

Literature Review

9. Literature Review

Recent HE reforms and their impact on legal education and training

Introduction

1. A significant proportion of the Ormrod Report (1971) is given to a consideration of the financial arrangements of the Committee's proposals (eg pp. 144-152). Commenting on the reforms to costs and student grants, the Committee observed that it had 'no reason to think that the University Grants Committee will not be as co-operative and helpful as possible. Moreover, the position in regard to student grants is likely to be more advantageous.' (p. 152). The Committee's optimism is a sign of how much things have changed in the interim. Today there is much more uncertainty and outright division on the way forward for Higher Education (HE).
2. Our remit in this chapter is to outline the possible impacts of the proposed 2012/13 reforms in the higher education sector on legal education and training and in particular the increases in undergraduate tuition fees. Before we examine some of the literature on recent HE reforms in England and Wales it may be useful to outline what the reforms actually entail. Given that our focus in this literature review is the regulation of professional legal education, we shall pay less attention to the effects of the reforms on university research capacity and on postgraduate research programmes (critical though these subjects are to the funding and culture of HE, and serious though the effects of the new regime have been to both). Instead we shall focus more on the general effect of the financial reforms on institutions and on law schools, as well as subsidiary issues such as the situation with devolved HE systems in the UK. We shall focus only on the period since the Browne Report (2010). It should be said at the outset that the literature is relatively scattered and immature, given the timeframe and the relative paucity of reliable data. Nevertheless, it may be possible to discern some emerging themes.

Recent funding reform

3. The problem of funding UK HE is not recent. It is as old as state funding itself which, in the form of maintenance awards and payment of course fees for full-time undergraduate students, was introduced in 1962 on the recommendations of the Anderson Committee in 1960.¹ The system remained unchanged for over 25 years but as the HE system moved, under political pressure, from elite to mass education, funding failed to match the increase in student numbers. In the early 1960s there were around 140,000 full-time degree-level students; by 2002, 1.5 million. As a result the real value of the student awards fell, as did the funding received by the universities from the state. In 1988 the Conservative government proposed an alternative system of top-up loans (DES, 1988), effectively moving from a grant system to a loan system of funding that was further developed by successive administrations.²
4. If the direction of recent funding reform has not changed, the pace and intensity of reform has, and this acceleration has brought with it significant trends towards marketization. Prior to the Browne Report (Browne 2010), student fees were capped (eg £3,224 for 2009/10). There were loans for tuition and maintenance with

¹ Implemented by the Education Act (1962), s.1. Note that while we focus on England in the period *post*-2010, the issue of student finance was generally comparable across the jurisdictions of the UK from the early sixties until the late 1990s, when its devolved status within the new devolutionary settlements began to create significant policy and cultural differences, particularly in Scotland and latterly in Wales (Øivind, 2011). These are discussed below.

² For a history of the last half-century of HE funding in England, see Hillman (2013).

grant support for households with an income level of £50,778. The loans were repayable when graduates reached a £15,000 income threshold. In 2009 the Labour government set up an independent review committee with Lord Browne as its chairman, which reported in 2010. Its aim was to identify a sustainable future for HE in England. It did so by proposing a system of funding that moved the costs of HE from government to students, on the principle that those benefitting from the privileges of HE should pay for them.

5. Brown (2011, p. 3) noted that the Browne Report was in effect one further step in a process of marketization of HE that 'began with the introduction of full cost fees for overseas students in 1980'. While this is arguable (in that the progressive decrease in student funding and in government support for HE began at least a decade earlier), Brown's point is essentially correct, and borne out by other commentators, as we shall see. He points to the main elements of the Browne Report approach:
 - 'Lowering of market entry barriers' for new providers
 - 'Separation of teaching and research funding'
 - HE institutions receiving a 'tuition fee' that is effectively 'a voucher system'.
 - Institutions compete on 'level of fee as well as on course quality and availability'
 - Students to receive more information in order to make their choice of institutions and courses
 - A 'strong regulatory regime'
 - 'Research is funded selectively' (Brown, 2011, p. 3)

6. The Browne Report was received by the Coalition Government, and its approach was largely followed by the Government's Comprehensive Spending Review proposals, in which the proposed 25% reduction in the Dept for Business, Innovation and Skills' resource budget would predominantly fall on HE budgets, again following the Browne Report. In effect, government withdrew from funding most undergraduate courses, but subsidised the STEM subjects (science, technology, engineering and mathematics) to a reduced level. In its place, universities would receive income from tuition fees capped at a maximum of £9,000, with universities given the freedom to choose their fee levels (many though not all adopted the maximum). The fees were repayable by students on reaching an income level when in employment, and at rates that were government-subsidised. This represented a cut in funding of 40% in the HE budget that, according to BIS will be reduced to £4.2 billion by 2014/15 (BIS, 2010).

