No stitch up on price

Fee caps and competition law

Plus
The reality of shared services
Managing estates efficiently
Equality in the Public Sector
Talking to GuildHE

And lots more...
Lifting the fee cap

Are higher education providers ready for competition?

The decision by the Coalition Government to implement the Browne proposals (though with some modification) has caused a huge rumpus, and debate so far has been focused (perhaps not surprisingly) on big political issues, such as allegations of a Liberal Democrat sell out, how far the state’s role in funding education should be scaled back, and what implications the increase in the fee cap will have for social mobility. But there will be a need, before long, for institutions offering degree courses to consider the specifics of how they will adapt to the new ‘market’ environment. Unfamiliar with these surroundings, institutions will need to tread carefully and watch that they do not unwittingly fall into any ‘bear traps’.

HEPI predicts that £9,000 will become the standard tuition fee, in just the same way as most of the English universities chose to charge the previous maximum fee of £3,000. That is not what the Government hopes. The Government hopes that institutions will compete by seeking to attract students based on the quality of the courses they offer and the tuition fees they charge for those courses. In other words competition on product and competition on price. But it is not just a hope. In a market environment, institutions must make their own unilateral decisions about how they are going to operate/how their courses should be designed and what tuition fees they should charge. And if they shrink from this duty to make decisions on a unilateral basis, and instead seek reassurance from discussing with others on what courses they are proposing/what tuition fees they are going to charge, they are going to find themselves in real difficulty. Because making these decisions in what might be described as a “comfortable” environment, in the company of other like-minded institutions, will be regarded, quite simply, as a cartel.
In step • Lifting the fee cap

Where room is created for competition, which is essentially what the Browne reforms will do, room is also created for the application of competition law. And competition law is not something the higher and further education sector has really had to concern itself about before. As a result, institutions would be well advised to ensure that all those who are involved in determining ‘product’ or ‘price’ are aware of the scope for application of competition law (which is wider than you might think), and aware of the potential consequences of infringement.

Agreements or concerted practices between ‘undertakings’ which have the object or effect of restricting competition are prohibited by the Competition Act 1998. Whilst the terminology here may be unusual (what is an undertaking?), the concept is relatively straightforward. Competition law clearly applies to businesses, companies and partnerships, but it also applies to any other type of entity which is engaged in economic activity (unless its purpose/function is exclusively social). And that includes educational institutions, as the Office of Fair Trading showed in 2006 in its case against 50 independent schools which were found to be exchanging information in relation to planned fee levels. So any agreement between institutions which affects competition (or aims to do so) is caught.

An agreement or concerted practice is a wide concept. There does not need to be any element of formality. Nothing needs to be in writing. An agreement does not need to be intended to be binding. All that is required is a meeting of minds, or concurrence of wills. And such a meeting of minds can be inferred (for example from the circumstances or the course of events). A chain of e-mails can constitute an agreement. So can a nod and a wink.

What are the consequences of infringement? These differ depending on whether we are talking about the institution or the individual. As far as the institution is concerned, the Office of Fair Trading can impose significant fines (of up to 10% of income). In addition, anyone who has suffered loss as a result of the agreement or conduct can sue for damages. As for the individual, there is the prospect of criminal sanctions for anyone dishonestly involved in agreements or concerted practices which fix prices (tuition fees, whether their own or those of an associated body such as an FE college providing a course under a franchise), share markets (divvy up courses between institutions) or limit supply (agree a cap on student numbers).

The independent schools case illustrates the breadth of application of the law in this area. There was no explicit agreement between the schools as to what fees they would charge. They had simply exchanged confidential information regarding future pricing intentions. But that was enough. Uncertainty between competitors as to what each other is doing in the market is one of the key drivers of independent behaviour (and thus competition). People who receive information as to a competitor’s intentions can be expected to take this information into account in determining their own conduct. And what competition law requires is decisions to be made on a unilateral basis. So make sure you are sitting uncomfortably...

Competition law is likely to become increasingly important in a wide variety of situations, including mergers and collaborative arrangements and estates matters, as well as in relation to fees. For further information contact:

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An interview with...

Professor Andy Westwood, Chief Executive GuildHE

One of the major membership bodies in UK education, GuildHE is playing an important role in the national debate during a turbulent time. We talked to its recently installed Chief Executive Professor Andy Westwood.

Who does GuildHE represent and what do you do?
Broadly speaking we represent many smaller and more specialist HE providers. Of course many of our members have changed and grown over the years so not every one of them fits into the same category.

The main reason for our existence is that we’re a voice for those who wouldn’t have a voice otherwise. We also do a lot of things with UUK and with them, co-own many of the HE bodies such as the Leadership Foundation, UCAS and QAA.

