

Oxford US-UK Roundtable 2012

Changing legal status – the impact of changes of legal form and charitable status of higher education institutions

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*Material on the US position provided by Barbara Lee*²

1. Introduction

1.1 *The UK position*

In the UK the private sector of higher education is small. There is only one private institution with university title (the University of Buckingham), although a small number (including Regent's College, founded by Rockford College, Illinois as a study abroad campus) have degree awarding powers. The number of such institutions which are for profit is even smaller, the largest being BPP University College (owned by the Apollo Group but until October 2012 partly owned by a private equity house). The majority of private institutions are vocationally focused although some, such as Buckingham and Regent's (both not for profit³), would claim to provide a liberal education.

However, the recent sale of the College of Law, a private UK charitable body with a royal charter and the power to award taught degrees⁴, to Montague Private Equity, has sent shock waves round the UK public sector of higher education (HE). Commentators seem to have been unaware that transfer of ownership of private sector institutions, some of them charitable, has been happening in the independent schools and colleges sector for some time. The acquiring organisations range from private equity firms⁵ to a large publicly funded further education college. But the latest manifestation of entrepreneurialism in the HE sector has raised the spectre of the possible acquisition of a public university by a private sector body. Such a move would bring to the fore the debate about the privatisation of the university sector and the commodification of HE as

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³ Both institutions are charities registered with the Charity Commission. The Principal of Regent's College has indicated that the College has no plans to convert to for-profit status: see Times Higher Education 14 June 2012, p.28

⁴ The College has since been granted university title and is now known as the University of Law: see *College of Law becomes UK's first for profit university*, Times Higher Education 22 November 2012

⁵ A report from the University and College Union has also identified other private sector for profit providers including Greenwich School of Management, Study Group International and HE On Line as being private equity backed. See Public service or portfolio investment? How private equity firms are taking over post-secondary education, UCU, September 2012 http://www.ucu.org.uk/media/pdf/0/l/ucu_psopi_oct12.pdf

a private good, the wrath of trades unions and the anxiety of the leaders of those public sector HE institutions which fear the growth of competition from the private sector. But what are the drivers behind such developments? What legal issues do they raise? How should government and regulators respond? And has any regard been had to the interests of students and how they should be protected?

1.2 *The US position*

The US private sector of HE is substantial, although most of the larger institutions are not for profit. Many for-profit institutions offer career-focused education; these are the entities that have incurred the greatest criticism from students, legislators, and the press. Many of these institutions are small and are not accredited; some have closed abruptly and failed to return students' tuition money, and many have poor placement records. But some are quite large, such as the Career Education Corporation, which has campuses in 23 states and five countries and offers programmes in design, culinary arts, information technology, health sciences, and computer science. Some of the for-profit entities offer baccalaureate, master's and even doctoral degrees, and have campuses in multiple states. For example, Kaplan University has campuses or "learning centers" in Indiana, Iowa, Maine, Maryland, Missouri, Nebraska, and Wisconsin. Its campuses and online programmes serve 53,000 students annually. It is approved to offer degrees in 21 states. The university is accredited by the North Central Association of Colleges and Schools.⁶ The University of Phoenix offers degrees in over 100 programmes, awarding bachelor's, master's, and doctoral degrees (doctorates are offered in Business Administration, Management, Health Administration, Education, Industrial/Organizational Psychology, and Nursing).⁷

The federal General Accounting Office has performed an analysis of student outcomes, comparing not for profit and for-profit college student performance⁸. Although graduation rates in some programmes were somewhat higher at for-profit institutions that offered "traditional" baccalaureate and graduate degrees, students who attended for-profit institutions were less likely to be employed, less likely to pass licensing examinations, and more likely to default on their student loans.

⁶ <http://www.kaplanuniversity.edu/home.aspx>

⁷ <http://www.phoenix.edu>

⁸ GAO, "Higher Education: Student Outcomes Vary at For-Profit, Nonprofit, and Public Schools" (2011), available at <http://www.gao.gov/new.items/d12143.pdf>.