7. The position was set out in the Government's White Paper, subtitled *Students at the Heart of the System*, which was voted through Parliament in December 2010, and implemented for the 2012/13 cohort of undergraduates. As summarised in a report by the million+ think-tank, the key changes included the following:
 - Removal of teaching funding provided by HEFCE for 'predominantly classroom taught subjects'
 - A cap on chargeable fees at £9,000, subject to access agreements with the Office for Fair Access (OFFA)
 - Increase in the scale of tuition fee loans
 - Increase in maintenance loans and grants available to eligible full-time undergraduates
 - Tuition fee loans available to eligible part-time undergraduates
 - Higher tuition fee loans made available for students attending private institutions

- Tuition fee and maintenance loan conditions that are subject to:
 - Variable real interest rate on loans, dependent on graduate earnings
 - Extension of the repayment period before debt write-off
 - Increase in the nominal earnings threshold before loan repayment begins
- Introduction of a National Scholarship Programme with matching funding from the HE sector (million+ 2013, p. 2)

Views on the Coalition Government's proposals

8. A number of commentators noted the risk involved in the scale of the cuts to HE, summed up in a response by the million + group, commenting on the position of England vis-à-vis other countries:
 - a. None of Britain's key competitor countries are withdrawing public investment from higher education in this way; nor are they seeking to fund university teaching almost entirely on the basis of students taking out loans which they repay as graduates. If the reduction in teaching funding is of the order proposed by Browne and assumed in the Spending Review, the UK's funding of university teaching will stand in sharp contrast to Germany, China, France, Sweden and Finland. Even in the highly differentiated higher education market in the US (currently the subject of much criticism within the US itself), state universities receive state funding. (million +, 2010, p. 3)³
9. The extent to which the radical innovation of the system can be controlled by risk-based regulation, as the White Paper (BIS, 2011a) proposes, has been subject to analysis. In a consultation paper the Government describes a system with HEFCE as the lead regulator, with QAA, OFFA (the Office for Fair Access), and the Office of the Independent Adjudicator (OIA) – see BIS (2011b). The key change was a move from quality assurance that applied to all institutions to a risk-based regime that, as King puts it, 'modulates levels of institutional audit on the basis of regulatory judgments concerning the variable risks posed by institutions to the sector and to the regulator' (King, 2011, 1). By taking this approach, risk-based regulation seeks to become 'proportionate, targeted, and explicit' (1).
10. As King observes, the approach is part of a general move to risk-based regulation in the last decade, and has been strongly encouraged by the Treasury, the Cabinet Office and the National Audit Office. However the challenges for this approach in the HE domain are considerable, and not least in an environment where institutions are encouraged to engage in entrepreneurial activities, both in the domestic market created for home students, and in the much less regulated international markets, where institutions may seek profit or simply to recover lost revenue from home students. King notes two principal problems:
 - That 'there will be failures as a result of institutions and activities that have slipped through the risk-based approach'
 - The 'reforms of the White Paper actually increase the risks that will be faced by a large number perhaps the majority of institutions'. As a result, King argues, 'the regulatory burden will increase – logically it certainly should increase – for these institutions as a result of a risk-based approach' (King, 2011, p. 11).⁴

³ Note that the Briefing Paper comments should deal not with Britain or the UK but with England only. HE is a devolved matter in Scotland, Wales and Northern Ireland. As we shall see below, the political ideology and fiscal infrastructure of HE in Wales and especially Scotland is significantly different to that of England.

⁴ This is discussed in the general context of COBR in chapter 3, paras 57-59.

11. Others have critiqued the detail of the Coalition's fiscal plans for HE. In a press release for the Institute of Fiscal Studies, Chowdry *et al* pointed out of the National Scholarship Programme mentioned above that because the programme is 'being administered separately, and differently, by each university and for students entering a majority of universities they cannot be sure in advance what level of support they will receive. The effectiveness of this financial support in encouraging participation of students from poorer backgrounds is likely to be undermined by these levels of complexity and uncertainty' (Chowdry *et al* 2012). Ironically, it could be argued that this situation returns students to the 1950s, pre-Anderson Report, where Local Education Authority awards to students varied considerably across the country (Hillman, 2011, p. 5).
12. Yet others have argued against the ideologies underpinning the new regime. In his analysis of whether the proposals would work and whether they would protect quality and diversity Brown considered the quantum of funding and other issues such as equity, diversity, regulation, quality and what he called 'the balance between private and public goods'.⁵ Summarising earlier research, he notes that the provenance of the public goods deriving from HE (and he quotes McMahon's (2009) estimate of that to be 52% of the total benefits of HE) 'is the principal justification for the direct subsidy of teaching'. Following the Browne Report, the Government has confined 'these public goods to a few, mostly scientific, subjects', with the result that '[i]nstead of being seen as a public good, higher education is seen as a private investment'. He maps out the possible consequences of this:
- This is reductionism on the grand scale, and it will lead over time to a diminution of the public benefits of higher education beginning, probably, with the detriments of a much narrower curriculum. It is this – as much as the increase in the fee and the reduction in teaching funding – which has fuelled the near total rejection of the package within the sector. (Brown, 2011, p. 6)
13. Brown concludes his analysis by looking to the future and attempting to discern the lineaments of our university system by mid-decade. He lists the following characteristics:
- Much greater 'resourcing and status differentials between institutions'
 - The student population 'is unlikely to be any more representative of the general population than is currently the case'.
 - A 'greater proportion of the university curriculum will be "vocational" or concerned with "employability"', with non-vocational subjects, particularly the arts, humanities and social sciences 'confined to a small number of elite institutions catering for wealthier students, together with poorer students on scholarships – a return to something akin to the situation in the 1950s.
 - Research concentration in a 'small number of institutions', with concomitant greater variation in staff salaries, terms and conditions (and a 'much bigger proportion of the teaching force will be on part-time and/or temporary contracts').

