Unfinished Business?: Higher education legislation

Nick Hillman

HEPI Report 65

Unfinished Business?:
Higher education legislation

Nick Hillman

Higher education in 2014

1. The Coalition Government's most substantial comment on higher education to date is their white paper of June 2011, *Students at the Heart of the System*. It was criticised for having little to say on the research function of universities and for offering an instrumentalist view of higher education, but the Government focussed it on three themes: reforming undergraduate finance; delivering incentives for high-quality teaching; and nurturing a more diverse sector.

2. White papers herald legislation and this one proposed legislation that would be implemented by the 2013/14 academic year.[1] However, the most significant primary legislative actions on higher education introduced by the Coalition are the measures in the Education Act (2011) extending the tuition fee cap to part-time students and increasing the interest rate on student loans. These appeared five months before the white paper.

3. The Government's position is that new primary legislation remains necessary but there is no time in the legislative calendar for it. That is an unconvincing argument as the Government itself controls the legislative calendar.

4. The political tension caused by higher tuition fees may have been a factor in the blocking of new higher education legislation. But the arguments for conflating the two issues of

---

[1] Department for Business, Innovation and Skills [BIS], *Students at the Heart of the System*, June 2011, p.70.

fees and legislation are weak: there are more voices in favour of a new legal framework for higher education than there were for the changes to student finance.

5. The absence of a higher education bill has not stopped important changes in all three areas identified in *Students at the Heart of the System*. For example, the reforms to undergraduate finance were already underway by the time the white paper appeared and they have been fully in place for new undergraduates since the start of the 2012/13 academic year.

6. Stronger incentives for a better academic experience were also in preparation when the white paper appeared: the Key Information Set – or KIS – of detailed information about different higher education courses went live in autumn 2012. The Minister for Universities and Science has called for extra information, for example on contact hours, but it is unlikely that any such improvements would necessitate primary legislation.[2]

7. In contrast, the third element of the white paper – a more diverse higher education system – was rooted in the assumption of a new legal framework. The shift in university finance away from centralised block grants paid to institutions and towards individuals' tuition fees means many courses that were previously funded by the Higher Education Funding Council for England (HEFCE) have lost their teaching grant. Such changes occurred against a regulatory backdrop that was designed for a completely different system in which the regulator held the power of the purse and could therefore withhold income from institutions.

8. No new legal framework been put in place and none is on the immediate horizon. The cross-party Higher Education

[2] David Willetts, Speech to HEPI Conference, 15 May 2013.

Commission has called for new legislation to be passed before the next general election but that is unlikely.[3]

9. A sticking plaster has been provided by the Regulatory Partnership Group, led by HEFCE. But university groups fear the Government could adopt over-mighty powers through secondary legislation: a proposal that the Secretary of State, rather than the regulator, could have the power to remove designation for student support purposes caused particular alarm.

10. Despite the absence of a new legal framework, the Government's desire to foster a more diverse higher education sector has made progress.

- Students at alternative higher education providers (defined as those not funded by HEFCE) have been allowed a tuition fee loan of up to £6,000 – almost double the previous figure of £3,375 – since 2012/13.
- In 2012, the Government reduced the normal minimum number of students required for securing university title from 4,000 to 1,000. Ten new universities quickly emerged from smaller specialist institutions.
- Three institutions (formerly the College of Law, Regent's College and BPP University College) have made use of a new route for obtaining university title via Companies House, while a fourth (formerly the ifs School of Finance) has obtained 'university college' title this way.

11. Some additional rules have been imposed on alternative providers too. Most notably, the process for securing designation for student support purposes has become more rigorous. This now applies a similar set of requirements on

[3] Higher Education Commission [HER], *Regulating Higher Education*, October 2013, p.32.

alternative providers to those that have been in place for HEFCE-funded providers on:

- quality assurance;
- financial sustainability;
- management and governance; and
- course eligibility.

