

Who let the dogs out?

The privatization of higher education

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In April last year, I framed my article on ‘New Providers’ in relation to the delay surrounding the publication of the government’s White Paper for Higher Education (HE). That was caused by a combination of factors, but chiefly the need to fix a hole in the proposals for student loan financing; and additional preparation for the marketization of HE in England. The government is now fully committed to removing the legislative restrictions that prevent new, cheaper operators from entering the sector. These ‘operators’ are the eponymous ‘new providers’ that the government is keen to see enter the English HE landscape in order to undercut established provision.¹

The White Paper finally appeared at the end of June 2011 under the title *Students at the Heart of the System*, outlining a series of consultations and a programme of implementation that was supposed to lead to a Higher Education Bill in 2012.² It introduced a ‘core/margin’ model in an effort to drive down average fees reducing the recruitment allocations institutions received (the ‘core’) and encouraging reduced fees by creating a pool of 20,000 places (the ‘margin’) to which only those charging below £7,500 (after waivers) could bid. In addition, the document and accompanying ‘Technical Consultation’ (published in August 2011) outlined measures to lower the barriers to ‘market entry’ by relaxing eligibility conditions on institutions applying for degree-awarding powers and use of the protected title of ‘university’.³

One year further on, delay is again the theme. Though a Bill was drafted, any reference to HE was absent from the Queen’s Speech at the beginning of May. It is now therefore extremely unlikely that there will be any further attempt in 2012 to enact primary legislation introducing the regulatory framework outlined in the White Paper and the Technical

Consultation. David Willetts, Minister for Universities and Science, has indicated that a draft bill may be published later in the year. This would open further consultation and prepare for legislation in 2013. So what explains these further delays?

In part, it can be attributed to the recent difficulties with the National Health Service (NHS) Bill and changes to welfare benefits. Higher education has the potential to be equally as fraught and one lesson learnt would be to anticipate contentious issues by preparing a draft bill (not done with the NHS Bill which had to be withdrawn and reworked before passing through both houses). Further, there is little appetite for more higher education reform amongst Liberal Democrats at this juncture: Vince Cable as secretary of state for business, innovation and skills has barely broached the subject of universities in the last year, while his party leader Nick Clegg would rather concentrate on constitutional reform in 2012.

However, the main issue lies with the policy itself and the two points I emphasized last year: the financing of higher education through increased loans and the creation of a new market in higher education. Well-orchestrated opposition to these proposals, especially in relation to the entry of *for-profit* ‘providers’ and the purchase of established universities wholly or in part by private capital, has stymied the government’s legislative plans here. But the stakes are high, and all the indications point to the government withdrawing tactically: *reculer pour mieux sauter*.

However, where primary legislation is not required, the government is pressing ahead with its programme. Both the Browne review into higher education funding and the White Paper were brief documents, but the plans are wide-ranging and dispersed. We are faced with a democratic deficit here given the relative lack of

scrutiny and oversight this piecemeal implementation involves. The government is using the full range of means at its disposal: secondary legislation, instructions to quangos, budgetary measures etc. The task of mapping and articulating the plans is considerable, and one which does not fit our normal intellectual habits when discussing universities.

In what follows, I outline four strands of privatization as a formative alternative taxonomy: changing corporate form; marketization or 'external privatization'; outsourcing; and joint ventures, or collaboration, with private capital. Privatization is normally reserved for the first in that list – changing from public or state ownership to private. Since that commonly understood form of privatization happened, in the main, with the transformation of the polytechnics in the late 1980s and early 1990s, some commentators feel the term is inappropriate for what is under way. Universities and other higher education institutions, although they have varied corporate forms, are all private charities. What we need to anticipate is the conversion of charities into legal forms that are commercially oriented, such as companies *limited by share*. We currently lack a specific coinage for this form of privatization. Three other aspects of the government's plans should also be borne in mind throughout: privatization as the repositioning of education from a public to a private good benefiting the individual (this is wrapped up with the commodification of education); privatization as the changing balance of an institution's revenue streams (i.e. away from public and state sources); privatization as gaining independence from regulatory structures. The last points to a counter-tendency to privatization in England: independent institutions are encouraged to enter the regulatory fold with access to loans as the carrot.⁴