How did you end up as Chief Executive?
I worked for both FE and HE institutions in the 1990s and I’ve spent most of the past ten years working in government or in think tanks, writing policy and assisting ministers. I was a member of the Leitch Review team and was a special adviser to John Denham.

Is your association with the previous government a problem with the current one?
I hope not. I’ve been in this job for five months and I’ve been working closely with Coalition ministers and officials. People like David Willetts have been around this sector for a very long time and I’ve known him in various capacities. Whilst he knows I have a political history, I’d also hope that he appreciates that my roots in education run deeper than party affiliation.

GuildHE is on record as saying that the Browne Review has sown the seeds for another review later on. Would you care to explain?
We have to remember that the Browne Review was the result of a compromise during the political process of introducing top up fees in 2004. Essentially it was conceived as a review of the tuition fee arrangements once they were bedded in, to make sure that disadvantaged students weren’t missing out. Whatever the actual impact of these next changes, the one certainty is that we’ll also have to look at how they have bedded in. I’ll be very surprised if there isn’t a formal process that evaluates how these plans have affected both students and institutions some time after 2012.

Do you think the changes will work in practice?
There are so many things that could create problems that it’s hard to be categorical about whether they will work, although there are elements we can probably be sure about. The demand for HE will remain incredibly high and grow exponentially, but also some institutions will struggle and some may go to the wall.

Any judgement on the system as a whole needs to be contextualised in terms of individual institutions and groups of students. For instance, if a region loses an important institution, or a group stops participating in the system, then that would be very damaging. Would that mean the system as a whole has failed? Probably not but it would mean a need to take a close look at what’s happening in particular areas.

You’re very vocal about the role of education in regeneration
One of the things we’ve been talking about in relation to the Browne Report is the local dimension to all of the changes. My view – and it’s shared amongst many others – is that colleges and universities are incredibly important for the local and national economy and in sectors ranging from low carbon technology to the creative industries.

That area of policy simply hasn’t been addressed adequately in the response to Browne. Whilst institutions can do more, politicians have to think what is the best way of ensuring that these institutions are one of the major motors of economic growth.

“The demand for HE will remain incredibly high and grow exponentially, but also some institutions will struggle and some may go to the wall.”
Your members include private HE providers. Why is that?

I think we have to be very clear that the world in front of us is very different from the world behind us. According to the OECD, public universities are those receiving public funding and where government or government bodies have a role at board level and/or direct powers over the chief executive and institutional strategy. By this definition no universities in England would be regarded as wholly public. Therefore describing an institution as private, public or not for profit is rather too simplistic. Lots of nominally public institutions are in partnership with private organisations and models of ownership will continue to evolve in the future.

We have more of a foot in the private sector than most bodies and many of our private institutions are associates rather than full members. Whatever education they provide the defining factor is that it has to be of the highest quality. If it is then we can be more relaxed about the ownership status of the institution that offers it.

Where do you see you and your members in the next five years?

What we want to see is a membership of thriving and diverse institutions – that will be a good place for both them and GuildHE. Specialisms are very good things in terms of catalysing economic development at a local and national level and giving students a real choice. We want the outside world to appreciate that diversity.
The public sector is looking seriously at options to share services in light of the current financial pressures and the government’s commitment to reduce bureaucracy and improve service delivery in a cost effective way.

Shared services are in essence organisational collaboration in the provision of services. There are examples of sharing ‘back office’ functions as well as frontline services but the overall aim is to save costs whilst improving the quality of services.

Local authorities have been sharing services for many years, either through shared arrangements with other public authorities or by providing services to schools, colleges or housing associations. There are also examples of shared services with health authorities and the police. In the case of health, examples include shared services for assessment and provision of care as well as strategic management arrangements and shared service delivery teams. There are examples of shared call centres with the police which operate alongside the emergency 999 service as a single non-emergency number. These arrangements have been highly successful in ensuring appropriate responses to individual calls and reducing pressure on the emergency services.

Arrangements are becoming more adventurous and sophisticated but are also being tailored to meet local need. This sits very well with the agenda for decentralisation, personalisation and the Big Society. A number of local authorities have used shared service arrangements to deliver efficiencies, review the way they deliver services to ensure they meet the needs of citizens and, in many instances, have achieved this in partnership with the private sector. In some cases, these have been linked with managing budgets across sectors in a particular locality through the pilots for Total Place budgeting. The pilots have produced impressive results, indicating significant financial savings. In broad terms, it is anticipated that savings of 20% or more can be made through shared arrangements.
Models for delivery

Although all the arrangements are individual, local authorities have used three basic models:

1. an administrative model
2. a contractual model
3. a corporate model.