Barbara Lee reports that in the US, although a number of private colleges have been purchased by for-profit entities, she is not aware of any public colleges that have gone this route. There was a great flurry of purchasing of not for profit colleges by for-profit entities between 2000 and 2010. This appears to have slowed somewhat, although there are occasional stories in the *Chronicle of Higher Education* about recent transformations of a small not for profit college to a college owned by a for-profit entity. A *Chronicle* article noted that trustees of a failing not for profit college would prefer to merge or sell the college to another not for profit because the trustees do not have the financial expertise to consider complex financial transactions. Furthermore, as trustees of a "charity," there is no financial incentive for the trustees to sell the college to a for-profit entity since they will not benefit personally. This reluctance in the education sector contrasts with an apparent greater readiness of boards of not for profit hospitals to sell the hospital to a for-profit entity in order to continue operations and improve community services through access to investment capital⁹.

A few for-profit institutions have changed from publicly-traded to privately held corporations and back again. Venture capital firms, once interested in what was viewed as the lucrative access to federal student aid funds, have found that the large interest payments incurred when the college went private were difficult to shoulder, and thus we have seen a return to publicly-traded institutions.

2. Drivers for change

2.1 UK position

2.1.1 Changes of legal form

The driver for wanting to change legal form varies. It could be that the institution finds its form restrictive in terms of eg statutory powers (consider the limited powers of higher education corporations under Education Reform Act 1988, s.124 – whereas a company can be given effectively limitless powers.) A few institutions are still established as unincorporated trusts and trustees may be concerned at the possibility of unlimited personal liability. As the activities of HE institutions become increasingly diverse many are developing complex group structures and some leaders of institutions see attraction in a more overtly corporate approach, perhaps involving a change to company form. Declining public funding is encouraging some institutions to consider external private sources of funding. That is unlikely to be possible unless investors are enabled to take a

⁹ Change of Status, Daniel McMurray, 65(2) *Trustee* (2012), p.6

stake in the institution, which is impossible where it is established by royal charter or statute. Finally, the switch of route of public support for UK HE institutions from grant funding to funding of students has been hailed by the Westminster government as meaning that most English universities are now “in the private sector”, at least for the purpose of EU procurement rules. Whether or not this is correct in law, the rhetoric is undoubtedly attractive to some university leaders and their governing bodies.

2.2 *Moving away from charitable status*

Many of the drivers for changing legal form also apply to the desire to move from charitable to for-profit status. In a few cases outside investors or existing for-profit providers may see the prospect of gaining a foothold or bigger foothold in the market by taking over a public charitable institution which is failing, either financially or educationally or both. However, other than the acquisition of degree awarding powers there may be little attraction for such a possible bidder and the English HE sector has seen a number of weaker institutions supported by the funding councils through sometimes lengthy turn around situations, rather than being allowed to go to the wall or the subject of a “distress sale”.

A more likely scenario is that the institution may be successful and looking for a way of obtaining external investment. This was said by the College of Law to be the driver for its sale. The issues this case has highlighted are discussed below.

A middle position is also possible, with the core institution continuing as a charity but with non-charitable activities (eg substantial trading, undertaking commissioned research etc) being undertaken through a non-charitable subsidiary company. This has the advantages of protecting the charitable status of the core institution, and its important tax advantages, while facilitating collaboration with both public and private sector partners in non-core but potentially rewarding activities. The Minister for Higher Education has recently suggested that this route may be used by UK universities to secure external investment which would be needed if they are to be able to meet the growing demand for mass HE in developing countries¹⁰.

2.2 *US position*

¹⁰ Education ‘must emerge as UK’s stock in trade’, David Matthews, Times Higher Education 25 October <http://www.timeshighereducation.co.uk/story.asp?storycode=421597>

The writers are not aware whether there is any interest amongst US institutions in changing legal form. As indicated in 1.2 above there seems to be little move for conversion from not for profit to for profit. However, some traditional not for profit colleges have created for-profit subsidiaries, lending their accredited status to the for-profit entity—often an online education arm of the college¹¹.

3. Public funding implications

3.1 UK position

UK not for profits will have received support from the relevant funding council (HEFCE in England, HEFCW in Wales, and the Scottish Funding Council) under a “financial memorandum” imposed under statutory powers. The funding councils are in turn funded by government. On a disposal of such publicly funded assets the “Exchequer Interest” in such funding will have to be bought out (although the Exchequer only ranks as an unsecured creditor and the Interest is written down over a period of years.)