⁵ In the literature analyzing HE and its contribution to society there is a generally accepted distinction between private goods and public goods. Private goods include market goods such as higher wages, and non-market goods such as health advantages. Public goods include greater contribution to the Treasury through increased tax revenues, more consumption, decreased reliance on welfare and NHS, workforce productivity and flexibility, increased charitable donation, reduced crime and recidivism and a general increase in the quality of public civic life (McMahon 2009).

- ‘Students will be even more clearly consumers (rather than producers)’, with institutions giving much greater resource to ‘marketing, advertising, branding and recruitment’ as well as ‘student care and complaints’ and ‘conspicuous expenditure’.
- Tighter regulatory regimes ‘because of the inability of markets to police quality in any serious way, and the unwillingness of governments to accept this’ (Brown, 2011, pp. 8-9).

His final point, should he be right, has serious consequences for regulatory oversight of the undergraduate LLB. While it is beyond the remit of LETR to explore this in detail, it should be noted.

14. Brown’s analysis of the changing culture in HE brought about by increased marketization has been taken further by many others. Representative of the literature is a collection of essays on the subject (Molesworth, Scullion & Nixon, 2011). In their chapter in this volume Nixon, Scullion and Molesworth noted how in the discussions of consumer and scholarly identities, choice in HE could encourage conservative learners (p. 207). They note in their conclusion how university brands make stakeholders act ‘off-brand’ (p. 229). The marketwise systems that support institutional activity in the market, too, will have unintended and deleterious consequences, for institutions and for students.
15. For students, they argue, the market ‘offers the appearance of endless opportunity to express one’s agency but that means choice is always contained and constrained within the market’. And yet, the environment of a market is a powerful force shaping student expectations of institutions. Adapting Fromm (1976) they point to how students have ‘adopted a “marketing personality”’, in which ‘the emphasis is on having the personal attributes that successfully position the individual in a capitalist system’ (p. 233). Thus in this discourse *having* a degree is privileged over *being* learners; in place of *transformation* through critical study, there is an emphasis on *confirmation* of the student as consumer.
16. In the same volume Barnett argues for more nuance in our definition of markets and their effects: they can be, he states, both virtuous and also pernicious. He explores ways in which the pernicious effects can be ameliorated by ‘countervailing measures’. While accepting that market presence can ‘distort the pedagogical relationship’, it can herald a shift from social knowledge to market knowledge. For him, nevertheless, ‘at the heart of the emergence of the student-as-customer lies the pedagogical relationship’ (Barnett 2011, 49). Our care for this relationship, he holds, ‘is perhaps the crucial pedagogical challenge of our times’ (Barnett, 2011, p. 50).
17. The social rejection of the Coalition Government’s direction for HE has taken the form of demonstrations, protests, petitions and a counter-literature. Almost 400 academic campaigners signed up to an ‘alternative white paper’ entitled In Defence of Public Higher Education. The first sentence of the defence sums up the approach of the campaigners:

Public higher education is not state-controlled higher education, but publicly-funded higher education that respects these principles and secures other public benefits appropriate to a democratic society. These principles and benefits are put at risk by a market in higher education and the entry of for-profit providers. (Campaign for the Public University 2011, p. 1)

The rest of the defence sets out in detail why the campaigners reject the fundamental principles underlying the Browne Report and the White Paper.