New providers redux

Following on from the recommendations of think tanks such as Policy Exchange, the government aims to create a 'level playing field' for new private higher education providers. As outlined in my essay last year, there are three steps to achieving this. First, remove the block grant for undergraduate degrees for arts, humanities, social sciences and other 'Band C' and 'Band D' subjects, such as mathematics, law and business. In the eyes of private providers, this removes a 'subsidy' to public universities which prevents private providers from offering competitive fees. From September 2012, private providers become competitive as established universities raise fees to meet the loss of block grant. As David Willetts told Universities UK back in February 2011:

Currently, one of the main barriers to alternative providers is the teaching grant we pay to publicly-funded HEIs [Higher Education Institutions]. This enables HEIs to charge fees at a level that private providers could not match, and so gives publicly-funded HEIs a significant advantage. Our funding reforms will remove this barrier, because all HEIs will – in future – receive most of their income from students via fees. This reform, of itself, opens up the system.⁵

Second, grant those private providers access to the student loan book on equivalent terms. Third, eliminate the other barriers to market entry – access to degree-awarding powers and the legally protected titles, 'university' and 'university college'.

The first was achieved in the Comprehensive Spending Review of Autumn 2010. The second and third points facilitate the marketization of undergraduate provision – what might be called an 'external privatization' – by allowing more private operators into the sector.⁶ With the government maintaining control of overall student numbers through controls on recruitment, we would see more outfits competing for a limited number of students: intensifying competition. It is one thing to use private providers to increase overall capacity (as recommended by Browne), quite another to intensify a zero-sum game: recruitment and marketing will eat up a significant proportion of the new higher fees.

Barriers to market entry

The Technical Consultation proposed that the Higher Education Funding Council for England (HEFCE) be tasked with promoting competition between providers in the interests of students.⁷ This remit extends to co-operating with the Office of Fair Trading (OFT):

In respect of competition, HEFCE's new role will be complementary, rather than parallel, to that of the OFT, which has extensive powers to tackle anti-competitive behaviour and structures across the economy. HEFCE's new responsibilities will include agreeing a memorandum of understanding with the OFT and monitoring and gathering information to refer it as necessary to the OFT if it has concerns about anti-competitive behaviour. This could include any suggestion of price-fixing between providers, control of prices of one provider by another or abuse of market position to gain unfair advantage. (§1.3.3)

HEFCE is thus to be transformed from a funder to the chief regulator of the sector. The original intention (in the Technical Consultation, not the White Paper) was to give it oversight of the process by which degree-awarding powers are granted to institutions.

This power currently resides with the Privy Council, and any transfer of powers would require primary legislation.

But it is not clear if the government will proceed with this transfer, since there are advantages to keeping it under the aegis of the Privy Council and to effecting desired changes without the need for primary legislation. Certainly, instructions could be issued to alter the criteria currently used to determine eligibility – to ‘modernize’ the criteria – so as to allow a greater diversity of provision and therefore boost choice for students. Such measures include introducing more flexibility into what is considered to be an appropriate track record: reducing it from a minimum of four years to a single degree cycle and allowing overseas activity to count. The government is also considering offering degree-awarding powers in single subjects, such as business or theology, and reducing the size of institutions that can qualify for the university title suggesting that only 1,000 Full Time Equivalent (FTE) HE students would be needed in future.