3.2 US position

In the US Federal funds primarily involve student financial aid programmes and grants and contracts for research or other services. When a college merges with another, or purchases its assets and liabilities permission of the U.S. Dept. of Education will be needed if the institution wishes to participate in federal student financial aid programmes. This involves filling out a 46- page questionnaire, including six pages that require information on each individual who owns 25 percent or more of the corporate entity (the now for-profit college). A US Senate committee chaired by Senator Tom Harkin has issued a scathing report¹² on the federal government's failures to monitor for-profit institutions' use of federal student aid. See section 10.2 below.

4. Retention of permanent endowment

4.1 UK position

¹¹ See <http://chronicle.com/article/For-Some-Colleges-the-Road-to/126001/>

¹² The Chronicle of Higher Education has an article and a link to the report: <http://chronicle.com/article/A-Damning-Portrait-of/133253/>

Certain assets of the institution may be regarded in charity law as permanent endowment, which the donor is deemed to have intended to be devoted permanently to the objects of the institution as an educational charity. Examples include many of the historic buildings of the colleges of Oxford University and their contents. On occasion potential disposal of such assets can cause controversy. An example was the possible disposal in 1993 of three pictures from the art collection of the Founder of Royal Holloway University of London. Charity trustees now have certain powers to dispose of permanent endowment and there is also the ability to seek consent from the Charity Commission (even where, as is generally the case at least in England, the HE institution is exempt from having to register with the Commission). The Commission will require a convincing case to be made out, usually involving demonstration that conditions have changed significantly since the assets were originally donated to the charity. However, in the Royal Holloway case the Commission accepted the University's case and agreed to make a scheme to allow the sale of the pictures in question.

4.2 US position

The writer understands that similar issues have arisen in the US. A Tennessee appeals court has ruled that Fisk University may sell a share in its modern art collection without being required to set aside much of the money gained to maintain the collection, [The Tennessean](#) reported. The financially struggling university has argued that it needs to sell some or all of the art to support other functions of the institution. But the Tennessee attorney general has challenged the sale as inconsistent with the public interest and the bequest that created the collection. It is unclear if the attorney general will appeal¹³.

Similarly in the health sector McMurray comments that if trustees decide to sell a hospital to a for-profit entity the attorney general of the home state "often is required to provide an opinion regarding the protection of donated assets and the safeguarding of the health and well-being of the state's residents...the attorney general will want to ensure that the ...board reached the decision to sell in a comprehensive transparent way". The decision to sell may need the approval of the attorney general who will insist that the board can show that "there is no conflict of interest, all options have been considered, and no charitable assets are transferred to the for-profit entity....By following these steps the trustees and hospital leaders demonstrate that the transition from non-profit to for –

¹³In re Fisk Univ., 2011 Tenn. App. LEXIS 641 (Tenn. Ct. App. Nov. 29, 2011). The Supreme Court of Tennessee affirmed the appellate court's ruling in April, 2012. Randy Kennedy, "Legal Battle over Fisk University Art Collection Ends," *New York Times*, August 3, 2012. According to the *New York Times* article, Fisk has agreed to sell half of its collection to the Crystal Bridges Museum in Bentonville, Ark., founded by Alice Walton, a Wal-Mart heiress.

Reference kindly provided by Tim Birtwistle. <http://www.insidehighered.com/quicktakes/2011/11/30/appeals-court-backs-fisk-u-art-sale#ixzz1sTOPMH5X>

profit was a transparent process predicated on serving the community"¹⁴. This may be contrasted with the comment by Sally Hunt, the general secretary of the UK university teachers' union, UCU, that "What the College of Law shows is that charity law isn't enough...The government needs to take urgent action to ensure that public assets and investment are protected and any change of ownership should trigger an immediate review of degree-awarding powers"¹⁵. More recently UCU has extended its recommendations to include a proposal for enhanced quality assurance review where an HE institution established a for-profit subsidiary or joint venture or changed its corporate form¹⁶

