


The future of university regulation

30 July 2024  Nathalie Jacoby-Danesh

Some observations and reflections from our higher education lawyers

“Fit for the Future: Higher Education Regulation towards 2035” by Sir David Behan (the “**Independent Review**”) constitutes a deep and thoughtful review of the state of the English HE regulator, on the back of “Must do better: the Office for Students and the looming crisis facing higher education” the second report issued by the Industry and Regulators Committee of the House of Lords in 2023 and the Government’s response to it.

The Independent Review contains 32 recommendations on how to improve higher education (HE) regulation in England. The appointment of the independent reviewer as the new interim chair of the Office for Students (OfS) by the Secretary of State has provided us with some of the strongest steers to date on our new Labour government’s position on HE.

We would like to share with you a few points from the Independent Review that struck us during a first reading.

1. Financial sustainability – is there any money?

In 2023 the House of Lords committee referred to a ‘looming crisis facing higher education’, since then voices from within and outside of the sector have become louder in acknowledging and understanding the extent of the financial catastrophe that universities are facing.

Monitoring financial sustainability

The Independent Review’s number one recommendation is that the “*OfS reduces its number of strategic objectives, and focuses on the priorities of monitoring financial sustainability, ensuring quality, protecting public money, and regulating in the interests of students.*” All of these priorities become particularly topical in the face of a provider threatened with insolvency. The Independent Review concludes that the financial position of many English providers is probably worse than anticipated, (due to the overly optimistic forecasts of student recruitment) and that the market exit of one or more large providers seems inevitable unless the regulator, government and the sector effectively manage the main challenges.

Questioning non-interventionism

The Independent Reviewer invites the government to reconsider whether non-interventionism remains the appropriate strategy given that market exits of providers would harm the interests of students. The Independent Reviewer also reminds readers of the overarching value to society and the economy of a higher education and research sector.

Types of OFS support

The Independent Review recommends that “*the OfS and government continue to build an infrastructure to offer advice, guidance and support for providers experiencing financial sustainability challenges, considering options such as early warning identification, management of emerging risk and prevention of disorderly market exit.*”

The Independent Review mentions that the OfS could provide “*tailored advice and guidance from specialists in financial restructuring,*” which could constitute a welcome in-kind assistance for institutions in difficulty, provided that the OfS secures the necessary funding for

offering this type of support.

The review also notes that the OfS does not currently dispose of the financial means to assist any providers in financial difficulties. The Independent Reviewer had received some feedback from the sector questioning whether it was appropriate for the OfS, as the HE regulator, to dispense any funding to registered providers at all.

However, the Independent Review is satisfied that the OfS's dual function of regulator and grant funder does not impede the regulator's independence and is not a cause for concern. This raises the question of to what extent the OfS could become involved in dispensing any financial rescue packages that the government might make available if it was to adopt a more interventionist regime.

Recent Government statements

The government's press release accompanying the publication of the Independent Review was entitled "Government watchdog to help stabilise university finances," but it did not hint at any financial interventions. Recent calls for an emergency rescue package by the Universities and College Union were turned down. News about a 22 billion pound 'black hole' shortfall in public finances, do not bode well for HE bailout packages.

A more positive note was struck in July by Lord Mandelson about a possible 'uptick' in capped fees and the Secretary of State for Education's speech at the Embassy Education Conference which may improve Britain's perception abroad as a welcoming destination for international students. This may well contribute to a more positive chapter for English HE, but it will unfortunately not balance the books immediately.

2. The importance of governance

Fit for the future recognises the importance of governance at two levels: at the level of the higher education provider and at OfS level.

At provider level

"Through a concentration on governance of providers, the OfS would have additional levers to consider the way that leadership of organisations shapes culture and behaviours, which are critical to successful organisations." The Independent Review recommends that *"the OfS considers an enhanced focus on the assurance of the management and governance of providers and how they carry out the range of priority areas for their students and providers, by revising and strengthening the 'good governance' ongoing conditions of registration (E conditions)"* (Recommendation No 6).

This raises the prospect of amendments to the OfS's Regulatory Framework^[6] as far as conditions E1 (Public Interest governance), E2 (management and governance) and E3 (accountability) are concerned, which may take a little while.

What can providers do in the meantime?

As autonomous institutions, registered providers should review their governance arrangements on a regular basis and, if necessary, make adjustments in order to ensure that they continue to embrace best practice. The Higher Education Code of Governance and the Charity Governance Code provide guidance and support to universities' governance professionals.

