

20. Legal requirements and regulation

Introduction and aim

Providers of higher education (HE) are required to comply with a wide range of statutory and regulatory requirements. Governing bodies and their members are expected to exercise appropriate oversight, seeking assurances that the provider is complying with the statutory and legal requirements placed upon it.

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1. The legal frame

The legal context to HE is based on two elements: the specific body of law applying to providers of HE and legislation applying more generally. Collectively, the two strands form the 'legal frame of reference' by which providers of higher education need to operate¹. Governors need to be mindful of both of the two legal strands.

2. Higher education codes

The [Scottish Code of Good Higher Education Governance](#) states 'the governing body must satisfy itself that the institution is compliant with all relevant legal and regulatory conditions.' In addition, 'the governing body is expected to review regularly its policies relating to compliance with statutory duties'². The [Higher Education Code of Governance](#) notes 'the regulatory and legal requirements will vary depending on the constitution of individual higher education institutions, but, for most governing bodies, members are charitable trustees and must comply with legislation governing charities and case law in the exercise of their duties. Some institutions are constituted as companies, and governing body members are normally the company's directors; the primary legislation in this case will be the requirements of the Companies Acts'³.

3. Separate legal entities

HE providers are typically constituted as a separate legal personality. This means that they are distinct from the individuals who are their employees. This allows the provider to enter into legal contracts and engage in, or be subject to, litigation.

4. An evolving framework

There is a plethora of legislation and regulations applying to HE providers. Both the legislation and regulations have evolved over time, and continue to change. In addition, it is important to acknowledge that there are differences in the legal frame and regulations that apply to providers in each of the four devolved nations of the United Kingdom.



5. Mapping the returns to be submitted by a provider

HE providers are required to submit a large number of returns, typically at least annually, to multiple agencies. Governing bodies (or in some cases the audit committee) may find it helpful to receive an overview of the number and timing of the statutory and regulatory returns submitted by the provider.

6. Register of returns

To assist the work of the governing body, a detailed register of the statutory and regulatory returns required from the provider may be compiled. This will allow Governors to understand better the number and scope of the returns submitted. The register may include the title and purpose of the return, the receiving organisation and the expected submission date. Information may also be inserted in the register showing if the return is subject to independent audit, the actual date the return was submitted and whether any issues have subsequently been raised by the receiving organisation. The register will also enable the governing body (or audit committee) to identify specific returns it may wish to examine and test assurance.

7. Legal milestones

Across each of the four devolved nations it is possible to identify key pieces of sector-specific legislation, which have influenced the operation of the system and individual HE providers. The following examples are illustrative of this process.

8. Further and Higher Education Acts, 1992

An important milestone in the development of the United Kingdom's system of HE was the Further Education and Higher Education Act (applying to England and Wales) and the Further Education and Higher Education (Scotland) Act in 1992. These brought significant changes to the structure and operation of the HE system in Great Britain. Specifically, they led to:

- The removal of the binary divide between nationally funded providers (e.g. chartered providers) and those historically funded by local authorities and paved the way for the creation of the first group of 'new' post-92 universities;
- Created unitary funding councils, and establishing three separate funding councils for England, Scotland and Wales;

- Government ministers being given the power to issue general directions and attach conditions to the grants of funding administered by the funding councils; and
- Funding councils being able to require providers to agree to specific terms and conditions (i.e. a funding agreement) in order to receive public funding⁴.

9. Changes to public agencies post-1992

Since 1992 a number of changes have occurred to how the HE system is regulated and funded in Great Britain. In England the Higher Education and Research Act 2017 (HERA 2017) has led to the establishment of a new regulator and separate research agency. In Scotland the formerly separate higher and further education funding councils have been merged to create the [Scottish Funding Council](#). In Wales funding for HE is channeled through [The Funding Council for Wales](#).

10. HERA 2017

When [HERA 2017](#) was passed it introduced major changes to the way the system of HE is operated and regulated in England⁵. The Act led replaced the Higher Education Funding Council for England (HEFCE) and established a regulator, the [Office for Students \(OfS\)](#). The Act also led to the formation of [UK Research and Innovation \(UKRI\)](#). UKRI responsibilities cover research and innovation.

11. OfS register

If they wish to be able to charge 'higher' (approved) tuition fees of up to currently £9,250 per annum for a full-time undergraduate student providers are required to register with the OfS. To register, providers need to meet the initial, and then satisfy the ongoing, [conditions of registration](#). These include a requirement that the governing body notifies OfS of any changes to the accuracy of the information in relation to the provider's entry in the [Register](#)⁶. Details of the initial and ongoing conditions of registration are discussed in [Briefing Note 26, The new regulatory approach to HE in England](#).