5. Disposal of other assets

5.1 UK position

Leaving aside assets which are permanent endowment it is suggested that there is no legal reason why the other assets of a charitable higher education institution cannot be converted into cash, which must then be used to further the institution's charitable objects. This is what has happened with the sale of the College of Law to Montague Private Equity. Although the transaction used a complex company law structure, the end result was that the underlying charity that had conducted the College received a substantial sum which the trustees have to apply to its charitable objects. Rather than conduct a college the trustees will devote the funds of the charity to providing bursaries and scholarships to law students at the College of Law and elsewhere. The College will be conducted by the same management team and staff, whose employment has transferred under the Transfer of Undertakings and Protection of Employment Regulations to a for-profit company ultimately owned by Montague. The trust has retained its royal charter, amended to delete reference to the College. The College's power to award taught degrees has transferred, with its other assets and liabilities, to Montague (see below.)

It is understood that there are academic views to the effect that such transfers are or should not be legally possible but the writer is not aware of the reasoning here. The sale of the College of Law has been accepted by the Charity Commission and by the relevant UK government department (the Department of Business, Innovation and Skills – BIS).

¹⁴ See note 2 above.

¹⁵ Quoted in *Could universities be sold off?*, Harriet Swain, the Guardian 23 April 2012. The College of Law had not received any public investment.

¹⁶ See op. cit. note 5 above at p.5

There will be complications in some cases as the result of the institution's legal form, e.g. if it has a charter this may need to be surrendered or amended, if it is a statutory corporation it will need to be dissolved by order of the Secretary of State. Only the relatively small number of institutions which are companies will be able to wind themselves up under the Companies Acts. Therefore in most cases there will be a certain degree of governmental control over the disposal.

5.2 US position

In relation to public universities, it appears that any assets donated to a public university would have to be returned in accordance with the provisions of the gift¹⁷. This limitation may also apply if the state seeks to gain control over foundations or other fundraising bodies that permitted donors to direct the use of the funds or the state intends to change the use of the funds. Since the adoption of the 14th amendment, and the incorporation of the 5th amendment, the courts will likely view such an action as a taking requiring the state to compensate the donors.¹⁸

6. Degree awarding powers & regulation of the private sector

6.1 Position in the UK

There has been a flurry of concern in the HE sector in the UK at the prospect of for profits buying up public sector HEIs, perhaps particularly to get hold of degree awarding powers (DAPs). As mentioned above, both the for profits (mainly US based) and private equity houses seem to be cautious given the uncertainty of demand in the UK HE market in the light of the massive increase in tuition fees from September 2012 and the uncertainty as to the speed and extent to which a level playing field for the private and public sectors will be established in England. The Coalition Government has indicated that the promised HE Bill is likely to be deferred until after the next general election in 2015 and its response to the White Paper consultation leaves many points unclear. This is in contrast with the Welsh Government whose recent White Paper on Further and Higher Education signals its intention to bring forward a Bill intended to establish an entirely level playing field, with private providers wanting their students to access the Student Loan

¹⁷ *Goldbaum v. Regents of U. of California*, 119 Cal. Rptr. 3d 664, 666 (Cal. App. 4th Dist. 2011), review denied (Mar. 23, 2011). I am indebted to John Mollaghan of Stetson University Law School for the material in this section.

¹⁸ *Id.*

Company's facilities having to accept the jurisdiction of the relevant regulators in terms of fair access, student complaints, and quality assurance.

In debates about the levelling of the playing field the rules about degree awarding powers feature highly. Private providers point to the fact that they are only able to secure degree awarding powers for 6 years at a time whereas public sector institutions secure unlimited powers. Some niche private providers argue that it is unreasonable that powers once granted can be used to teach any discipline and not only that or those in which the institution may have an established track record.

Perhaps the strongest theoretical argument used by the critics of the ready transferability of degree awarding powers is that they should not be regarded as a private good, in effect as a type of intellectual property, but as a public good in that, like licences, they are the result of the use of public powers (by the Crown acting through the Privy Council). This argument perhaps overlooks the fact that like, eg patents, DAPs are the product of private development which is then formally publicly recognised, there being an important public interest in ensuring that students and employers are not misled by the activities of unscrupulous "degree mills".

