open online courses (MOOCs). So long as such courses do not offer accreditation (as is mostly the case at present) this may not matter. However even when credits and even full degrees become available it is likely that MOOCs will prove no more susceptible to regulation by any single national government or agency than have other manifestations of globalisation. This is a problem for the future, the approach to resolving which – if any - it is difficult to anticipate.

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