The most important change proposed is to extend degree-awarding powers to non-teaching bodies, such as Pearson Education. Issuing new instructions about size criteria can be done relatively easily, but allowing institutions with no academics or teachers to award degrees would need primary legislation. Section §4.2.9 of the Technical Consultation reads: ‘We are also reviewing the degree awarding powers criteria and process *to ensure that barriers to non-teaching bodies are removed*’ (emphasis added). Currently, to be considered for degree-awarding powers, an institution must demonstrate ‘a well found[ed], cohesive and self-critical academic community that demonstrates firm guardianship of its standards’. This ‘academic critical mass’ would not be present in non-teaching institutions and therefore presents difficulties for current quality control of undergraduate degrees which relies on this precondition having been met.

The subprime student loan?

Such relaxation brings obvious risks: a market saturated with ‘universities’ and degrees, where becoming an informed consumer is a tricky business. The risk of ‘subprime’ qualifications is one example of market failure. The attraction is that these new providers, especially those without the normal overheads of undergraduate teaching will reduce the Exchequer burden of higher education. This consideration leads to the second main point: granting access to the loan book.

The original Implementation Plan accompanying the White Paper reads: ‘In 2012: Legislate to allow

HEFCE the power to attach conditions to the receipt of grant and access to student loan funding, and to monitor institutions to ensure financial stability, and intervene if necessary.’ HEFCE needs to be given powers to control access to students *for all established higher education institutions*. At present, universities comply with HEFCE’s allocation of student places because it holds the purse strings through the block grant. But by 2014/15, several institutions which offer only arts, humanities, creative disciplines and social sciences will be receiving no grant. They would then have almost no reason to comply with current student number controls because all students at the established higher education institutions have access to student loans and grants as a right. Legislation is therefore needed before 2014/5 in order to maintain the functioning of the new system. HEFCE would then also gain the power to grant access to the loan book to students at new providers. The delay to legislation has significant implications: as mentioned in ‘New Providers’, BIS and the Student Loans Company, SLC, have been operating a ‘shadow scheme’ which allows students at certain designated private courses access to loans and maintenance grants. In the interim, this scheme will continue and expand.

As a result of my own Freedom of Information Request, the SLC revealed that in 2010/11, more than £40 million of public money was accessed (over £9 million as grants) by students at private providers. There has been a rapid expansion of designated status in recent months in preparation for 2012/13. Initial assessments of student numbers in 2011/12 show the numbers of students accessing loans through the scheme almost doubling to 9,360.⁸ There are now over 150 institutions with this designated status.⁹ Many of these are for-profit. Once designated, there is no restriction on recruitment, in marked contrast to the established sector. From 2012/13, as decreed by Willetts, such students will be able to apply for up to £6,000 per year for tuition fees, covering or part funding private tuition.

Consider the implications for the sector if these 150 institutions qualify for degree-awarding powers and the university title. The proposed single regulatory framework would end the shadow system and bring the ‘new providers’, or ‘insurgents’ as some have styled them, into the regulatory framework. This would be seen as rationalizing an initiative inherited from Labour and appear positive. But far more institutions are now involved, many of them for-profit operations. One can imagine that it will be hard to take places away from these providers when they are

finally integrated and with each delay to legislation their position strengthens.

Access to the loan book is crucial: the Student Loans Company acts as a factor collecting repayments on loans made. The administrative costs of creating an independent scheme are large, but more importantly, the debt relation is between the individual and the SLC: the higher education institution takes the fee upfront and leaves others to worry about the rest. The dangers of subprime loans are exacerbated when there is public money at stake and what might be interpreted as state imprimatur.

In response to concerns of this ilk, BIS sneaked out a tender over the 2011 Christmas break with a 4 January 2012 deadline.¹⁰ It sought a survey of private HE provision in the UK. Given the direction of the government's policy, it might have been expected to have conducted such due diligence prior to the White Paper. The tender document admits that 'there is only a limited amount of robust information which describes the current scale, organization or potential of private or alternative providers in the UK.' It further notes that an earlier report by the Higher Education Policy Institute had found that private providers had a 'disproportionate number of students from low income backgrounds; higher default rates; and [a] relatively narrow range of subjects'. The survey will therefore be designed to meet concerns of those – such as UCU, which mounted a successful campaign against privatization and allowing for-profits access to the publicly backed loans – who have drawn comparisons with the USA, where students at for-profits have access to federal loans and the sector has become mired in mis-selling scandals.¹¹ Clearly, the evidence base is lacking at the heart of the government's proposals: one advantage of a delay, then, is to gather arguments to rebut opponents.