As indicated above it seems that the relevant UK government department, BIS, has accepted that DAPs attach to the institution and not to the legal entity that conducts it. If this were not the case institutions (whether privately or publicly funded) that wanted to change legal form without changing ownership would need the consent of government before DAPs could transfer, even though the institution was likely to operate in essentially the same manner as previously. It would seem more reasonable to argue that HE institutions which sought public recognition, e.g. through the ability to award degrees, should have continued recognition dependent on having to secure government approval to changes of ownership where that involved an actual or potential change of control that could lead to significant change in the education offered to students. There is a precedent for this in the statutory requirement (Education Act 2002) that independent schools register with the Department for Education (DfE), and obtain DfE approval to significant changes, including change of proprietor.

It should be noted that many UK professional and statutory bodies regulating access to the professions (including the legal professions) have similar requirements involving "fit and proper person" tests for continuing recognition of professional courses. Accordingly the sale of the College of Law involved the new proprietors having to satisfy the Solicitors Regulatory Authority and Bar Standards Board as to their suitability.

6.2 Position in the US

The states have the power to grant or deny a college the authority to grant degrees within the state. Most states have an agency that approves degree-awarding programs within the state, including the online courses and programs offered by out-of-state colleges within that particular state. Even private not for profit (and for-profit) colleges must submit to the authority of the state agency before they can grant degrees.¹⁹

When a college merges with another, or purchases its assets and liabilities, there are two levels of review that must be satisfied, in addition to the federal level discussed at section 3.2 above, namely regional and state level (although more than one state may be involved):

1. Permission of the regional accrediting agency to “transfer” the accreditation of the college that is being purchased to the entity that is the purchaser;
2. Approval of state agency that authorizes awarding of degrees within the state;
3. Approval of the state agency in each state in which the institution offers online education or has a campus.

In addition it appears that a number of institutions with DAPs cease to operate in the US each year, and in such circumstances the DAPs disappear together with the institution to which they attached²⁰.

It would seem that the accreditation position in the US (unlike that in the UK) is clear and well understood.

7. The role of government

7.1 Position in the UK

Some of the arguments of the critics of the development of a nascent market in HE provision and providers in the UK seem to be based on a model of HE as entirely a public

¹⁹ William A. Kaplin and Barbara A. Lee, *The Law of Higher Education*, 4th ed. (Jossey-Bass, 2006), Section 12.1.

²⁰ I am grateful to Michael A. Olivas of the University of Houston Law Center for this information.

good, with providers, or at least those funded in part by the state being seen as public bodies. However, such arguments are questionable for a number of reasons:

- even before the radical change of funding arrangements from September 2012 some universities had very substantial private sources of income, in a few cases being over 50% of all income (the threshold for the application or not of the EU public procurement regime);
- The Minister for Higher Education has argued that under the new funding arrangements most university income will come from students' fees, rather than funding council grant, and that the former is private funding, with the result that most universities will be outside the EU procurement regime. (It must be said that a number of specialist procurement lawyers disagree with this analysis.)
- the number of private providers gaining recognition of courses for the purpose of access to the Student Loan Company is increasing and BIS has introduced basic tests of governance and financial stability. Some private providers are voluntarily accepting the jurisdiction of eg the Quality Assurance Agency for Higher Education (QAA). So the differences in the extent of regulation between the public and private sectors of HE are reducing.

It should also be noted that government is steadily intervening more in what may be described as academic quality matters, for quite unrelated political reasons. The most notable example is the requirement that in order to recruit students from outside the EU HE institutions must secure and retain Highly Trusted Sponsor status. This involves either being subject to institutional audit by QAA or going through the new "educational oversight" regime. Not all private providers have secured educational oversight and a number of providers (public as well as private) have had their HTS status suspended or even terminated. Such decisions seem to have borne more harshly on colleges than universities and on the private as compared with the private sector. But in principle questions may be raised by all bona fide providers, whether private or public and whether charitable or for profit, whether the government's determination to reduce immigration, including student immigration, is leading it to intrude too deeply into matters that should be left to academic institutions.