12. Nonetheless, important differences remain. Some alternative providers claim they are being treated no more fairly than in the past, with the Vice-Chancellor of Regent's University London stating: 'the playing field is becoming so tilted against alternative providers that some institutions may fall off'.[4]

The removal of the student numbers cap

13. The announcement by the Chancellor of the Exchequer in the Autumn Statement of 2013 that 'we will abolish the cap on student numbers' took many people by surprise.[5] Although the 2011 white paper had promised to liberalise more student places each year, the scale and rapidity of the change was unexpected.[6] It came just two weeks after a leak to the *Guardian* suggested a shortfall in the budget of the Department for Business, Innovation and Skills of £1.4 billion over 2014/15 and 2015/16.[7]

14. The Treasury's small print made clear that the ending of student number controls is costed on the basis of 30,000 extra higher education entrants in 2014/15 and 60,000 extra entrants a year thereafter.[8] This is double the level of

---

[4] Aldwyn Cooper, 'Haphazard cap hazards', *Times Higher Education* [*THE*], 12 December 2013, p.28.
[5] *Hansard*, 5 December 2013, col. 1110.
[6] BIS, *Students at the Heart of the System*, June 2011, p.50.
[7] 'Poorest students face £350m cut in grants', *Guardian*, 23 November 2013.
[8] HM Treasury, *Autumn Statement*, December 2013, p.54.

untapped demand identified in the Browne review of 2010 (although the number of part-time students has fallen since then).[9] There are expected to be backstops to avert the explosion in costs and the questions over quality that have been faced in Australia since their abolition of student number controls.[10]

15. It remains unclear what the backstops will be, although options include minimum tariff points on entry, completion rates, quality assurance procedures, graduate employment records or loan repayment rates.[11] It also remains unclear who will pay if recruitment runs higher than 60,000 extra entrants a year and whether additional entrants would be treated as 'off-quota' students ineligible for financial support.

16. Questions have been asked by Hepi and others about the affordability of extra places using the current funding model, as well as about the Treasury's stated intention of funding the extra places by selling the income-contingent student loan book accrued since 1998.[12] The Treasury has been caught out by demand for higher education before: the Dearing report noted that, after shifting to a partially demand-led system in the early 1990s, Ministers quickly 'imposed a system of capping full-time student numbers, leaving individual institutions very little room for manoeuvre in their recruitment of full-time students'.[13]

---

[9] Independent Review of Higher Education Funding and Student Finance, *Securing a Sustainable Future for Higher Education*, October 2010, p.33.

[10] Vince Cable and David Willetts, Hefce Grant Letter for 2014-15, Annex 1; 'Lifting the cap: can more mean better too?', *THE*, 23 January 2014, pp.34-41.

[11] Jack Grove, 'Quality cover for a capless "free-for-all"', *THE*, 12 December 2013, p.8.

[12] Business, Innovation and Skills Committee, *Oral evidence: Student Loans*, 17 December 2013.

[13] National Committee of Inquiry into Higher Education, *Higher Education in the Learning Society*, July 1997, p.292.

17. Aside from the important financial questions, the change to number controls has the potential to affect higher education institutions in important ways. For example, it could affect the size of individual institutions, the level of competition between institutions and even introduce an element of price sensitivity that has been largely missing to date. On paper at least, the biggest impact could be on the number of people from under-represented groups accessing higher education, as recruitment will be less of a zero-sum game.

18. The Department for Business, Innovation and Skills consulted on how to apply student number controls to alternative providers during the winter of 2012/13.[14] When the Chancellor spoke, an in-year recruitment ban had just been imposed on Higher National Certificate and Higher National Diploma students at twenty-three alternative providers for 2013/14.[15] So one particularly notable feature of the Autumn Statement announcement was the inclusion of alternative providers, albeit not until 2015/16.[16]

19. Including alternative providers brings forward the market-based higher education system foreseen in the white paper, as it removes a major barrier against competition. Student loans will effectively come to resemble a transferable education voucher. However, it makes the mismatch between the current regulatory regime and the way the system operates in practice even more notable.

A level playing field or an unkempt meadow?