The Independent Review also recommends that "important issues that matter to students such as mental wellbeing and sexual harassment on campus, should be taken forward as part of an assessment of the governance of higher education providers."

As a result, registered providers should not only take the ongoing self-assessment of their governance arrangements seriously, question the effectiveness of their governing body and other governance organs, but should also consider at a strategic level whether their governance is set up to deal with the most important student issues.

At OfS level

Several of the final recommendations of the Independent Review relate to the governance arrangements of the OfS itself, its relationship with Government, its board composition and effectiveness, the appointment of its executive team, as well as its engagement with students.

"Changes are recommended to make the OfS fitter for the future: *"Current and near-term future vacancies present an opportunity to refresh and further strengthen the collective skillset of the OfS's board to ensure they reflect the sector's key challenges and risks. The review notes that the chief executive does not have the ability to appoint their full executive team, and this should be addressed. The OfS*

should strengthen the voice of students within the governance of the OfS. The board must also take action to ensure the OfS's approach is not risk averse. There should be a strong, ongoing board development programme."

Those points can be transposed to university governance too.

3. Students

Students as consumers

Recognising the status of students as consumers, the Independent Review advocates for greater protection of students from a consumer perspective, which could be achieved through the following means:

- Greater engagement of the OfS with students, for instance by involving students directly in its formal governance and regulatory activity, by constituting a student panel as a formal committee of the OfS board and including students in quality assessments and investigations (Recommendation No 5).
- Students to provide feedback on their experience in order to drive quality and improvement in HE.
- The OfS to take on a consumer protection role for students (Recommendation No 3). The Independent Review noted that students do not generally consider the OfS as a champion of their consumer rights at present, although this lack of recognition should not deter the OfS from carrying out these functions. It will be interesting to find out how the OfS wishes to address this challenge and how it will carve out its remit and activities at the intersection of realms of the Office of the Independent Adjudicator, the Competitions and Market Authority as well as other relevant regulators in the tertiary sector (such as the Financial Conduct Authority, the Education and Skills Funding Agency and Ofsted).
- This challenge will be part of the regulator's readjustment of its positioning among regulators of tertiary education not only in a spirit to enforce consumer protections for students but to ease the regulatory reporting burdens on registered providers.
- Key appointees at OfS to have the required experience in consumer affairs to carry out their duties.

A model student contract

Recommendation 4 of the Independent Review states that the OfS and the sector should explore the development of a model student contract for higher education. In principle, affording equal protection to all students sounds like a good idea. However, we question whether a one-fits-all approach is feasible.

Given the large variety of providers and courses and the large cross over between an institution's operational and academic policies with its student contract, it would seem very difficult to develop one model contract (or even a series of model contracts) to be used by all registered providers on a mandatory basis without depriving providers of institutional autonomy at a large scale. Also, agreeing the terms of the arguably single most important template between the OfS and all the registered providers would seem an extraordinary practical challenge.

Leaving this practical challenge aside (or placing our faith in the various HE representative bodies to make the seemingly impossible possible), we would encourage the sector to consider the introduction of some model clauses for student contracts, which would translate some key rights from a consumer protection perspective and could be incorporated into the university's existing student terms and conditions without warranting a blanket replacement of all existing terms.

Our teams have been working over the last few years across several sectors on initiatives contributing to standard contractual terms which are more accessible, inclusive and easily understood by consumers, including:

- Plain Numbers, an initiative aimed at improving the readability of documents containing financial or numerical information and
- The Knowledge Partnership, a UKRI funded project which we are carrying out together with the University of Nottingham to promote greater equality, diversity and inclusion in legal documents.

Both initiatives have allowed us to develop a range of skills, tools and precedents which could help with a modular approach to student contracts (akin to the project which led to model climate change clauses being made available across sectors) without requiring a fully standardised approach across the sector.

Student Protection Plans

The Independent Review pointed out that Student Protection Plans *"do not appear to adequately consider or mitigate the risk of market exit to students, nor protect their interests. Many are out of date and do not reflect the operational reality of current economic conditions."*

While it is not possible for a Student Protection Plan to legislate for all known and unknown circumstances surrounding the market exit of a provider, reviewing and updating them provides a useful aide memoire of all the arrangements that a provider would need to bear in mind when winding down all or part of its operations.

It can also act as a mechanism for providers in the same region or specialising in the same subjects to work towards closer collaboration and form alliances, which could help assure the longer-term viability and sustainability of most institutions.

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