7.2 Position in the US

According to a 2011 report by the U.S. Government Accounting Office, nearly 32 billion dollars in federal grants and loans were awarded to students attending for-profit (or proprietary) colleges during the 2009-10 academic year, and this sector accounts for

twelve percent of student enrolment in the United States. The U.S. Department of Education reported that in 2009-10, 92 percent of students enrolled in these institutions received some form of federal student aid—in most cases, federally-subsidized student loans.²¹ For-profit colleges have been harshly criticized in the press for their high attrition rates, poor job placement history, and very high student loan default rates. Not surprisingly therefore the Federal Government is taking a close interest in the for profit sector. The federal Consumer Financial Protection Bureau is investigating Corinthian Colleges for possible fraud in its student loan programme²². A study found that in 2008 low income and minority students were overrepresented in for-profit institutions relative to their enrolment in not for profit institutions.²³

8. Where does this leave charity law?

8.1 England and Wales

One of the many puzzling areas of HE law in England and Wales is just how far reliance is going to be placed on charity law. Most universities in England are exempt from registration with the Charity Commission, although those in Wales are now all registered. Those universities in England which are unregistered (the great majority) have under the Charities Act 2011 (a consolidating Act replacing the 1993 and 2006 Charities Acts) a “principal regulator” of compliance with charity law. The designated “principal regulator” is HEFCE. However, the powers of enforcement remain with the Charity Commission and the Commission alone retains the power to authorise acts which would otherwise not be permissible (although this power does not extend to making lawful what would otherwise be prohibited by statute.) HEFCE undertakes essentially routine monitoring of compliance through receiving annual statements of compliance and reports of “serious incidents”. The Commission for its part has until recently had little experience of regulating compliance by HE institutions and has focused on regulation and support for the registered charity sector. Most registered charities are small and the issues which they present very different from those presented by HE institutions. The area of education with which the Commission has experience, namely independent “private” schools, has been marked by the Commission’s attempts to apply a somewhat rigid interpretation of the test of public benefit, the outcome of which has been successful challenges to the Commission’s guidance.

²¹ *The Condition of Education 2012*, p. 100, available at http://nces.ed.gov/pubs2012/2012045_4.pdf.

²² <http://www.insidehighered.com/news/2012/05/10/cfpb-investigating-corinthian-colleges-possibly-focusing-student-lending>

²³ *Initial College Attendance of Low-Income Young Adults*, Institute for Higher Education Policy, 2011, available at <http://www.ihep.org/assets/files/publications/m-r/Portraits-Low-Income-Young-Adults-Attendance-Brief-FINAL-June-2011.pdf>.

It might be thought that the HE sector should therefore not expect too much of the Commission. However, it is interesting that when in the light of the 2006 Act those HE institutions that were registered with the Commission were asked by HEFCE if they wished to become exempt, no such institutions to the writer's knowledge took up the suggestion. Indeed, the sector seems to be becoming increasingly wary of HEFCE as it works with government to develop a "super-regulator" role as envisaged by the HE White Paper, even before any enabling legislation.

8.2 Scotland

In Scotland the approach of the Scottish Charity Regulator, OSCR, has been different. It too has looked at the public benefit issue, and (unlike the English Commission) reviewed a university (which it found to be working for the public benefit despite a limited amount of privately commissioned research). More significantly, it found the further education colleges were not operating in accordance with Scots charity law in that they were insufficiently independent of government, in particular because government retained the power to dissolve them. As a result of the OSCR report the Scottish Government had to amend the Further and Higher Education (Scotland) Act 1992 to ensure that the Secretary of State could only dissolve a further education corporation with its consent. In England government retains this power in relation to the statutory higher education corporations, even though further education corporations under the Education Act 2011 can now only be dissolved by the corporations themselves. If the English Commission were to seek to ensure the independence from government of not for profit HE institutions the need for more direct state regulation would be avoided -many of the same concerns about good governance and financial stability would be articulated by the Commission.

8.3 The US

The writer has been unable to establish the position in the US.

9. And students?

9.1 UK position

The Westminster Government has made the interests of students the focus of its reforms. The Higher Education White Paper was entitled "Students at the Heart of the

System” and described a vision of empowered students using their financial muscle to drive the HE market. From this perspective the precise classification of the providing institution – public, private or perhaps more accurately “third sector” – seems of little relevance. Students’ concern will be for clarity in what they can expect and then delivery of that promise. Government is seeking to support these demands through requiring institutions to provide more and better information on their courses and services and to engage in more effective dialogue with students, encouraged through devices such as the “student charter”. While the “student charter” seems to have been conceived as a non-legally binding document it would be unwise for institutions to assume it could have no legal effect. In addition, the QAA has set out new expectations for provision of information to students and applicants in its new Quality Code²⁴ and the Office of the Independent Adjudicator although having no remit regarding complaints concerning admissions regularly comments on poor communication by institutions as being at the bottom of student complaints.