20. In 2011, diversity was to be delivered primarily through 'a level playing field'. All institutions with students eligible for

---

[14] BIS, *Applying Student Number Controls to Alternative Providers with Designated Courses: Consultation*, November 2013.
[15] *Hansard*, 19 November 2013, col. 43WS.
[16] BIS, *Alternative Higher Education Providers: Student Number Controls Final Guidance for 2014/15*, December 2013, p.6. Institutions deemed to be 'high risk' will remain subject to number controls.

student support were to be subjected to similar requirements on ‘quality, dispute resolution, information, fair access, financial sustainability and tuition charge levels’.[17] For any institution passing these tests, success was to rely almost wholly on how many students it could attract. But the persistence of different regulatory regimes for different sorts of providers means we are a long way from the world that was envisaged.

21. The Government’s position has not changed. In December 2013, the Minister for Universities and Science said he looked ‘forward to a day when there is a single regime for all providers, regardless of their historic origins’.[18]

22. The absence of legislation has allowed a range of different higher education models to develop, thereby illuminating particularly pressing problems. But the rules for many critical features of English higher education are different depending on the type of provider, including: fees and loans; the treatment of international students; and complaints procedures. In place of a level playing field, there is an unkempt meadow.

23. A number of proposals for a wholly new regulatory system for higher education have been proposed to sort out the current mess, including by Hepi.[19] When legislation does appear, these will influence its shape. But there is no blank slate and what has been missing from the debate to date is a sober analysis of where the pinch points lie.

---

[17] BIS, *A new, fit-for-purpose regulatory framework for the higher education sector*, August 2011, p.13.

[18] Chris Parr, ‘Willetts: student expansion plan “perfectly possible”’, *THE*, 17 December 2013 (http://www.timeshighereducation.co.uk/news/willetts-student-expansion-plan-perfectly-possible/2009962.article).

[19] Roger Brown and Bahram Bekhradnia, *The Future Regulation of Higher Education in England*, November 2013; HER, *Regulating Higher Education*, October 2013.

- What exactly are the differences in the regulation of HEFCE-funded providers and alternative providers?
- Which elements of the current regime that apply to HEFCE-funded providers should be spread to others – and *vice versa*?
- What differences should there be between insitutions with their own degree-awarding powers and others?
- Is a level playing field still desirable and what would it look like in practice?

24. This pamphlet does not answer all these questions but it does attempt to rekindle the debate about future legislation. Ministers and opposition parties must decide whether the legal framework for higher education should:

- continue to let a thousand flowers bloom without significant change; or
- deliver the long-promised level playing field with identical rules for all; or
- introduce a new regulatory regime that aims to provide equitable (rather than equal) treatment to different sorts of providers.

25. Political parties need to offer a response before the 2015 general election not so much because voters demand it – higher education regulation has little electoral impact – but because the long-term reputation of the higher education sector rests upon it.

Eight pinch points

i. Tuition fee loans

26. The standard undergraduate tuition fee cap has been £9,000 a year for HEFCE-funded institutions since 2012/13. No increase is in prospect. There is a lower cap of £6,000 for those institutions that do not submit – or cannot agree – an access agreement with the Office for Fair Access (OFFA).

27. The origin of the two-tier fee cap is the previous Government's decision to change the standard undergraduate tuition fee from a fixed £1,175 in 2005/06 to a 'variable' fee capped at £3,000 in 2006/07.

28. In order to ensure additional income for institutions while also bolstering social mobility, there was no offsetting reduction in the HEFCE teaching-grant and institutions wishing to charge between £1,175 and £3,000 had to adopt an access agreement acceptable to OFFA. However, because £3,000 came to be the standard fee rather than the maximum within a variable fees regime and because access agreements were only set to be reviewed quinquennially, the lower threshold was not a crucial feature of the system.