18. Other academics have examined the conceptual bases of Browne, the CSR and the White Paper. Stefan Collini has contested the view that universities must be judged on their contribution to economic growth, arguing that this mistakes the inherent worth of intellectual activity. For him, the concept of ‘accountability’ as defined by the Browne Report and White Paper is fundamentally in error. In place of a consumerist view of HE, where students choose in a market and universities are accountable to them, he describes a wider concept of accountability: ‘[i]n reality, universities are already, and necessarily, ‘accountable’ to society, including students, in all kinds of ways: it is cheap and empty rhetoric to suggest they exist purely to ‘serve students’, especially when this is really code for “respond to the expressed wishes of the consumer in the way other businesses have to do”’ (Collini, 2011, p. 14, col 1).
19. Collini and others see basic misunderstandings in the White Paper regarding the fundamental purposes of universities. Comparing the Robbins Report and the White Paper, he observes that ‘what the White Paper so lamentably lacks is a considered understanding of the character of intellectual inquiry and of the conditions needed to sustain it successfully across a wide range of subjects and across many generations’ (Collini, 2011, p. 14, col 3). In his broad perspective across the history of universities and his analysis of the present policy direction of the Browne Report and White Paper Collini argues not just that the Government has misunderstood HE and its role in society, but is attempting to redefine higher education: ‘[the Browne Report] displays no real interest in universities as places of education; they are conceived of simply as engines of economic prosperity and as agencies for equipping future employees to earn higher salaries’ (Collini, 2012, p. 187).
20. The long-term costings for the new regime have been analysed. Thompson and Bekhradnia have analysed the projected costs of the HE White Paper in detail, as these are represented in models of public deficit and debt. They focused on the Resource Accounting and Budgeting (RAB) cost, ie the ‘long-run real-term cost to the Government of the loans that it makes’ (Thompson & Bekhradnia, 2012, para. 11). Following their consistent critique that ‘the cost of the policy is likely to be higher than [the government] admitted’ (para. 15), the results of their analysis is that the true RAB cost to government (and therefore to taxpayer) will be considerably more than forecast. Noting discrepancies in government figures (eg between the RAB cost for full-time over against part-time students – para. 14), they also pointed out the doubtful assumptions that were made of career growth and earnings (that they would replicate the last 30 years over the next 30 years – para. 22.a) and that the distribution of earnings will remain as it has been historically (when in fact there is evidence that ‘shows the difference between high and low graduate earners is increasing’ – para. 22.b). By their figures there will be an increased cost base of over £1 billion per year. As a result they conclude that public expenditure will not be reduced; indeed, at a ‘slightly higher RAB cost or a slightly greater inflationary effect [...] would mean that the present policy is actually more expensive than the one it has replaced’ (para. 47).
21. These figures have been updated by the university think-tank million+ in association with London Economics. According to a report on the costings of the new regime,

the Treasury will 'contribute £1.166 billion *less* to the funding of the smaller 2012/13 cohort of students overall compared to the 2010/11 cohort of students' (report's emphasis). However according to the report's calculations the short-term benefits are considerably outweighed by the longer terms costs to the Treasury. They put it in stark terms: **'the combined costs of increasing higher education fees is estimated to be almost 6½ times as great as the potential Treasury expenditure savings** (million+ 2013, p. 20, report's emphasis).

Widening participation in HE

22. As Williams pointed out, 'it has long been recognised by serious higher education researchers that the public subsidy of higher education has in practice been largely a transfer of resources towards people who are, and who will be, relatively wealthy' (Williams, 2011, p. 2). One of the government's stated aims is to widen the scope of participation in and access to HE. Whether this will be achieved is disputed in the research literature. Roberts, examining the implications of the expansion of HE for social class formation in the UK, argues that widening participation in HE is 'unlikely seriously to dilute the overwhelmingly middle-class complexion of UK higher education', and 'a further expansion will strengthen the role of higher education as a distinctive and normal middle-class life stage' (Roberts, 2010). Others point out that despite much political argument about the nature of participation in HE, there are serious inequalities in social class with HE institutions. The role of HE, however, should be viewed in a wider context on this issue. Williams observes, adducing the research of Galindo-Rueda and Vignoles (2004, 2005), that 'a large part of the differences in social class participation in higher education can be attributed to differential performance in secondary education. The most effective way of widening higher education participation is to reduce inequalities in nursery, primary and secondary education' (Williams 2011, p. 2).
23. This was verified by research carried out for the Institute of Fiscal Studies. Focusing on the determinants of participation in HE among participants from lower socioeconomic backgrounds the researchers discovered that 'poor achievement in secondary schools is more important in explaining lower HE participation rates among pupils from low socio-economic backgrounds than barriers arising at the point of entry to HE'; and that these factors are 'consistent with the need for earlier policy intervention to raise HE participation rates among pupils from low socio-economic backgrounds' (Chowdry *et al* 2012, p. 431).
24. Recent research produced by the Institute for Fiscal Studies and supported by the Nuffield Foundation analyzed the financial implications of the White Paper reforms for a wide array of stakeholders – students, graduates, taxpayers and universities. It concluded that the Government's proposals eventually saves the taxpayer around £1800 per graduate, achieved largely by the cut in direct public funding to universities. For universities, they argue, 'this cut is more than offset by almost £15,000 in additional fee income per graduate - a 140 per cent rise over the old system. Thus the total amount spent - from both private and public sources - on higher education is expected to *increase* as a result of these reforms. On average, universities will be better off financially as a consequence' (Chowdry *et al* 2012, 211).
25. This finding should of course be viewed in context: universities now operate in a fee-based, market-structured financial system where the total amount spent derives