These measures are consistent with the government’s more general concern to improve the operation of markets, which will be given further impetus by current EU proposals to strengthen consumer protection law. All institutions, both public and private, will need to review their contracts with students to ensure they meet the tests of fairness and reasonableness. This is an area which is considered from time to time by the relevant regulator (the Office of Fair Trading) and where the National Union of Students and its affiliated students’ unions are active.

Many academics are of course critical of the concept of the student as consumer and, rightly, point to the much greater reciprocity involved in being a student compared with being a supermarket shopper. There may be a need for HE institutions to be more explicit as to their expectations of students, and to feed this into their outreach work as well as ensuring that their marketing avoids unrealistic promises. The growth of the private sector can perhaps be seen as an indicator that the public sector has not fully appreciated the diversity of experience that many students seek. Many students no longer want, or are in a position to undertake, full time courses at institutions far from home. It should be noted that the Welsh Government has indicated that it expects institutions to work closely with students’ unions to ensure that students’ views are informed and are fully taken into account, and see a role for government as well as the funding body and the Quality Assurance Agency in ensuring that quality is maintained and enhanced: it has less faith in the market than has the Westminster government.

²⁴ Part 3 – Information about higher education provision:
<http://www.qaa.ac.uk/Publications/InformationAndGuidance/Pages/Quality-Code-Part-C.aspx>

9.2 US position

In the US as in the UK the relationship between students and their institutions is primarily contractual, although the courts traditionally are reluctant to intervene in matters of academic judgment. There appears to be a greater readiness of students to use the courts to pursue disputes with their institutions, although many institutions have "campus ombuds" or other less formal means of attempting to resolve disputes. In addition there are the accrediting bodies referred to in section above, although there are no bodies similar to either HEFCE or the OIA operating at federal level. As indicated above, it is likely that the profile of students attending private sector for-profit institutions in the US is significantly different from that of students attending not for profit institutions, and many of the former will have little choice but to stay in the for profit sector which is more likely to provide the part time or distance learning programmes that they require.

10. And staff?

10.1 UK position

In the UK under EU law (implemented in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE Regulations) where the ownership of an "undertaking" changes its employees contracts of employment transfer, unchanged, to the new owner. Employees are protected against dismissal arising from the transfer in most circumstances, and transfer on their existing terms and conditions. To a considerable extent therefore staff should not be concerned by the prospect of their employer changing. However, pension rights are not covered by TUPE and the new employer cannot be prevented from changing terms and conditions, and making changes to the work force, where these changes do not arise from the transfer, but, for example, are implemented a year or so later and are not "connected" to the transfer. It is therefore quite likely that in public institutions the trades unions will be resistant to any such changes where the new employer is in the private sector and not bound by existing collective agreements. The practice of UK private sector HE institutions with regard to recognition of trades unions is understood to vary.

9.2 US position

In the US the writers believe staff would have no such statutory protection as applies in the UK and EU. Barbara Lee comments that "faculty are unionized at some private colleges where faculty governance is not strong. Staff are also unionized at some private colleges. In my readings over the years about institutions that have merged or been acquired, the acquiring institution usually assumes all the contracts and other obligations of the college it is acquiring, which would include faculty and staff collective bargaining agreements. I suppose it is technically possible that a college could simply go out of business and thus default on its collective bargaining agreements, but if it is purchased, I think the acquiring entity, in purchasing the "good will" and the physical and other assets of the college, would need to honor its obligations as well."

10. Implications for governance of institutions

10.1 UK position

The governance arrangements of publicly funded UK HE institutions vary considerably, with the biggest divide being between pre and post 1992 institutions. However, with the exception of the essentially self-governing universities of Oxford and Cambridge there are significant similarities. All publicly funded institutions are required to commit to a Code of Governance produced by the Committee of University Chairs, or be prepared to explain why they are not prepared to do so. The privately funded HE sector is too small and diverse to make it possible to generalise about governance arrangements.