29. The two-tier system nonetheless survived: in 2010, the Conservative-Liberal Democrat Coalition opted to work within Labour's legal framework in order to increase fees and reduce HEFCE grants as quickly as possible, as well as to ease the parliamentary passage of higher fees. The lower threshold was set at £6,000 and the higher threshold was set at £9,000. Although the HEFCE teaching grant was more than halved alongside, it was claimed a tougher OFFA regime would ensure a fee of £9,000 was 'exceptional'.[20]

30. As in 2006/07, the maximum fee swiftly became the norm. However, the lower fee cap of £6,000 took on a new importance far beyond being the threshold below which an access agreement is not required. In particular, the Government allowed students at alternative providers to borrow a tuition fee loan of up to £6,000.

31. As some higher education institutions are able to cover all the costs of their courses at fee levels of £6,000 (or slightly above), the lack of a HEFCE grant is less important than when the maximum fee loan at alternative providers was £3,375.

---

[20] *Hansard*, 9 December 2010, col. 542.

32. This transformed the economics of delivering higher education qualifications to students from the UK and EU, who unlike international students are entitled to student support, to such an extent that it led to an explosion in numbers at some alternative providers.

33. The total number of students at alternative providers claiming student support grew five-fold from under 6,000 in 2010/11 to 30,000 in 2012/13.[21] By 2012/13, the total budget for these students had reached £175 million, or 4 per cent of the student support budget.[22] Comparisons have been drawn with the ill-fated Individual Learning Accounts.

34. The change allowing students at alternative providers to access larger tuition fee loans occurred just as the Home Office were placing higher obstacles in the way of international students. This gave alternative providers an additional incentive to refocus their offer towards UK/EU students, despite the Government's goal of more educational exports.[23]

35. A key question for policymakers is whether to continue maintaining the differential in tuition fee loans, but not maintenance loans or maintenance grants, according to whether the institution is funded by HEFCE or not. The current rules run counter to the concept of a level playing field, although they also suggest it is possible for the alternative sector to grow rapidly even while their students are entitled to a smaller tuition fee loan than HEFCE-funded providers.

ii. Tuition fee caps

36. While alternative providers continue to lack access to HEFCE funding, they may charge whatever fee they like and are beyond OFFA's jurisdiction. Many have opted to keep their

---

[21] *Hansard*, 5 December 2011, col. 158W
[22] *Hansard*, 19 November 2013, col. 43WS.
[23] HM Government, *International Education: Global Growth and Prosperity*, July 2013.

fees within the available £6,000 tuition fee loan, as at BPP University and Kaplan Holborn College. Others price their courses higher and expect their students to make up any gap between the £6,000 fee loan and the actual fee: for example, UK/EU students at Buckingham University may only borrow a maximum of £6,000 a year but their two-year degrees typically cost over £10,000 a year.

37. The Government's technical consultation underpinning the 2011 white paper recommended the rules on tuition fees and loans that apply to HEFCE-funded providers should be applied to alternative providers as well.[24]

38. In contrast, some people have argued that the freedom of alternative providers to set their fees above the level of the available loan should be replicated in the HEFCE-funded part of the sector.[25] The Vice-Chancellor of Oxford has argued that his institution should be able to charge above the current £9,000 tuition fee cap on the grounds that Oxford spends more than this educating each undergraduate. He argued: 'the notion of different universities charging significantly different amounts, doesn't feel inherently unnatural. It is the current situation that seems out of kilter.'[26]

39. There are three options:

- keeping the status quo which offers alternative providers more freedom on fees than HEFCE-funded institutions but which can leave their students paying upfront fees, in the interests of a diverse sector subject to different degrees of regulation;

---

[24] BIS, *A new, fit-for-purpose regulatory framework for the higher education sector*, August 2011, pp.16-17.
[25] 'Leading English universities "must go private to stay in the global race"', *The Times*, 29 January 2013.
[26] Vice-Chancellor's Oration, October 2013 (http://www.ox.ac.uk/media/news_releases_for_journalists/101008_1.html).

- extending the freedom to impose higher fees to HEFCE-funded universities, with a possible tweaking of the rules on access agreements to ensure under-represented groups do not suffer; or
- imposing the same fee and loan caps and the same OFFA requirements on all providers that are designated for student support purposes on the original principle of a level playing field.