Changing corporate form

Where legislation is not required, the government has pressed on with its commitment to creating a 'level playing field' in HE, most notably with March's Budget statement, which made two announcements regarding VAT reform. One, announcing an exemption for 'shared services', makes the pooling of resources between universities more likely and therefore catalyses further outsourcing. The second reads: '2.186 VAT: providers of education – The Government will review the VAT exemption for providers of education, in particular at university degree level, to ensure that commercial universities are treated fairly.'¹² What this indicates is that the government is keen to extend the current VAT exemption for universities, schools, sixth-form

colleges, FE colleges and so forth to commercial – that is, for-profit – operations.¹³ Unfortunately, the furore surrounding increasing taxes on goods such as Cornish pasties covered this remarkable move to lighten the tax burden on commercial providers. It removes one of the few advantages that non-profit charities have in a competitive market.

Universities in England currently exhibit a number of corporate forms: chartered corporation, company limited by guarantee and higher education corporation being the most common.¹⁴ They are not publicly owned and administered and so are technically private charities (including the independent University of Buckingham). Given the corporate practices now prevalent at many institutions, the charitable status of universities, and their public benefit objectives, may be viewed askance by many. But a more profound transformation may be on the horizon: converting to alternative legal forms, and ditching charitable status, so as to attract equity investment.

The White Paper included a couple of vaguely worded paragraphs (§§4.35 and 4.36) about making it easier for universities to adopt a legal form of their choosing. On one level, this may have been about allowing those ex-polytechnics which are 'higher education corporations' to alter their quasi-public status so as to free them up to issue bonds and other financial products.¹⁵ Generating working capital for investment may be key to a successful strategy in the next few years. Indeed, this was the reason given by the White Paper for 'converting', 'to make it easier for them to attract private investment' (§4.35). Compared with issuing debt or traditional bank lending and overdraft facilities, private investment has large appeal. But it can take forms that require the transformation of established universities and may resemble the recent purchase of the private College of Law by Montagu Private Equity. This deal, effectively involving the purchase of all assets and undertakings of a charity with a Royal Charter by a for-profit operation, may set the precedent for such purchases in the established sector.

Opposition is likely to be stronger to the purchase of established universities. The Charity Commission made a submission to the White Paper consultation indicating that making it easier to convert charitable universities into other forms would have profound implications for charity law in general. All this coincides with a statutory review of the 2006 Charities Act being run out of the Cabinet Office. Its consultation closed in April but it covered precisely this terrain: including 'exempt charities', public benefit,

and ‘mergers, restructuring and winding up’.¹⁶ Within a document on ‘organizational forms’, we find the following sentences: ‘A relatively small number of charities are constituted as corporations by legislation (statutory corporations) or by Royal Charter. *Where these charities want to make constitutional changes there can be complex, lengthy and bureaucratic processes involved*’ (emphasis added).

This review may serve a similar function to the new survey of private providers in building a stronger, more coherent case for the government’s reforms prior to legislation. This presentation of such changes as ‘burdensome’ evades the issue of whether such process performs a key function in allowing scrutiny of the decision and an assessment of the public interest.

Joint ventures and outsourcing

Although it is implementing market reforms, the decisions outlined above will be made by individual institutions – by their managers, overseen by their governors. In this sense, the government is distanced from changes even though its reforms push universities in certain directions. Mapping the aggregate effect is a necessary task in order to assess the impact on the public good. This is most apparent with regard to outsourcing and joint ventures.

