Pinsent Masons

Pinsent Masons' response to the Green Paper on Fulfilling our Potential:

Teaching Excellence, Social Mobility and Student Choice

January 2016

Introduction

This response to the green paper is on behalf of Pinsent Masons. It addresses the key areas we encounter as a law firm advising a large number of universities and higher education institutions in the UK and internationally, as well as aspiring market entrants, suppliers to the sector, regulators and sector bodies. The response to the green paper draws on our experience in practice and attempts to offer practical suggestions and point out potential challenges to be worked around.

We are supportive of reform. We think it is overdue in some areas and vitally needed to protect the sector's hard won reputation.

For some of the major and most needed reforms proposed in the green paper, primary legislation will be needed. We know that Parliamentary time is at a premium and this will be difficult to achieve. However we consider that in order to protect the sector from reputational risk, and to protect public funds much more effectively, the government should prioritise this legislation. An effective system of regulation protects all reputable providers and enhances the sector's reputation.

Teaching Excellence Framework

Question 6: Do you agree with the proposed approach, including timing, assessment panels and process? Please give reasons for your answer.

Question 11: Do you agree with the proposed approach to the evidence used to make TEF assessments - common metrics derived from the national databases supported by evidence from the provider? Please give reasons for your answer.

Metrics

As is recognised in the green paper, the TEF will only be successful if the judgement on teaching excellence is based upon valid, robust, comprehensive, credible and current metrics. Without such reassurance, providers will quickly lose confidence in the system and the credibility of the awards will be undermined.

It is difficult to see how the metrics that are currently proposed meet this criteria as employment, retention and student satisfaction data are affected by a number of issues, many of which are unrelated to teaching quality. For example, a student's commitment or lack of it and family circumstances will affect employment choices.

In addition, the information it is proposed is produced by the providers themselves is likely to lack the required level of robustness unless it can be independently verified and so the use of this data could affect the validity of judgements.

A more credible method of judging teaching standards is to measure the learning gain of students whilst they are registered with the provider. Perhaps the technical consultation could consider if there is any data available which could show the level of learning gain.

The green paper suggests that criteria and metrics used for TEF will develop over time. We understand why this may be necessary but such evolution has the potential to create a confusing system for providers and make it difficult for them to plan for the future. In order to create a fair and transparent system and avoid legal challenges, it must be

absolutely clear (and providers must be provided with sufficient notice) which criteria and metrics are to be used as the basis for making a decision about teaching excellence.

Decision Making

Given the proposed consequences of an award of teaching excellence, the judgements made by the panels are likely to be of critical importance to the providers. It is therefore crucial that providers are able to understand how judgements are to be reached, that reasons are provided for the decisions made and that providers are given a proper opportunity to appeal those decisions. It is important that there is a process for review as that gives the decision-makers an opportunity to rectify any mistakes and avoid any legal action which may otherwise be necessary in order to obtain such a review. The grounds for appeal could be limited (e.g. to those that are used in judicial review proceedings) to prevent an appeal being made in respect of every adverse decision.

Precondition

We note the proposed requirement that providers will have to comply with certain pre-conditions in order to apply for higher level of assessment. One precondition is the requirement that the provider observes the Competition and Markets Authority ("CMA")'s published guidance on how consumer protection law applies to higher education providers.

Our view is that the proposed link between a provider's eligibility for TEF and its compliance with consumer legislation is unworkable and could result in perverse and unfair outcomes.

In particular, it is important to note that the CMA has stressed that it has produced guidance and that it is ultimately for the courts to decide whether a provider has breached consumer law. The proposed precondition of compliance with the guidance could therefore penalise a provider for something which is entirely lawful.

There are also significant practical difficulties with the proposed pre-condition. Who would decide whether a provider has complied with the guidance? If the CMA, then how often would the position be reviewed? What would happen if the provider sought to judicially review the CMA's decision? What would happen if the provider was found to be non-compliant but then followed all of the CMA's recommendations to make it compliant - would the provider be deemed to be compliant when the last change was made?

Further, issues of fairness and proportionality would have to be taken into account. For example, it would be unreasonable for a provider to be prevented from applying for TEF due to a minor and immaterial point of non-compliance with the guidance.

Consumer legislation and the CMA already offer protection to students in relation to their consumer rights. Consequently, there is no need to seek to deal with this issue as part of the TEF process. Requiring compliance with the CMA guidance as a precondition for an award of teaching excellence, is, in effect, imposing a sanction on providers and unless the grounds for imposing that sanction are fair and transparent, it will be challengeable and any such challenge could undermine the entire process.

Social mobility and widening participation

Question 12:

a) Do you agree with the proposals to further improve access and success for students from disadvantaged backgrounds and black and minority ethnic (BME) backgrounds? Please give reasons for your answer.