40. The current position has emerged as a consequence of more thought being applied to the HEFCE-funded sector than to alternative providers, which have nonetheless grown considerably since the two-tier fees cap regime was legislated for in the Higher Education Act (2004). Each of the three options would have a different impact on the future diversity of the sector and it is time for a more conscious decision on what fee cap, if any, should apply to alternative providers.

iii. Research funding

41. Alternative providers are generally not strong, and many do not wish to be strong, in research. To date, their lobbying has focused on ensuring their students have access to student support (such as maintenance grants, maintenance loans and tuition fee loans), as well as on student number controls and regulation. They have been less interested in accessing the Quality-Related (QR) research income provided to HEFCE-funded providers and the funding distributed by Research Councils.

42. However, alternative providers are heterogeneous and a small minority do want access to the public funding available for research. The Vice-Chancellor of Buckingham University has made it clear he would like access to the research funding (but not the teaching funding) provided by HEFCE, telling MPs:

> *our lives would be so much easier at Buckingham if you, as a group, were to advocate to Government and to Parliament allowing the Buckinghams to have*

access to QR money without having to subject themselves to all the regulatory framework of HEFCE. Why not follow the Harvard/Yale/Princeton model?[27]

43. It is not currently possible for an institution to pick and choose which of HEFCE's funding streams it wishes to receive as institutions entitled to HEFCE funding sign a single financial memorandum.[28] Although a two-part financial memorandum could tackle this issue, it would put at risk the concept of a single higher education sector by raising the prospect of an English Ivy League in which institutions can receive public funding for research while rejecting it – and the accompanying regulation – for teaching.

44. It is unlikely this issue will disappear. The debate over Scottish independence has raised a number of similar questions about the institutions eligible for UK research support: in particular, whether this funding could continue to be spent in institutions within an independent Scotland.

iv. Renewal of degree-awarding powers

45. Publicly-financed higher education institutions with degree-awarding powers have been given them in perpetuity. Since 2004, there has also been a process by which other organisations can secure degree-awarding powers for a period of six years on a renewable basis. Organisations that have secured taught degree-awarding powers in this way are: Ashridge Business School, BPP University, The College of Estate Management, ifs University College, Regent's University London and the University of Law.

46. The Government's technical consultation of 2011 proposed a different system on the grounds that, 'The recent funding

---

[27] Business, Innovation and Skills Committee, *Oral evidence: The Future of Higher Education*, 24 May 2011, Q560.
[28] HEFCE's Financial Memorandum includes coming within the OFFA regime.

reforms to higher education now make these distinctions between publicly-funded and non-publicly funded organisations largely irrelevant.'[29] It proposed that all new degree-awarding powers would be renewable in the first instance but with the possibility of them becoming indefinite afterwards.

47. In addition, a new power was proposed to suspend or remove degree-awarding powers on quality or academic grounds from any provider, including those previously awarded them in perpetuity. The official consultation suggested this was a reasonable middle way: 'Many respondents in favour of awarding DAPs indefinitely also cautioned that this must be balanced with the sanction of suspension or withdrawal of powers.'[30]

48. In the absence of legislation, alternative providers will continue to face more onerous duties in maintaining their degree-awarding powers than other institutions. Given their greater likelihood of a change in ownership, this may be appropriate. But it is another important area where a level playing field was promised but has disappeared by default rather than as the result of a conscious decision.

v. Working rights of international students

49. The Tier 4 migration rules, which govern international students, have been tightened by the previous and current administrations. The changes have included tougher English language tests and a new 'highly-trusted status' for institutions wishing to sponsor international students. These have been designed to root out bogus colleges and bogus students, such as those using the student-visa route when

---

[29] BIS, *A new, fit-for-purpose regulatory framework for the higher education sector*, August 2011, p.32.
[30] BIS, *Government response to consultations on: Students at the Heart of the System; A new fit for purpose regulatory framework for higher education*, June 2012, p.48.

their main goal has actually been to find employment. The measures are also part of the Home Office’s commitment to reduce overall net migration.

