



Higher Education Policy Institute

Good Regulation: Lessons for England from the Australian Experience?

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The debate over good regulation

There is currently much discussion in the sector about regulation or, more specifically, *good* regulation. HEPI has featured a number of contributions on the subject, including a particularly insightful piece from Andrew Boggs.¹ GuildHE is publishing a series of policy contributions on regulation² and UUK recently held a symposium on good regulation that included contributions from Lord Johnson, the architect of the Higher Education and Research Act (2017), and Susan Lapworth, the CEO of the Office for Students (OfS). And, of course, the House of Lords Committee on Industry and Regulation is currently holding an inquiry into the work of the OfS, with public sessions featuring many of the key players from the regulatory space, both current and from its recent past.

The emphasis in most of these contributions is indeed on good regulation because very few, if any, are of the view that the higher education sector does not need to be regulated. It is true that this is often the accusation levelled at those who raise questions or doubts about the current approach to, and practice of, regulation in the English sector but this seems to me to be an attempt to close down, rather than engage with, a legitimate discussion.

My own perspective is drawn from a number of different roles: between 2009 and 2015, I was Chief Executive of the Quality Assurance Agency (QAA) and thus part of what might be described as a co-regulatory approach; then I moved to Australia as CEO of the Tertiary Education Quality and Standards Agency (TEQSA), the statutory regulator for the whole higher education sector, public and private; and now, back in the UK, I am Chair of GuildHE and the Vice-Chancellor of a regulated entity. What follows draws principally on the first two roles because, as noted above, GuildHE is already an active voice in the current debate and, as one of the regulated, my experience is no more or less significant than that of any other vice-chancellor or principal.

Is there a need for regulation in higher education? The question was asked by the Lords' committee of Lord (Jo) Johnson (former Minister for Universities, Science, Research and Innovation) and Charles Clarke (former Education Secretary) at one of its hearings. Jo Johnson was in no doubt that it was necessary. Charles Clarke was less sure – he did not accept the need for statutory regulation for a sector as mature as higher education.

I side with Jo Johnson. Good regulation provides protection for the consumer (much as that term is disliked), accountability for taxpayer (and individual) expenditure and assurance for the public and stakeholders. In fairness to Charles Clarke, he was not arguing for no regulation but for self-regulation. With a sector as mature and demonstrably successful as the UK's higher education system, this is not an unreasonable position but self-regulation is arguably inadequate when considering the provision of the necessary protection, accountability and assurance required in such a sector.

But regulation clearly needs to be effective – otherwise it is irrelevant for the consumer, provides no or limited accountability and may actively undermine assurance and confidence.

England's system has moved during my career from self-regulation to co-regulation to external statutory regulation, and I have been responsible for, first, a key agency in a co-regulatory system in the UK and, afterwards, for a statutory regulator in Australia. Compare and contrast, as exam questions used to state.

Benefits of statutory regulation

My view is that there are clear benefits to statutory regulation. They include:

- a. Clarity of structure and intent** – the regulatory authority of the Higher Education Funding Council for England (HEFCE), to the extent that it depended on institutional quality, famously rested on two lines of the 1992 Further and Higher Education Act (Section 70) which required HEFCE to make provision for the assessment of quality in institutions that they funded. A great deal of weight – almost certainly too much – rested on those two lines.
- b. Provision for sanctions in cases of breaches of statutory duties and requirements.**
- c. The incorporation of a full and rounded view of the public purpose of universities and their duties to stakeholders, and particularly to students.**
- d. A clear line of accountability through the regulator to government.**
- e. Protection for the regulated** – statutory limits to what the regulator is permitted to do in pursuit of its objects.

Certainly, I found those strengths at TEQSA when I arrived in 2015 as its new CEO, with a remit to address some of the key problems that had been identified in the 2013 review:

- a. There is a clarity of structure and intent, with crucial pieces of regulatory scaffolding providing a framework within which a diverse range of providers can work. The foundation is the TEQSA Act 2011, supported by a legislative instrument, the Higher Education Standards Framework (HESF), and the Australian Qualifications Framework (AQF), a National Register of Providers and a statutory framework for providers' obligations to overseas students (the ESOS Act).
- b. Sanctions: Part VII of the TEQSA Act is all about enforcement and it is 22 pages long.
- c. The purposes of regulation are stated comprehensively in the Objects of the TEQSA Act and the HESF covers a provider's responsibilities in all phases of the student life cycle, from information provision through governance, internal quality assurance, teaching and learning, research to student outcomes.
- d. There is clear accountability: as CEO I was appointed by the Minister for Education and was required to appear in person, together with the Chief Commissioner of TEQSA, before the Senate Estimates Committee three times a year to answer questions about any aspect of the Agency's operation.
- e. Crucially, the Act sets out a number of measures of protection for the regulated. These safeguards include:
 - The three regulatory principles: Reflecting Risk, Regulatory Necessity and Proportionate Regulation. Any regulatory action proposed by TEQSA has to be tested against these principles.
 - The CEO and executive of the Agency are required first to take the most serious regulatory recommendations to the TEQSA Commissioners, senior and respected figures from the higher education sector.
 - There is a clear system of appeals, starting with internal review and including the possibility of legal challenge in the Administrative Appeals Tribunal. This is a merits-based rather than a process review, permitting the case and TEQSA's conclusions to be re-examined in full.
 - The HESF is not TEQSA's but is drawn up by the Higher Education Standards Panel, an independent panel of experienced individuals from the sector and business.