12. General statute law

In addition to the specific legislation relating to HE, many different areas of general statute law also apply to HE providers. These include:

- Employment and workplace legalisation: contracts of employment, and the requirements with regard to equality and diversity and health and safety legislation
- Supplier contracts: as a business, HE providers procure goods and services from different suppliers.
- Charities law: many HE providers are either an exempt or registered charity
- Agreement and arrangements relating to franchising or other forms of academic partnership: HE providers may well enter in to an agreement with another education provider who may be UK-based (e.g. further education colleges) or located overseas
- Agreements with local authorities: HE providers may need to seek planning permission from a local authority. This may result in a legal agreement with the local authority and may include the signing of a section 106 agreement in order to secure planning permission for a new building
- Other areas of legalisation: for instance, data protection (e.g. General Data Protection Regulation – GDPR) and freedom of information.

13. Consumer protection law

Consumer protection law applies to the relationship between a potential student, and subsequently the student, and the HE provider. It sets out minimum standards that apply to various aspects of the HE provider's interactions with students, for example in relation to information provision and complaints handling⁷.

14. The student as a consumer

The [Competition and Markets Authority](#) (CMA), which is responsible for enforcing consumer protection law, notes that for the purposes of consumer protection law undergraduate students are viewed as 'consumers'. Providers need to ensure:

- Potential students and students are not misled by the information they provide
- The terms and conditions applying to students are fair and balanced
- Complaint handling processes and practices are accessible, clear and fair to students.

15. Guidance on consumer protection law

To assist compliance with consumer protection law, the CMA has issued two publications to assist providers: [UK higher education providers – advice on consumer protection law](#), and a short one-page summary on [consumer law and higher education providers](#).

16. A condition of registration

Governors of English HE providers should take note that a condition of registration with the OfS, is that providers undertake a self-assessment showing that they have given due regard to guidance about how to comply with consumer law (Registration condition C1).

17. Governors' role

As previously noted, the law affects a HE provider's relations with its staff, students, contractors, regulators/ funding agencies and collaborative partners. In each case it is important that the HE provider identifies areas of risk and takes appropriate action to manage these risks. Specifically, governors need to assure themselves that the provider:

- Is fully compliant with all the relevant legislation and regulations, being mindful that both are subject to change and new requirements may be introduced;
- Has acted to embed the necessary policies and procedures throughout the organisation;
- Anticipates and evaluates the impact of proposed changes to legalisation or regulations, responding in appropriate and timely manner; thereby reducing the risk of continuing to operate out-date policies and procedures;
- Has clear policies and procedures to formalise and manage its relationships with those individuals and organisations with whom it has legal relationship; and
- Has appropriate policies and procedures in place to handle disputes and complaints, including, for example, in respect of staff, student and suppliers.

In practice much of the detailed work on testing compliance is likely to be delegated to the audit committee, who will be report on their work and findings to the full governing body.



18. Conclusion

The legal requirements and regulations placed on HE provider are considerable. A vital element of the work of the governing body is seeking assurances that the provider is satisfying these legal and regulatory requirements. Given the nature and scope of the requirements this is a necessary, but normally a demanding and time consuming task.

19. Questions to review

- Q** Does the audit committee actively monitor and review the annual returns submitted by the provider to external agencies?
- Q** Are governors made aware of emerging legalisation or regulations, and where changes to existing policies and procedures may be required?
- Q** Does the provider review regularly key aspects of its relationship with its students, to ensure it is compliant with consumer protection law?
- Q** Has the provider been subject to significant complaints or legal disputes? If so, are there important lessons to be learned?

End notes and further reading

- ¹ Farrington D and Palfreyman D (2012), *The Law of Higher Education*. 2nd Edition. Oxford: Oxford University Press. p.3. Farrington and Palfreyman provide an extensive resource for readers wishing to understand more about the law in relation to higher education providers.
- ² See Scottish Code of Good Higher Education Governance, p.9.
- ³ Higher Education Code of Governance, June 2018, para. 1.2
- ⁴ Farrington D and Palfreyman D (2012), *op.cit.*, p.97.
- ⁵ The provisions contained in HERA2017 come fully into force from the 1 August 2019. 2018-19 is a transition year, during which the regulation and the funding of higher education providers in England is based on a mix of the 'old' and 'new' systems.
- ⁶ Where there is a breach in the ongoing conditions of registration the OfS has the power to impose a monetary penalty, suspend or remove a provider from the register. See HERA 2017, Sections 15-19.
- ⁷ Competition and Markets Authority (2015), [UK higher education providers – advice on consumer protection law](#), CMA 33, 12 March, Para. 1.4