from the market, and the amount available to an institution also depends crucially on market placing. As McGettigan (2013) points out with regard to the issue of universities raising bonds, for instance, market placing is crucial. His discussion of the recent bonds issued in 2012 by Cambridge (for £350M) and De Montfort (for £90M) reveals how Cambridge's dominant position in the university market strengthens its ability to raise funding in the financial market; while the position of less established institutions such as De Montfort in the university market renders their position in the financial market much more uncertain:

While Cambridge strengthens its place, De Montfort and similarly positioned institutions must consider whether business as usual is an option, and whether being in the squeezed middle is a bigger risk than large borrowings. Something seems to have gone wrong if these are the questions facing colleges and universities.

26. Chowdry *et al* claim that on social mobility 'the new funding regime is actually more progressive than its predecessor: the poorest 29 per cent of graduates will be better off under the new system, while other graduates will be worse off.' However, they acknowledge that this requires a 'lack of debt aversion amongst students from poorer backgrounds' (a point also made by Thompson & Bekhradnia, 2010, para 37). As we shall see from the research of Callender and others, though, the problem is more complex than explaining the consequences of financial figures to prospective students. There are many affective and cultural issues bound up with choosing prospective careers in Law to do with identity, resilience, social capital, perceptions of projected futures, perceptions of current and future communities and their networks and value systems, and much else (Francis & Sommerlad, 2011; Anderson, Murray & Maharg, 2003).
27. The literature on fair admissions has acknowledged much of this body of research (eg Schwartz 2004), and the Government has encouraged institutions to consider the use of contextual information in admissions processes (eg OFFA's guidance on Access Agreements). Whether or not this will have any effect, given the nature of the issues at stake for disadvantaged students, remains to be seen. Again, the literature lacks reliable data: by the end of the decade we should be in a much better position to clarify the position. As we reported in chapter four of the this literature review, however, the recommendations of the Schwartz Report had not changed the practices of the majority of institutions (McCaig *et al*).
28. On the issue of whether the Government's new regime is progressive or regressive Brown makes the valuable point that the regulatory attitude to institutions will probably have an impact on the institutions that are perceived as weaker or in danger of failing. It is the institutions that currently accept the majority of students from disadvantaged backgrounds that 'are amongst those most at risk from the new regime' (Brown 2011, 4).

HE and UK devolutionary settlements

29. One often unregarded aspect of HE and its funding in England is the extent to which devolutionary settlement in Wales and Scotland has changed HE in the UK nations. Following referenda, Parliament passed three devolutionary Acts – the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998 (later

superseded by the 2006 Government of Wales Act). The Acts established devolved legislatures and defined their powers.⁶

30. Broadly speaking, HE is a devolved matter in Northern Ireland and Scotland, while in Wales it is the responsibility of the Welsh Executive.⁷ The Welsh Government's twin priorities for HE were stated as being 'supporting a buoyant economy and delivering social justice' (HEW, 2013, p. 3). The Government introduced grants for poorer students. It gave home domiciled students better financial support, as did Northern Ireland. This created the problem of balancing significant inward and outward flows of students from and to England (Bruce, 2012, 98). Wales also has 'a less selective approach to research funding'. It tends to encourage the merging of HEIs. There is concern that there is a funding gap between England and Wales (Trench, 2011, p. 7).
31. These are encouraging signs of devolutionary activity. In 2002 Rees and Istance questioned whether a national system of HE was emerging in Wales. They earlier had commented upon the patterns of participation, observing:
 Currently, Wales exhibits a pattern of participation which is unique amongst the home countries, whereby the Welsh higher education institutions serve very substantial numbers of students from England (and to a much lesser extent elsewhere), whilst a large proportion of Welsh students register at institutions in England. This indicates that there is now a significant disjuncture between an increasingly distinct pattern of governance of Welsh higher education and a pattern of participation which is massively integrated in the 'England and Wales' system. (Rees & Istance, 1997, p. 49)
 Nine years later, Rees and Taylor observed that the price differentials in student finance arrangements between England and Wales had had little effect on patterns of participation to date, but that 'from 2007–2008, there will be a significant price differential for Welsh-domiciled students studying in Wales and those who wish to go elsewhere' (Rees & Taylor, 2006, p. 370).⁸
32. HE policies in England have not been replicated in Scotland where, under devolved government, a significantly different approach has been taken to HE. In one sense this is the resumption of a fundamentally different approach to tertiary education in Scotland that existed in the Enlightenment and nineteenth centuries. In the nineteenth century, as historians of universities have pointed out, Scottish HE was very different from English university education (Withrington, 2008) in its culture, openness, organization of curricula, the flexibility of the curricula for students, outreach classes and the more democratic participative rates of attendance. As Keating points out (2006), the convergence of the systems of HE in Scotland and England that characterised much of twentieth century UK HE policy was in a number of important respects halted after devolution. Where English HE was based on 'differentiation and competition', Scotland favoured 'integration and more egalitarianism' (2006, p. 23).⁹
33. The issue of higher variable HE fees is a classic example of the divergence, but by no means the only one. In 2000/01 the Scottish Government abolished up-front tuition