50. The problem of bogus institutions and bogus students resided largely within the alternative provider sector, while legitimate alternative providers potentially stood to gain the most from protecting the reputation of this part of the sector through tougher rules. So there was an evidence-based reason for making it easier for publicly-funded institutions to obtain highly-trusted status than for alternative providers.

51. On the other hand, alternative providers note the close tabs they typically keep on their students and point to evidence of record-keeping problems in some parts of the HEFCE-funded sector. So, once two institutions have secured highly-trusted status, there is arguably no logic in applying a different level of trust. Yet universities, publicly-funded further education colleges and alternative providers with their own degree awarding powers are treated differently to other alternative providers even after securing highly-trusted status.

52. International students at alternative providers without their own degree-awarding powers must have an approved English language qualification to prove they are competent in speaking, listening, reading and writing. This can be a costly business, especially if they do not have an official test centre near their home. For other international students, ‘your sponsor may choose its own method to check that you are competent in English language’.[31]

53. The rules on employment are also different for students at alternative providers without their own degree-awarding powers, who unlike their counterparts at other institutions are not allowed to do part-time work. When the current rules came into force in 2011, for example, international students of

[31] Home Office, *Tier 4 of the Points Based System – Policy Guidance 10/13*, October 2013, pp.22-23.

the University of Sunderland studying in Sunderland could work part-time but international students taking a University of Sunderland degree under a franchise arrangement in London at eThames College could not.

54. An early evaluation by StudyUK found the new migration rules may have cut the number of international students enrolling at alternative providers by around 70 per cent.[32] In some cases, the fall is likely to have been even greater and it has continued. One college has gone from around 1,000 international students in 2009/10 to just a handful in 2013/14.

55. The ability to gain experience of work is a key factor in the decision-making of many legitimate international students and working rights are offered to international students by competitors to the UK. So many alternative providers saw their business models collapse. For example, Cavendish College, which had enjoyed a turnover of £4 million, closed in 2011. Other institutions are considering applying for degree-awarding powers for the sole reason of securing employment rights for their international students.

56. The Coalition is committed to educational exports and a diverse higher education sector but their migration policies are a barrier to both. Some believe the Government could lose if legal action were brought by alternative providers opposing their differential treatment on students' working rights. So the current situation may prove unsustainable even without premeditated Government action.

vi. VAT exemptions

57. There is currently an exemption from Value-Added Tax for schools, sixth-form colleges, general further education colleges, higher education corporations, universities, certain institutions eligible to receive funding from HEFCE and

---

[32] CentreForum, *Tier 4 tears: how government student visa controls are destroying the private HE sector*, January 2012, p.3.

designated institutions under Section 28(4) of the Further and Higher Education Act (1992). These institutions do not have to pay VAT on supplying education or training for which a fee is charged.

58. In contrast, for-profit further and higher education providers are not generally exempt, meaning they have to charge more or absorb extra costs.

59. HM Revenue and Customs recently consulted on a change to the law, which would have extended the VAT exemption to for-profit bodies offering university-like courses.[33] This risked a new anomaly for providers offering both further and higher education, which would have had to split their businesses in order to benefit. It was also unclear to respondents why the rationale for higher education should not be applied equally to vocational training and further education, and queries were raised as to whether the proposed changes for the UK were in line with the EU VAT Directive.[34] Overall, the consultation raised more questions than it provided answers.

60. There is no absolute guarantee that any savings on VAT would lead to more spending on students, nor that it would stimulate demand by lowering fees. Broadening the VAT exemption would also represent a loss to the Exchequer, although there could in time be offsetting benefits from encouraging the growth of private education providers.

61. Lawyers contend that the Coalition's commitment to a more diverse higher education sector is stymied by the current VAT rules: 'It is difficult to see how the Government can effectively open up the higher education sector to competition

---

[33] HM Revenue and Customs [HMRC], *VAT: Consideration of the case to extend the education exemption to for-profit providers of Higher Education*, September 2012.
[34] HMRC, *VAT: Consideration of the case to extend the education exemption to for-profit providers of Higher Education: Summary of responses*, June 2013, p.10.

from for-profit providers without levelling the VAT playing field'.[35] Along with the migration rules, it is a second example of one arm of government hindering another.

vii. External degrees

62. Every English and Welsh university founded between 1849 and 1949 initially taught University of London degrees before securing their own degree-awarding powers.[36] Polytechnics also lacked their own degree-awarding powers prior to becoming universities in 1992.