Dangers of, and for, a statutory regulator

However, despite the benefits of statutory regulation and the strength of the Australian Framework governing its exercise, there are also inherent dangers; as powers are extensive and backed by government, there are temptations for their misuse or inappropriate application. Many would argue that TEQSA, once established and operational in 2012, fell into several of them.

There is no need to rely on anecdote in this regard because the problems are set out eloquently in the review commissioned by the Australian government in 2013, only a year into TEQSA's operation. Professors Kwong Lee Dow, former Vice-Chancellor of the University of Melbourne, and Valerie Braithwaite, Emeritus Professor of Regulatory Studies at the Australian National University, tackled the sector's complaints about the new regulator in their report *Review of Higher Education Regulation*, delivered to the then Minister of Education, Kim Carr.³

The new approach had clearly run into significant opposition at an early stage of its implementation. The main problems raised by the sector and confirmed by the review were:

- a. Regulation as conducted by TEQSA was risk-based in name only, leading to ...
- b. ... a 'one size fits all approach' – which was onerous for non-traditional providers and established universities alike, although in different ways.
- c. The Agency's risk framework was excessively complex, leading inevitably to excessive demands for information ...
- d. ... and therefore, to regulatory burden, exacerbated by no meaningful interaction with the other regulators, either government or professional, impinging on the higher education regulatory space. There was therefore significant regulatory duplication.
- e. Unclear messaging – the sector was often uncertain as to what was required from the regulator. This in turn was an aspect of ...
- f. ... a poor relationship with the sector, leading to a lack of respect, real or apparent, in both directions; and lack of consultation of, or response to, the sector's views. This aspect was summed up by the report's memorable insight that TEQSA was regulating higher education institutions as 'objects' rather than 'partners'.

Responses for good regulation

The review made a number of concrete recommendations. They did not include TEQSA's abolition, which, the report acknowledges, was one option that had been considered. But despite the depth of criticism of TEQSA's approach, which was spread across the sector, Dow and Braithwaite found little appetite for abolition but rather support for the principle of regulation and the framework established by the TEQSA Act, coupled with a wish that the regulation be done better and in response to problems that had been identified. The review called upon a reformed TEQSA to:

- a. Apply a genuinely risk-based approach, with a reduction in burden on providers that could demonstrate consistent quality** – and to develop a concept of 'trust' or 'earned autonomy' to balance the emphasis on faults and breaches which are inherent in a risk-based approach.
- b. Think through how regulatory approaches need to be adapted for different kinds of providers, or policy settings** – does the government want 'a thousand flowers to bloom' or is safeguarding quality paramount? One-size-fits-all cannot cope with tensions arising from the need to have a framework that can admit high-quality new providers while identifying and correcting or even excluding those of low quality.
- c. Simplify data requests** – do not ask everyone for everything or, if you do, limit it to a core set that can be readily produced. (In the wake of the review, TEQSA reduced its risk framework, through which it assesses every provider annually, from 44 indicators to 12 – a number further reduced to 11 after more recent consultation with the sector).
- d. Actively cooperate with other regulators to avoid duplication and provide a (more) joined-up approach.** This became increasingly important as the Australian government adopted the view that the higher and vocational education sectors should be viewed and structured as a tertiary sector.

e. Clarify messaging, especially around the basis for particular regulatory interventions.

f. Demonstrate a wish for partnership by listening – as there is much more expertise in providers than there will be in the regulator, no matter how well-staffed. Expect to learn and look at communications – are providers being addressed as ‘partners’ or ‘objects’? TEQSA established an annual conference in 2016 to bring together all those in the sector (and, to the surprise of sceptics, there were many) who wished to contribute to and influence the national debate on what good regulation should look like.

Protecting the regulated – checks and balances

The government of the day accepted the report’s recommendations. In addition, it made a number of structural changes to ensure the regulator’s very considerable powers were used responsibly and in accordance with the principles of risk, proportionality and regulatory necessity that were enshrined in the TEQSA Act.

There is always a tension for a statutory regulator between the relationship with government and the need for demonstrable independence if regulation is to be free from political interference. In fact, some of the safeguards for TEQSA in this regard were already in place at the time of the 2013 review. The TEQSA Act specifies that TEQSA must be independent – that is, ‘not subject to direction from anyone in relation to the performance of its functions or the exercise of its powers’. But the TEQSA Commission had been drawn from outside the sector and this, it was believed, meant that there was insufficient understanding of, and expertise in, higher education. Since then, the Commissioners have been drawn from experienced higher education practitioners, both academic and administrative, and both the Chief Commissioners have been former vice-chancellors.