Name Blind Applications

It seems to us that the proposal to introduce name blind applications is likely to make it more difficult for providers to take positive action in relation to students from disadvantaged or under-represented groups. In particular, it may impede a provider's ability to assess the comparative academic achievements of students from different backgrounds or influence tie break decisions.

b) Do you agree that the Office for Students should have the power to set targets where providers are failing to make progress? Please give reasons for your answer.

Power of the OfS

In order to ensure that providers continue to focus on the need to widen participation, providers are required to set targets and those targets are reviewed by the Director of Fair Access to Higher Education. In our view it would be counter-productive to provide for the targets to be set by the OfS. This is because the issue of social mobility is very complex and the factors which influence it vary from area to area and from provider to provider. The provider is therefore, by far, in the best position to set the targets based on its knowledge and experience. It would take a significant amount of resource for the OfS to obtain the same level of knowledge and understanding.

c) What other groups or measures should the Government consider?

Equality Act Implications

There is a risk that steps taken to encourage wider participation by students from disadvantaged backgrounds may conflict with Equality Act obligations if the provider is encouraged to put their interests above those students who have a protected characteristic (as economic disadvantage is not a protected characteristic).

Disabled Funding Allowance ("DSA")

The Government's policy for DSA for 2016/17 which was published in December 2015 effectively reduces the availability of funding for disabled students and places greater

burdens on the providers and the students themselves. There is a significant danger that such a change could result in a fall in the number of disabled students who progress into higher education and that would have a detrimental impact on social mobility. This does not appear to have been taken into account in the green paper and we believe that it should be considered.

The Role of Primary and Secondary Schools

Higher education is an important driver of social mobility and it is important that anyone with the talent and potential should be able to benefit from higher education. Better access, retention and progression for students from disadvantaged backgrounds and under-represented groups is crucial but the issue of social mobility is very complex and it should be recognised that although higher education providers have an important role to play in ensuring that there are no barriers to education for students from disadvantaged backgrounds and under-represented groups, providers have very limited control over the numbers of those students who actually apply for and accept an offer of a place.

Whilst the focus is upon the higher education sector, the role of primary and secondary schools in encouraging social mobility must not be overlooked (a short reference is made to this in the green paper). The majority of students make the decision about whether or not to apply for a HE course whilst they are at school. Consequently, focus must be placed on ensuring that action is taken at the earliest possible stage to ensure that the students from disadvantaged backgrounds and under-represented groups are taught the core skills required to access higher education and encouraged to make the appropriate applications and continue with their studies.

Opening up the sector to new providers

Question 15:

a) Do you agree with the proposed risk-based approach to eligibility for DAPs and university title? Please give reasons for your answer.

b) What are your views on the options identified for validation of courses delivered by providers who do not hold DAPs?

Regulation

It is noted that as part of the proposed reforms which open up the sector to new providers, there may be a greater need to provide for the imposition of sanctions on institutions which cause concern. The current proposal is that there is a power to suspend and remove DAPS and University title. If any such regime is put in place, it should be one which clearly sets out the circumstances in which the power may be exercised and there should be a number of stages before a final decision is made. We would strongly recommend that the process provides that the initial stages are confidential. The reason for this is that any indication that a regulator is considering removing DAP and/or University title from a provider will cause very serious reputational and financial damage which could threaten its very future regardless of whether or not the concerns are valid. Except in the most serious circumstances where there are proven problems, providers should therefore be given an adequate opportunity to respond to any concerns before a sanction is imposed and before the position is disclosed to any third parties.

Provider exit and student protection

Question 17: Do you agree with the proposal to introduce a requirement for all providers to have contingency arrangements to support students in the event that their course cannot be completed?

Please give reasons for your answer, including evidence on the costs and benefits associated with having a contingency plan in place? Please quantify these costs where possible.

Insolvency Problem

The proposed contingency arrangements should effectively support students if a provider closes a course or a campus or is forced to exit the market by the regulator. The reason for this is that in each of these scenarios, the provider will still be trading and so should have access to funds that it can utilise for this purpose.

However, one of the biggest risks in opening up the sector to new private providers and making changes to the allocation of funding is the risk of insolvency. The proposed contingency arrangements set out in the green paper do not provide any protection for the students in such circumstances.

The only way to provide such protection is to obtain a financial guarantee and/or ring-fence funding for that purpose. However, that raises the issue of who would be responsible for providing such funding, how much funding would be required and who would manage the process (payments to students could be unlawful unless they were made in accordance with insolvency law). It would also be extremely difficult in practice to obtain such financial security. For example, a requirement that any entrant has to come up with a contingency package which includes financial guarantees is likely to be commercially unattractive and a barrier to entrants. If existing providers are required to provide funding or financial guarantees then that could force those that are currently struggling into financial difficulties and trigger an exit. A requirement that contingency plans be supported by collaborative or bilateral agreements with other providers would be ineffective if both providers were financially weak and would be a barrier to entry if there were limitations on which providers could provide support.