63. In the past, it was standard practice for students at institutions that taught other institutions' degrees to be entitled to student support. Indeed, this continues to be the case in some circumstances – for example, for much of the higher education that is delivered in further education colleges and where students at alternative higher education providers are studying for a degree from another provider under a franchising or validating arrangement.

64. But there is an anomaly for the most famous of all external degree programmes. People on the University of London International Programmes are entitled to tuition fee loans if they are in a publicly-financed institution, such as a further education college. However, if an alternative provider opts for the University of London degree, their students are not eligible for mainstream tuition fee support.

65. As a result of the current rules, a UK/EU student on a University of Plymouth degree at the Greenwich School of Management is entitled to the full student support package on offer at alternative providers, including a maximum £6,000

[35] http://www.out-law.com/en/articles/2013/june/hmrc-will-not-proceed-with-vat-exemption-for-commercial-higher-education-providers/.
[36] http://www.londoninternational.ac.uk/history.

tuition fee loan, but someone studying a University of London degree at the New College of the Humanities is not.

66. There is no compulsion on any institution to teach the University of London International Programmes and the New College of the Humanities was established as an institution that would not claim public support, but it is nonetheless an odd feature that the traditional route to university title now has greater barriers.

67. This anomaly is particularly stark, given the Coalition's explicit support for externally-assessed degrees and the University of London International Programme in particular.[37] The 2011 white paper even promised a big expansion of the external degree route by committing to allow non-teaching institutions to award degrees, which could have provided a path of rapid growth for education companies with qualification arms, such as Pearson.[38] As this change needed legislation, it has not happened.

68. Nevertheless, the recent history of Higher National Certificates and Higher National Diplomas (externally-assessed sub-degree higher education qualifications) suggests a need for care. When there is a looser relationship between a teaching institution and an examination body than in the usual franchising and validating arrangements between alternative providers and universities, there can be an explosion in student numbers and questions are raised about quality control.

viii. The Office of the Independent Adjudicator

69. The Office of the Independent Adjudicator (OIA) is a free, independent and transparent national complaints system for

---

[37] Willetts, 'University Challenge', Speech at Oxford Brookes University, 10 June 2010.
[38] Willetts, Speech to UUK Spring Conference, 25 February 2011; BIS, *Students at the Heart of the System*, June 2011, p.52.

students that has reviewed around 10,000 cases to date. At present publicly-funded universities in England and Wales are required to join the OIA Scheme. Other providers may apply to do so and are admitted if they meet the due diligence criteria set out by the OIA Board and pay the fees. Students whose institutions do not seek membership of the OIA have no access to independent redress, except through the courts.

70. Some students are better protected than others:

- HE in FE students have different access to the OIA depending on the precise franchise arrangements of different universities;
- students at overseas campuses of English and Welsh institutions are not always covered; and
- students studying at colleges with Foundation Degree awarding powers are not covered.

71. The Government's white paper and accompanying technical consultation suggested students at all institutions designated for student support should be able to use the OIA, but currently this only happens where the institution has voluntarily opted to join the scheme. The Welsh Government has also expressed clear support for the OIA and considered change in this area.

72. International students use the OIA disproportionately and alternative providers typically have a high proportion of international students.[39] So this anomaly is particularly notable and hard to justify because of the reputational risk to the whole sector. The OIA's view is clear: 'The notion of a "level playing field" is more than just a phrase. When it comes to student disputes all students should have access to a specialist, independent, experienced ombudsman service.'[40]

---

[39] Office of the Independent Adjudicator [OIA], *Annual Report 2012*, June 2013, p.18.
[40] OIA, *Annual Report 2012*, June 2013, p.12.