Following the review, a further check on executive overreach was put in place by separating the roles of Chief Commissioner and CEO, so that the regulatory proposals of the executive were first subject to the scrutiny of the Commission. The role of the Higher Education Standards Panel in providing independent oversight of the Agency’s activities was clarified. These organisational changes, coupled with the existing provisions for internal review, legal challenge and regular parliamentary scrutiny, means there is now a more convincing answer to the question raised by Professors Dow and Braithwaite in their review: ‘What body monitors the activities of TEQSA?’

The place of thematic reviews in the regulator’s activities

However, there was a key area of activity where the direction taken by the review and initially endorsed by government has proved less durable: sector-wide ‘thematic’ investigations, related not necessarily to the general risks facing an individual provider but to wider issues, potentially affecting all institutions to some degree and involving areas of public and political concern.

The Dow / Braithwaite review, written in a context in which TEQSA’s initial attempt to conduct such a review (of the approach to the management of third-party providers in higher education institutions) had been met with universal dismay – due not least to the very substantial data requests which it involved – was very clear. TEQSA should not be involved in such sector-wide reviews and should stick to the regulatory knitting. The Agency was already, in the review’s opinion, too large (with over 100 staff in its first year of operation) and was, essentially, finding work for all those hands. The government reinforced the review’s direction by setting TEQSA on a three-year path to halve its staff numbers and its funding (TEQSA was then funded directly by the government).

But in subsequent years, the sector-wide issues did not go away and they were precisely the ones in which, fuelled by extensive media coverage, the wider public was interested and to which politicians were therefore very sensitive. In some cases they involved major social problems which manifested themselves in higher education settings. This is not the occasion to go into these matters in detail – they are complex and very much on-going concerns – but they included, during my time as CEO: the need to make admissions criteria more transparent; growing concern about the prevalence of sexual assault and harassment on campuses; challenges to the principles of academic freedom and freedom of speech; and the increasing threat posed by so-called contract cheating and other digital breaches of academic integrity. In each case, TEQSA – despite the admonitions in the *Review of HE Regulation* and the concerns of some in the sector –

was asked to take a leading role both in reviewing the sector's performance in these areas and in making recommendations to government and to providers for addressing the problems. Indeed, in 2020 the government provided funding for the establishment of a Higher Education Integrity Unit at TEQSA.

Summary

So what lessons were drawn and applied from the early and somewhat traumatic history of the statutory higher education regulator in Australia? The consensus that regulation is essential remained in place but was matched by a determination that it should, for a sector with the international standing of Australia's, be good and indeed world class. After all, the TEQSA Act itself requires the agency to:

protect and enhance ... Australia's reputation for quality higher education and training services; and international competitiveness in the higher education sector.

Might those lessons have any application in England, at a point where the arrangements established by the Higher Education and Research Act (2017) are being reviewed? I suggest some areas that are worth considering:

- a. To use the terminology of Kwong Lee Dow and Valerie Braithwaite, **it would be a positive development to recognise explicitly that the sector comprises 'partners', not 'objects', and that there is collective wisdom and value in the structures the sector itself has created**, such as the *UK Quality Code* and the Subject Benchmarks, as well as the essential contribution of reviewers from the sector. The temporary arrangements being put in place for the Designated Quality Body function offer an opportunity to address the latter point, which was a strong part of the QAA's approach to quality review.
- b. **Make sure independence is secured by the right checks and balances, with real accountability** – not simply because independence is a requirement but because visible independence is essential to trust and therefore to the assurance of students, taxpayers, stakeholders and international audiences, who are watching all the time. Too often, we conduct the discussions about quality as if no one outside the UK – indeed, outside England – is listening.
- c. **Make sure regulatory judgement goes through rigorous challenge, both inside the regulator's structures and beyond.** This can go hand in hand with an approach which subjects proposed interventions to the tests of risk, proportionality and necessity.
- d. **Finally, the English higher education sector for its part should acknowledge, as many institutions already do, the role that a regulator can play in ensuring a sector-wide response to the great thematic challenges** that inevitably arise in organisations as large, complex and embedded in our society as higher education institutions.

Endnotes

- 1 Andrew Boggs, *Where do we go from here? Quality assurance in English higher education*, HEPI Policy Note 44, 2023
- 2 GuildHE, *Regulation Briefing 1: Introduction, Burden, Cost and Overlap*, 2022; Smita Jamdar, *Regulation Briefing 2: Regulation of Higher Education in England-Is there Another way?*, 2022; GuildHE, *Regulation Briefing 3: Regulating in the Student interest*, 2023; GuildHE, *Regulation Briefing 4: World-class Regulation*, 2023
- 3 Kwong Lee Dow and Valerie Braithwaite, *Review of Higher Education Regulation Report*, Australian Government, 2013

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