Simplifying the higher education architecture

Question 19: Do you agree with the proposal for a single, transparent and light touch regulatory framework for every higher education provider? Please give reasons for your answer, including how the proposed framework would change the burden on providers. Please quantify the benefits and/or costs where possible.

Question 20: What steps could be taken to increase the transparency of student unions and strengthen unions' accountability to their student members?

Question 21:

a) Do you agree with the proposed duties and powers of the Office for Students? Please give reasons for your answer.

b) Do you agree with the proposed subscription funding model? Please give reasons for your answer.

Question 22:

c) Do you agree with the proposed powers for OfS and the Secretary of State to manage risk? Please give reasons for your answer.

d) What safeguards for providers should be considered to limit the use of such powers?

Student Unions

The green paper recognises the important and constructive role played by student unions in representing student views and interests and promoting the provision of academic and other services. Student unions are not trade unions and the link suggested in paragraph 24 with proposed trade union reform does not make sense. (Students withholding their labour?) However, the current law covering student unions is unnecessarily confusing and some reforms to legislation on student unions could clarify responsibilities and thus help to improve any shortcomings in relation to transparency and accountability.

Student unions are now covered by two separate and unrelated pieces of legislation – the Education Act 1994 Part II which set up a regulatory regime for student unions essentially making them the responsibility of the parent university's governing body. Subsequently the Charities Act 2006 (now 2011) required student unions (which have always been separate legally from their universities) to register as separate independent charities, thus coming under the regulatory regime of the Charity Commission. (Previously they were exempt from registration, sheltering under the umbrella of their university's exempt status). Student unions are now therefore regulated by two separate bodies with potentially contradictory consequences. The two regimes are not tied in together. For example, the university governing body has a set of supervisory duties over the student union's financial affairs and democracy under the 1994 Act, is required to approve any changes to its constitution and to review the constitution every 5 years. The Charity Commission also has the responsibility of approving changes to the constitution of a registered charity and responsibilities over its proper conduct – e.g. the Charity Commission can and does get involved if student unions become in the CC's view over-politicised (not allowed under charity law).

Although they are independent charities and have separate legal status, student unions are odd because they would not exist but for their university. Their officers (trustees, legally) come and go on a very transient basis inevitably with mixed success. Problems

with student union elections and finances occur from time to time. Pragmatically most universities in the “traditional” HE sector in England fund and support their student unions and have developed a range of methods of requiring accountability for the use of funds from student union office holders. Student unions are important to universities as a brand and reputational issue – whether well run or badly run. The 1994 Act gives universities leverage over student unions which while it does not make sense legally, generally works quite effectively in practice. Therefore, while we say that the law on student unions does not make sense, we see that universities and student unions are generally operating within a framework which suits them. We suggest that the 1994 Act should be reviewed in the light of experience since 2010, but pragmatically we think it is likely that many of the rules set out in that Act will continue to be desirable.

OfS

We agree that the higher education regulatory architecture is outdated and needs to evolve. We support the establishment of a new regulator for all providers and the creation of a single transparent regulatory framework. However, great care has to be taken to ensure that the regulator takes into account all relevant issues and factors when making decisions and does not place undue importance on one particular element of higher education.

The green paper envisages that most of HEFCE's functions will be transferred to the OfS. However, a number of these functions do not directly refer to students. Whilst we understand the desire to put students at the heart of higher education, it should be recognised that higher education has a much larger role in our society. For example, higher education providers are also one of the largest employers in this country and research and commercial collaborations are absolutely critical to maintain innovation and economic growth. The interests of students cannot and should not always take precedence over other considerations and this must be reflected in the regulatory regime.

In these circumstances, we would recommend that the new regulator's statutory duty should not be to "*promote the interests of students to ensure that the OfS considers issues primarily from the point of view of students*", it should be to act in the best interests of the public as a whole (thereby creating the right balance between interests of students, taxpayers and employers). If the regulator has a statutory duty to consider issues primarily from the view of students, that could lead to some perverse decisions which are not ultimately in the best interests of the public because the impact on the economy and society would necessarily be classed as secondary considerations.

In relation to the exercise of a power to impose sanctions on providers, it is crucial that the circumstances in which those powers may be exercised are clearly set out, that the provider is given an opportunity to respond to the concerns that have been raised before a decision is made, that reasons are provided for the decision and that providers are given an opportunity to appeal the decision. It is important that there is a process for review as that will give the decision-makers an opportunity to rectify any mistakes and avoid any legal action which may otherwise be necessary in order to obtain such a review. The grounds for appeal could be limited (e.g. to those that are used in judicial review proceedings) to prevent an appeal being made in respect of every adverse decision.