⁶ For a comprehensive list of the legislation, strategy reviews and reports affecting the four nations of the devolved UK, see Bruce 2012, Annex 2.

⁷ In general financial terms though certainly not in all aspects the system of HE in N. Ireland is based upon the English system.

⁸ The differential was effectively a non-repayable fees grant that covered half the costs of the course, and which was also not means-tested.

⁹ As Keating points out, these differences are consistent with 'overall patterns of divergence in public services after devolution', eg health care.

fees for Scottish and EU domiciled students studying in Scotland, and the newly-elected SNP administration abolished the system of Graduate Endowment in 2008. For College students there are Bursaries, Maintenance Allowances and Extra Allowances for some students, depending on circumstances, Child Care Assistance and Additional Support Needs for Learning, for disabled students, and other assistance with costs, eg travel. Most Scottish HE students do not pay fees for a first degree or equivalent. Living costs are met via a student loan based on household income, and in addition there is a Young Student Bursary for students under the age of 25. There are also other bursaries and additional loans available (Scottish Government, 2013). Newall lists some of the achievements of this approach:

Scotland outperforms the rest of the UK in widening access and in research. It produces a higher proportion of graduates than any other European nation. And the universities have a profound impact on the national community. (Newall, 2003, p. 150)

Newall's praise should be tempered by the recent figures on socioeconomic diversity, which have given rise to calls in the press for legislation to raise the figure of students from poorer backgrounds attending Scottish universities (Denholm, 2013).

34. While the Scottish Government's approach has been praised in many quarters, it has also been criticised for not providing a sustainable model of financial support for Scottish universities (Royal Society of Edinburgh, 2011). Trench states that '[i]f Scotland and Wales maintain their policies on fees their spending on higher education will be disadvantaged' (Trench, 2008, p. 8). Trench also observes that devolutionary progress is hampered by UK governmental approaches to policy:

The UK Government's policymaking process often considers devolved concerns late, or not at all, and liaison remains undeveloped. Greater clarity in the UK Government about devolved and non-devolved matters is needed, with more systematic liaison and recognition of the impact of the financial systems and the anomalies they can create. (Trench, 2008, 8)

Watson made the same point, stating that 'national policy confusion' is 'exacerbated by devolution' (Watson 2012). This point was also made, independently, by Higher Education Wales in their response to the Commission on Devolution in Wales:

Universities need a policy framework at a Wales and UK level that facilitates the development of appropriate national policy, and not inhibit it. (HEW, 2013, p. 5)

As Bruce points out, though, there are policy differences that signal the significant difference between the market-based reforms adopted in England and the social democratic governments of the devolved nations. He summarised the themes well, and it is useful to quote him in full, given that these are alternatives to the English position:

There are a number of consistent themes in the policy statements of the devolved countries as they respond to common pressures. These include an emphasis on lifelong learning, more coherent pathways for learners from schools and colleges to university, the need for the rationalisation of provision, and enhanced research performance. Higher education is seen primarily as serving economic and social objectives and this focus is shaping how the devolved governments secure the changes in the sector that they are seeking. While acknowledging the importance of autonomous institutions, the devolved governments wish to see them contributing optimally to their ambitions and are increasingly interventionist in their approach. (Bruce, 2012, p. 99)

35. The funding dilemma, however, remains for Scotland. The Scottish Government published a Green Paper on the Future of Higher Education in Scotland. The Royal Society of Edinburgh's (RSE) Education Committee responded to the Paper in its own

Advice Paper, warning that ‘as a consequence of the funding cuts for 2011/12 of £130 million per annum [...] will create a cumulative shortfall by then of £640 million’ (RSE, 2011, para 5). The RSE proposed a number of alternatives to the shortfall: flat funding, virement from other parts of the Scottish Government budget, structural change to the Scottish university system, and student contributions. It is significant that on the subject of fees, the Advice Paper did not expressly state its preference for a fees solution such as that operating in England; in fact quite the opposite. The Paper points to a lesson for Scotland ‘in the current confusion about university funding policy in England’ (para 21).