Outsourcing is familiar to most, but the government is now committed to offering VAT exemptions on ‘shared services’: operations that pool administrative, IT, catering, maintenance, library and other ‘support’ will in theory allow universities to access much larger economics of scale or leverage in tenders. With the VAT on such schemes now revoked, one impediment to them is removed. This could accelerate the outsourcing already seen in the sector and indeed produce further outsourcing on already outsourced services.¹⁷ Most recently, the University of Sussex announced plans to put a raft of services out to private tender affecting over 10 per cent of its staff.¹⁸ That leads us to joint ventures whose complexity and variety cannot be mapped in this article.¹⁹

Joint ventures have the attraction of parcelling off part of a institution’s activity and turning it into a profit-making activity with the aid of private investment. They represent one way of sidestepping the problems described above regarding the outright purchase of charities. (As noted, equity investment through shares is not possible here.) Such initiatives have so far tended to focus on peripheral academic provision such as access degree courses, English language classes and distance learning support. The legal firm Eversheds believes these approaches can be extended to ‘research

commercialization projects, revenues from overseas campuses and from selling access to the institution’s degree-awarding powers in the private sector’.²⁰ Coincidentally or not, those first two are precisely the areas that will be boosted by recent government initiatives. Willetts has announced plans for a new kind of privately funded ‘university’ concentrating on science and postgraduate research as part of the government’s broader ‘hi-tech future’ strategy:

Globalization is still at its early stages when it comes to Higher Education. The next round of new institutions may well link existing British universities with international partners. The surge in international investment in science and technology would make this a key part of the mission of a new foundation. It might be that today’s institutions propose a new campus or a new international partnership. Or it might be new providers wanting to enter with different models. Today I can announce therefore that the Coalition is inviting proposals for a new type of university with a focus on *science and technology* and on postgraduates. Local economic partnerships, universities, businesses and international partners can come together to put forward proposals for new institutions.²¹

There is no public money available for these initiatives but again the government commits to removing all legislative barriers to their operation. A cross-party consensus exists here around extending collaborations between business and universities. Universities are seen as research engines that can boost innovation, ‘accelerate the commercialization of emerging technologies’ and externalize R&D costs.²² The higher education sector is the seventh biggest export industry in the UK and is described by Vince Cable as one of our key ‘traded services’.²³

Regarding overseas campuses, *Education Investor* reported a secret meeting at the beginning of May where Willetts raised the issue of rolling out such provision. This might represent one solution to the current stand-off between BIS and the Home Office over student visas. If the students have difficulty getting in, let’s take the university to them. *Education Investor* reports: ‘Sources who were present say that Willetts is hoping to create a comprehensive solution for those providers hoping to set up overseas branch campuses. This would bring together educational, financial, legal and construction support.’²⁴ In this case, the financing seems to be coming from a Canadian pension fund, but they want to see improved – that is, more corporate – management teams in place at universities before they will invest. The sums discussed are in the region of £150 million a time.

The dogs are out

This quick sketch of developments since May 2011 is meant to illustrate the varied ways in which a privatization agenda is being pursued in England. Rapid and mobile capital is beginning to course through a system that is being altered to smooth its flow. Our habits of thought are inappropriate for understanding and contesting these developments: new forms are required. The great failing of the liberal commentariat is to have not gone beyond lamenting the philistine or unseemly nature of the proposals, while, without the headline power of fees, organized resistance has struggled to maintain any productive political capacity. Primary legislation attracts the focus because it occurs on the national stage and the media are positioned to cover it.

However, it could be such ignored features as changes to VAT, when combined with support for joint ventures and other commercial activities, will have the greatest effect when aggregated nationally. None of this requires primary legislation or democratic deliberation. All of it may be close to impossible to undo.

It is *mass* higher education provision in England that is most at threat from this competition. The Russell Group aims to use its prestige as a kitemark in the new sea of degrees, thereby establishing a Premier League of universities and so further monopolizing revenues in the new terrain. Its recent expansion to take in four new members will not be repeated for a decade according to unguarded comments from one insider. Despite the public spat between Willetts and Michael Gove, the secretary of state for education, who has his own designs for universities, here they have a common vision: protect the 'excellent' institutions and let the market sort out the rest.