The more important divide is between those institutions that are charities and those that are for-profit. However, regulators have been alive to the risk that in pursuit of high enrolments and a strong share price private institutions might be tempted to increase pass rates. Accordingly institutions such as BPP University College are required as a condition of the award of degree awarding powers to ring fence their academic board from the main board that takes commercial decisions. It would seem likely that post-sale the College of Law will need to make similar arrangements.

It may be that the more important change will be that of business model and management style. A move to the private not for profit sector (increasingly referred to as the "third" sector), may herald a move to a more entrepreneurial approach, and such a move is even more likely where the change is to a for-profit status. However, the extent of the likely change should not be overstated. In cases where the institution has been successful the ultimate owners may wish to keep the existing management team – indeed the reality may be a management buy out backed by private finance. This will of

course not apply where the institution has failed and is in reality being acquired because of its assets, in particular its accreditations.

10.2 US position

The cogent criticism of the private for profit sector in the Harkin report has already been mentioned. However, most of the report's recommendations are based on making the HE market operate more effectively rather than confronting corporate governance issues directly. The report calls for enhanced transparency through collection of relevant and accurate information about student outcomes, identifying institutions' corporate ownership; prohibiting all HE institutions from spending federal financial aid on marketing and recruiting; and establishing an online complaint clearing house to ensure student complaints reach the appropriate regulator. However, the proposal that for-profit colleges be required to provide a minimum standard of student services, including "tutoring, remediation, financial aid and career counselling and job placement" and that employees in these departments should "not be financially incentivised to simply meet quotas"²⁵ present more direct challenges to the business models of many of the for-profit institutions. Given the critical reaction of for-profits' representative bodies²⁶ and the uncertain political direction resulting from the Presidential election campaign it is far from clear that these recommendations will be implemented.

11. Closing comments, speculations and questions

Opportunities to exploit institutional value exist for public sector institutions as well as those in the private sector. For example, institutions with the power to award degrees conferred under the Further and Higher Education Act 1992 are able to authorise other bodies (including private sector bodies) to award degrees on their behalf. Is this possible in the US?

How should the results of that realisation of value be shared? Many academics will be suspicious that most gain will accrue to institutional leaders but this is not inevitable. Why not encourage staff generally to acquire a stake through developing a mutual/ co-operative model? The University of Northampton is already exploring the possibility of becoming a "social enterprise" and Birmingham Metropolitan College, a large and entrepreneurial further education college providing some higher education, is exploring

²⁵ Op cit n.9 at p.24

²⁶ <http://www.insidehighered.com/news/2012/07/30/harkin-releases-critical-report-profits>

the possibility of becoming a "mutual" to allow staff to have a stake in the institution. Are there any US models that might be instructive here?

Much institutional value is created by the academy which extends beyond the boundaries of individual institutions through mechanisms such as peer review. How can this be captured. Why should the Quality Assurance Agency, which advises the Privy Council on applications for degree awarding powers, be treated just as a servant of the funding body and of the Privy Council when the Council decides? The QAA is a company owned by the HE sector and all public and a few private sector institutions pay for it. Should it not return value to the sector in some way? Or should it become a regulator along the lines of US accrediting agencies?

Most UK private sector HE provision has been undertaken by relatively small institutions that present little threat to publicly funded institutions. The concern of the latter is that multi-nationals with huge resources may enter the market, perhaps by buying up ailing public institutions to get their hands on their degree awarding powers. But the Coalition government is firmly opposed to such concentrations of market power and where it retains controls has indicated that it will use them to block mergers or take-overs that they consider stifle competition. This may be one reason why it has retained the sole power to dissolve a higher education corporation. Regardless of government policy it is likely that competition law is going to be more widely used by institutions concerned at such developments and will become an important tool for UK HE lawyers in the future. Is anti-trust law used for this purpose in the US?

The College of Law case has created more heat than light. What are the real concerns here? Can most of them be addressed by limited regulatory intervention (e.g. in relation to conditions to be attached to the grant of the power to award degrees), avoiding the danger of undue government interference with the academy? To what extent are potential quality issues a matter for the academy to deal with itself? And can the public and private sectors of HE co-exist so as better to meet the increasing need for good quality HE at an affordable cost – an issue not just for the UK and the US but a global issue?