Effects on legal education

36. The literature on this is not well developed, as one might expect. On the subject of funding, at least one study indicates that the effect of the new funding regime will be small. Walker and Zhu estimated the impact of HE on the earnings of graduates in the UK by subject studied, and incidentally used the data of the £9,000 fee structure in their simulations. They note that relatively little research has been carried out on the economic effect of the ‘college major’. Unsurprisingly, ‘the studies that do exist report large differentials by major of study’ (Walker & Zhu, 2011, p. 1177). They state ‘the strong message ... is that even a large rise in tuition fees makes relatively little difference to the quality of the investment [by students] – those subjects that offer high returns ([defined as Law, Economics, Management] for men, and all subjects for women) will continue to do so’. They conclude that ‘this policy would have only modest detrimental effects on the soundness of an investment in higher education – but large cross subject differences will remain’ (Walker & Zhu, 2011, p. 1186).
37. As an economic analysis of graduate earnings and funding, Walker and Zhu’s study may work on the macroscale of funding analysis. On the microscale of legal education, there are many issues that affect graduate earnings – perception of the relative worth of institutional degrees, costs of LPC and BPTC and their relative worth, availability and uptake of traineeships, the relations between social class and ethnic profiles and traineeship, and much else. There is also the perception of debt and how that debt will be managed which, when they are at the point of considering legal education, is a factor in dissuading students from lower socio-economic categories.
38. In their study of the issue, Callender and Jackson derived data from just under 2,000 prospective students and showed clearly that ‘those from low social classes are more debt averse than those from other social classes, and are far more likely to be deterred from going to university because of their fear of debt’. As they point out, student funding policies predicated on the accumulation of debt ‘are in danger of deterring the very students at the heart of their widening participation policies’ (2005, p. 509). Their findings, though not specific to Law, can surely be applied to Law as a discipline. They are replicated in other jurisdictions – see for example the Report of the Illinois State Bar Association (2013). In other words, funding may affect who enters HE in the first place, as well as who has the funds to exit with a good enough degree to proceed through professional training such as the LPC and training contract to employment. Research by the National Union of Students, cited in HEFCE (2013, p. 14) also found that financial considerations were significant, but variable, affecting two categories of students in particular – those who were parents and younger prospective students (eg in school, Years 10-13).

39. Reports in the press in 2012 suggested a serious downturn in the numbers of applicants to English universities, with figures quoted ranging from 15,000 up to 50,000. Thompson and Bekhradnia analysed the phenomenon, using figures from UCAS and the Sutton Trust. In their conclusion they noted that it was too early to make long-term predictions as to whether the reforms had discouraged students in general and disadvantaged students in particular. They made a distinction between ‘the impact of the changes in 2012, as distinct from the temporary impact from introducing the change’. They stated that the ‘estimate of 15,000 less than expected 18 year old applicants should be viewed as an upper bound’, and that ‘it is far more likely that demand, as measured by application rates, has not been reduced by the increase in fees to any material extent (Thompson and Bekhradnia, 2012, para 52). Since 2012/13 was the first year of the new funding regime for students, it is clearly too early to draw strong conclusions.
40. It is significant, perhaps, that mature application rates for groups of 24-29 and 30-39 age in England dropped steeply in 2012 (falling only slightly, by comparison, in Scotland). All sources are agreed that there has been a steep drop in undergraduate applications and acceptances from mature students – much more significant than for young students. The recent HEFCE Report (2013) cites caring responsibilities and other factors, but does not mention the issue of debt-perception. The consideration of debt taken on later in life is much more significant for a mature, rather than a young, debtor. HEFCE also points out that data from HESA and ILR show that ‘in 2011, young students from the most disadvantaged backgrounds were twice as likely as the most advantaged young students to choose to study part-time rather than full-time’ (HEFCE, 2013, p. 21). HEFCE acknowledges the need to ‘develop a deeper understanding of the risks of large and swift declines in part-time numbers as well as the opportunities of broadening learning in flexible and innovative provision’ (2013, p. 15). Unless reversed these declines will clearly affect the profile of the student populations in law schools, and will affect the revenues of those institutions that have much larger numbers of part-time and mature students. Here, as in many areas of this chapter, more data is required before a fuller understanding of the issues can emerge.
41. Brown points out that one effect of the fees regime may be the shift of students from disciplines such as the arts, humanities and social sciences to what are perceived as professional programmes, including Law. He notes that commentators expect that ‘subjects like history or sociology will in future be the preserve of the wealthier middle classes’ (Brown, 2011, p. 4). If that is the case then undergraduate programmes in Law may not be as affected as some other disciplines by the reforms. Since the market pressures will increase on law schools within their stratum of the sector, though, we may see a move by some institutions to capitalise on the vocationalisation of the curriculum by adding placements, professionally-related modules in the undergraduate curriculum and such like – and these may not be only post-1992 institutions but those who wish to make strong links with professional groupings in the locality of the institution. Some institutions may well target specific sectors of the market, similar to the way that private legal education providers have targeted City law firms. This is one effect of what will probably be a larger form of marketization, namely significant movement away from ‘not for profit’ programmes to ‘for profit’ programmes which will serve to reduce student choice on curricula (Brown, 2011, p. 8). Recent HEFCE data would seem to confirm this pattern. There

has been an increase in the applications for Law programmes, though how many of the applications will translate into enrolments is another matter (HEFCE, 2013, 30).