Shortly before going to press, the government published its response to the white paper consultations. The result? Still more delay with plans to overhaul degree-awarding powers and easing the process to change corporate form now on hold and unclear. Even the proposed regulatory framework is now under review. This must be in place by 2015 for the funding regime to work.

Notes

1. Andrew McGettigan, "'New Providers': The Creation of a Market in Higher Education", *Radical Philosophy* 167, May/June 2011, pp. 2–8; p. 2.
2. *Students at the Heart of the System*, HE White Paper, 2011, www.bis.gov.uk/hereform.
3. *A New Fit-For-Purpose Regulatory Framework for the Higher Education Sector*, www.bis.gov.uk/hereform.
4. The proposed regulatory framework has three tiers. The lowest is for institutions that hold degree-awarding powers but do not wish to access public funds. They would

only need to subscribe to the QAA and have procedures in place for dispute resolution.

5. www.bis.gov.uk/news/speeches/david-willetts-uuk-spring-conference-2011.
6. Roger Brown, ed., *Higher Education and the Market*, Routledge, London, 2011, p. 19.
7. 'HEFCE will be given a new explicit remit to promote the interests of students with a duty to take competition implications into account when making decisions about funding.'
8. John Morgan, 'Oversight of Private Providers is Introduced as State-funded Loans Soar', *Times Higher Education*, 10 May 2012, p. 6.
9. Full list of designated courses: www.practitioners.slc.co.uk/policy-information/designated-courses/full-list.aspx.
10. www.bis.gov.uk/assets/biscore/higher-education/docs/p/11-1441-private-he-providers-institutions-and-students-call.pdf.
11. The campaign has tied in with an Early Day Motion (1999) in Parliament which has attracted the signatures of over 130 MPs including senior figures in the Liberal Democrats such as Charles Kennedy and Menzies Campbell. www.parliament.uk/edm/2010-12/1999.
12. H.M. Treasury, Budget 2012, www.hm-treasury.gov.uk/budget2012.htm.
13. See 'VAT Status of Education and Vocational Training', June 2011, http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_00117&propertyType=document.
14. Oxford and Cambridge have an anomalous status owing to the fact that they predate the creation of the British state. They are 'civil corporations'.
15. Around forty-five universities have this status and are currently barred from issuing debt. For more information, see Andrew McGettigan, 'Demand Would Be Enormous', *Research Fortnight*, Supplement to issue 375, 21 September 2011, <http://exquisitelife.researchresearch.com/files/3rdrevolution-supplement-2.pdf>.
16. www.cabinetoffice.gov.uk/content/charities-act-review.
17. H.M. Treasury, Budget 2012, §2.191.
18. Elizabeth Gibney, 'Sussex "Sell-off" Stirs Union Ire', *Times Higher Education*, 19 May 2012, www.timeshighereducation.co.uk/story.asp?sectioncode=26&storycode=419982&c=1.
19. For one example, see Stephen J. Ball's coverage of the University of Liverpool's joint ventures with Kaplan and Laureate. Stephen J. Ball, *Global Education Inc.*, Routledge, London, 2012.
20. 'Private Equity Firms Looking to Acquire Universities', *Education Investor*, 22 September 2011, www.educationinvestor.co.uk/ShowArticleNews.aspx?ID=2450.
21. BIS press release, <http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=422706&NewsAreaID=2>.
22. The general strategy on *Innovation and Research for Growth*, published by BIS in December 2011, can be found at www.bis.gov.uk/assets/biscore/innovation/docs/i/11-1387-innovation-and-research-strategy-for-growth.pdf.
23. See the leaked letter from Cable to Cameron dated 8 February 2012, http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/06_03_12_vince_cable_letter.pdf.
24. 'Willetts Moves to Turn HE into Export Business', *Education Investor*, 17 May 2012, www.educationinvestor.co.uk/ShowArticleNews.aspx?ID=2789.