Question 23: Do you agree with the proposed deregulatory measures? Please give reasons for your answer, including how the proposals would change the burden on providers. Please quantify the benefits and/or costs where possible.

Our response in this section draws on our work with the Association of Heads of University Administration (AHUA) over many years on the subject of constitutional reform of universities (in particular HECs). We responded to the Law Commission's 2015 consultation paper number 220 on technical issues in charity law which covered some of the same issues in relation to university constitutions and the role of the Privy Council as noted below.

Reforms to the constitutional arrangements of Higher Education Corporations

As we have been arguing for a long time (since 2004!), constitutional reform for HECs is important and overdue. It requires primary legislation.

Our work with AHUA (and our response to the Law Commission's consultation in 2015) pointed out that as the green paper now says, HEC constitutional arrangements are outdated and unnecessarily restrictive and burdensome. They can stifle innovation and growth and slow down institutional change. We have consistently made the case that HECs are at a disadvantage constitutionally compared to institutions established by Royal Charter or under company law. (For example, HECs as statutory corporations with powers limited by statute cannot engage in interest rate hedging arrangements). So we are pleased that the government now accepts the need for reform and intends to deregulate and modernise the constitutional arrangements governing HECs with a view to placing them on a more equitable footing with other institutions. We agree that this should allow HECs greater freedom and flexibility to innovate and respond to business opportunities.

Deregulatory reforms to the constitutional arrangements of HECs definitely require primary legislation in order to deal with the perceived (and in some cases actual – as in interest rate hedging) restrictions on their powers set out in the Education Reform Act 1988. A HEC cannot agree and revise its own powers to be wider than those expressed in the Act, so those provisions of the Act will need to be repealed.

Deregulating the prescribed HEC instrument and articles of government is also necessary and requires the Secretary of State's approval rather than legislation. We have been arguing for a long time they are unnecessarily prescriptive and restrictive. With AHUA we have drafted a set of proposed reformed and simplified instrument and articles which have been with BIS for some time.

Finally in respect of HECs the proposal to remove the Secretary of State's power to dissolve a HEC and transfer its assets is also a welcome move. It is inequitable that HECs are subject to this regime when institutions established under different constitutions have no such restriction on their ability to dissolve and transfer their assets as they think fit. Again this important reform requires primary legislation.

Role of the Privy Council (in approving higher education institutions' governing documents)

In practice we do not find the requirement to obtain Privy Council approval for changes to institutions' governing documents adds much to the work involved in constitutional reform for universities. These changes are potentially significant and require care and a level of

supervision. Whether or not they are classed as public bodies for various purposes, universities are treated by government as a national asset, substantially publicly funded, and the sector is held up as a model internationally. Perceived or real delay incurred in such work is usually the result of navigating internal governing body approval processes, often with infrequent meetings holding things up. The Privy Council Office is helpful and efficient - the officers give early guidance on what is required and stick to their own forecast turnaround times.

As noted in the green paper, institutions already have the option of putting forward reforms which remove from their main constitutional documents matters in which the Privy Council has no interest. We have helped between 20 and 30 institutions put through such reforms, to modernise and streamline their constitutional arrangements.

We do agree that the key principles of public interest over which the Privy Council should have oversight could be significantly reduced from the list set out in the Ministerial letter of 6th February 2006. We would suggest it is important for the Privy Council to maintain oversight in relation to: name, university title, degree awarding powers. We would suggest provisions covering governing body composition and democracy do not necessarily require Privy Council supervision, although they could continue to be fed through the Privy Council. These are essentially governed by charity law principles – for example in relation to the ability to pay remuneration to governing body members for their services as trustees. We find in practice that charity law can get forgotten about and from that point of view having the Privy Council as a central, expert resource is helpful to universities. It will be a matter for government policy whether a requirement to include a provision guaranteeing academic freedom remains a key principle of public interest.

We do not consider that that the long term proposal of Government to remove the requirement for the Privy Council to approve amendments to University governing documents is appropriate. The constitutions of bodies established by Royal Charter are currently amended by exercise of the Queen's Royal Prerogative through the Privy Council. We would not endorse a future proposal to take chartered universities outside of this regime in contrast to other chartered bodies nor to create two different approval regimes (and therefore different playing fields) for chartered and non-chartered universities

Removing Barriers: HEFCE-funded providers

In relation to the additional requirements placed on HEFCE-funded providers, compliance with the FOIA regime is a significant burden and does create an uneven playing field and so we would encourage a review of that statutory obligation. In addition, a student from a HEFCE-funded provider currently has the right to launch proceedings for judicial review should they wish to challenge a decision of that provider. As students now act as private consumers and have a contractual relationship with their providers, our view is that students should be prevented from issuing judicial review proceedings in relation to any matter which could be pursued as a claim for breach of contract. This requires primary legislation.