42. The concept of a free market brings with it the increased likelihood of institutional weakness (given the frail capital resources of most institutions) and potential failure, with resulting movement between institutions. While law school admission figures may be better than those of other disciplines it may be difficult for some law schools to sustain their historical levels of admission within the legal educational market. Summing up views on this Brown observed 'most commentators are assuming that there will be a good deal of institutional restructuring in the form of takeovers, mergers, strategic alliances and the like, and indeed this is the preferred scenario in the Browne Report' (Brown, 2011, p. 8).
43. The HEFCE Report is muted on whether the reforms have encouraged innovation: it is clear that they have not, though HEFCE asserts it will 'look to identify specific examples of emerging innovative higher education in future reports' (2013, 44). It could be said that financial uncertainty and anxiety, for institutions as for students, is an environment unlikely to produce sound and innovative practices or risk-taking. Clearly this applies to the curricular practices of law schools as other disciplines, though there was as yet little clear evidence in the literature (as opposed to anecdotal evidence and hearsay) of law schools responding innovatively to the challenges presented by the new funding regime.
44. HEFCE acknowledges that 'there is wide variation in the financial performance and health of different institutions within the sector, and some institutions will face difficulties if they experience repeated falls in student recruitment' (48). Their statement bears out King's cautionary statements on risk-based regulation, cited above (King 2011). HEFCE goes on to warn that if the Government makes good on the indications in the Autumn 2012 Statement that public sector funding will come under further pressure, then 'it could prompt a significant change in the sector's financial position' (2013, 49).

Themes arising from debates

From grant funding to loan systems: HE financial provision and widening participation

45. The shift of UK HE funding from a system of grant funding to loan systems has accelerated and intensified in the last five years, with the proposals of the Browne Report and the Coalition Government White Paper. The effects of the withdrawal of the state from funding large sectors of HE are sharply debated in the recent literature. Some have argued that the proposals to withdraw public investment in this way go too far, in contrast to HE funding regimes of England's competitors and partners in HE in Europe, US and Asia. Others point out that the reforms of the White Paper increase the risks of failure and decline faced by institutions that will result, for those institutions at least, in increased regulatory burdens. The conceptual bases have been critiqued in depth, and particularly the concept of universities as engines of potential wealth, rather than as sites of education and personal growth.
46. The longer term costings have been challenged, with one paper outlining a potential increased cost base of over £1B per year; while a university think-tank estimates the

combined costs of increasing HE fees as 6½ times as great as potential Treasury expenditure savings. The Coalition Government's fiscal plans have also been criticised as likely to engender complexity and uncertainty, and thus deter students from poorer backgrounds. Widening participation in HE, one of the Government's aims, is strongly disputed. While some commentators argue that other educational factors such as poor achievement in secondary education matter more than barriers at the HE stage, and that the poorest students may be better off under the new system than the previous one, others point to the problems created by the fee system in increasing debt aversion amongst poor students. For those commentators, debt aversion will deter those students to whom widening participation policies are constructed in the first place. It is too early to conclude from application figures that the reforms had discouraged students in general and disadvantaged students in particular from applying to university. Nevertheless it is clear that mature application rates, particularly for part-time students, in age groups 24-29 and 30-39 have declined significantly. HEFCE has called for a 'deeper understanding of the risks of large and swift declines in part-time numbers'.

Devolutionary alternatives

47. Political devolution has brought about differentiation in HE policies in Wales and particularly Scotland. The devolved countries tend to emphasize lifelong learning, coherent pathways into education, and the role of universities in serving social as well as economic aims. Their route to funding universities is much less marketized than that of England, but they still face significant problems in funding Higher Education.

HE reforms and institutional restructuring

48. It is likely that as a result of the reforms, some institutions will become more fragile. Institutional restructuring will be probably increase in the form of takeovers, mergers, etc. The climate of anxiety and uncertainty may lead institutions to become less innovative and entrepreneurial than they otherwise might have been. The evidence for this, however, is slight – as indeed could be said for much of the situation in HE at present.

HE reforms and legal education

49. There is little literature on how this affects legal education in particular. It has been argued that since Law is a subject that offers relatively high career rewards, the large rise in fees will have little detrimental effect on entry figures. Others point out that the reforms will increase pressure on many degree programmes to vocationalize their content and method – for instance placements, professionally-related modules and the like.

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