73. A partial short-term fix could be implemented whereby any degree-awarding institution with franchising arrangements could insist that all their students have the same rights to go to the OIA. That would be an effective act of self-regulation that could pre-empt the need for legislation, or at the very least inform the legislation as and when it appears.

Conclusion

74. The full list of differences between higher education providers is long and significant. It goes beyond those presented above, touching upon other important areas including:

- the ability to charge different fees to international students;
- access to capital funding;
- the public sector equality duty;
- the Freedom of Information Act; and
- the right to run courses that are not designated for student support alongside ones that are.[41]

75. There are also differences in the treatment of non-HEFCE funded providers by the Quality Assurance Agency (QAA). Different QAA methodologies include Institutional Review, Higher Education Review, Review of Educational Oversight and College Review of Educational Oversight. The minimum QAA subscription fee is £2,575 for a HEFCE-funded provider and £23,350 for other providers 'because of concerns about cross-subsidy from public funding'.[42]

76. There are some parts of the system that may not be different in theory but do seem to be so in practice: for example, private colleges have been allowed to collapse,

---

[41] BIS, *Alternative Higher Education Providers: Student Number Controls Final Guidance for 2014/15*, December 2013, p.14.
[42] Quality Assurance Agency, 'Terms and costs', http://www.qaa.ac.uk /AboutUs/subscribing-institutions/Pages/Terms-and-costs.aspx.

leaving their students adrift. One international student on a business degree at a college that failed was quoted in the *Guardian*: 'We wondered how it was that the UK gave no protection or consideration to us.'[43] In contrast, financial institutions that lend money to universities tend to treat them as if they are guaranteed by the state *de facto* even if they are not *de jure*.

77. In 2011, Hepi's report on alternative providers asked:

> *whether the playing field should be made level – or more level – and in what ways? Given the significant differences, there is no reason for the two sectors [HEFCE-funded and alternative providers] to be treated the same – and neither side argues this. But equally, it seems self-evident that their treatment should not be inequitable and unfair, or that differences in their treatment should exist, for no reason.*[44]

78. Alternative providers themselves typically agree. The Government found: 'There was a clear preference from alternative providers and from other respondents for a level playing field of regulation for all providers of higher education in England, although there should be a sufficient degree of flexibility to accommodate different sizes and missions of providers.'[45] Yet none of the political parties is currently offering either a clear defence of the current arrangements or a commitment to eradicate them.

79. The funding rules for undergraduates at HEFCE-funded and other providers have converged as funding council grants

---

[43] 'Stranded: the students and staff hit by the crackdown on "bogus" colleges', *Guardian*, 14 May 2012.
[44] Robin Middlehurst and John Fielden, *Private Providers in UK Higher Education: Some Policy Options*, 2011, pp.6-7.
[45] BIS, *Applying Student Number Controls to Alternative Providers with Designated Courses: Government Response*, March 2013, p.4.

have withered and more money has arrived via tuition fees. This may mean remaining differential rules have less justification than they once did and more explicit reasons for any differences are necessary. It may also mean that legal status should matter less but that differences should be applied according to institutional mission.

80. Policymakers in all parties need to take a view on which of the current differences are broadly appropriate, which should be smoothed away – and in what direction – and even whether any new differences should be introduced.

81. The last few years have proven that some flexibility exists in the current system to resolve challenges as they occur – for example through the ability to add extra conditions to the process for designating courses for student support. But this is not always completely watertight in legal terms and seems haphazard. New legislation is likely to prove necessary eventually.

82. Higher education regulation is unlikely to play a major role in the 2015 general election. But the sector could usefully apply pressure to all political parties on the question of whether they intend to legislate for a new regulatory framework after the next election. The answer may not affect the electoral fortunes of politicians but it will affect the educational fortunes of thousands of students and the long-term reputation of the UK's higher education sector.

Hepi was established in 2002 to influence the higher education debate with evidence.

We are UK-wide, independent and non-partisan.

February 2014

Higher Education Policy Institute
99 Banbury Road
Oxford OX2 6JX
Tel: 01865 284450
www.hepi.ac.uk

Printed by Hunts Tel: 01865 853633