The administrative model involves shared administrative arrangements between two local authorities where staff and assets will be shared, as will liabilities. A contractual model is used where the arrangements are between a local authority and another public body or a social enterprise or charity. These arrangements may also involve major contractual arrangements with a third party to assist in the delivery of the infrastructure to support more ambitious projects. This could include IT or longer term asset management arrangements. These can also be delivered through a strategic partnership arrangement.

The third model is a corporate model where a specific company is set up to deliver the services. This can either be a wholly owned public sector company or, more often, is a special purpose vehicle with public sector and private sector shared arrangements.

Evidence from shared arrangements in the local authority sector demonstrate that savings of between 20% and 30% can be made. In common with most of the public sector, back office functions lend themselves well to shared arrangements, for example HR, IT, financial payroll and payment systems, estates management, libraries, catering and transport. Shared procurement is also a possibility. The government is also aiming to have shared public sector data available and this will mean a move towards increased shared record keeping.

What are the barriers?

There is a general reluctance by managers to move to shared services, particularly in untested areas. Managers are concerned about the risks of failure and consequences for service delivery. There are also specific issues to address in terms of VAT (discussed in the autumn 2010 issue of Instep) and a concern that where projects are ambitious the time taken to procure them and set up the arrangements will mean savings cannot be made. The practicalities of transferring staff, property and assets and reaching agreement about liabilities, pension issues and how long the arrangements should last in uncertain economic times are also a challenge.

How to choose the model

Local authorities have found that it is important to be clear about the objectives you are trying to achieve and to make sure that there is the legal power to enter into the arrangements. A business case needs to be developed and approved through the normal decision making processes. It needs to set out what will be achieved within what timescales and within what budget. Consideration will also need to be given to the governance arrangements, reporting requirements and the arrangements for working practices. Will staff be transferred or seconded? How long will the arrangements last for? Expect this streamlining to extend to the management of institutions. Schools will have greater control over their financial and general management arrangements and in further and higher education funding is to follow the student, as it already does for schools.

Conclusion

Although changing the way services are delivered is not easy when there are so many legal obligations to comply with, there are options worth exploring which will make a real difference to the quality of educational services and efficiency.

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Managing your estate in a harsh economic climate – driving down costs and maximising revenue

In the current economic climate, and with the further funding cuts announced by HEFCE at the beginning of February, pro-active estates management to drive down costs and maximise revenue has never been more important. This article considers some ideas around this.

Disposals and re-gearing

If capital receipts are a key requirement for you, restructuring your land holdings and/or your occupational arrangements may achieve this.

Disposing of surplus land or investment portfolios are obvious examples but another option is sale and leaseback arrangements. There are pros and cons with these but investors are likely to be interested given the covenant strength of education institutions.

Restructuring your current occupational arrangements could help you generate more surplus land, particularly where funding cuts mean that some departments need less space. For example:

- If you have, or will have, vacant space in strategic sites, could you relocate staff/services into that space from less strategic sites, leaving you free to dispose of or let the space in the less strategic sites?
- If you hold leasehold properties, are the leases coming to an end soon or do any contain break clauses? If so, could you relocate staff/services from those properties and terminate the leases?

Outsourcing and partnering

Creating joint ventures with private sector partners can often make the best use of the value and availability of your land assets. Working together can ensure that developments of strategically required, refurbished or constructed facilities are project managed, maintained and enhanced by the commercial understanding and connections of, and financial enhancements available to, the partnering entity.

Joint ventures are becoming increasingly common in the provision of student accommodation, not just for securing new build accommodation but also for providing additional accommodation and refurbishing institution owned accommodation. There are various ways these arrangements can be structured, from passing over all the risk, management and cost to the private sector partner to more innovative arrangements where risk and profit is shared.

In terms of the management and provision of services more generally, more innovative options of procuring services jointly with other education institutions or by sharing services with other education institutions could achieve greater cost savings than simply outsourcing services to a procured provider. For example, a recent article in Times Higher Education claimed that universities could save £2.7 billion by sharing services and outsourcing the majority of functions. See the article on lessons from local government in this issue of Instep.

Maximising revenue

If you have pro-actively managed your vacant space but do not wish to dispose of it, renting could provide you with a valuable new income stream. Current market conditions mean that there are many tenants looking for short term leases on flexible arrangements. Also, there are a number of private retailers like Starbucks and WHSmith that are keen to maximise the ‘captive audience’ of student campuses and which may be happy to take short term lettings to get a foothold into a campus. Both options could sit well with securing an interim income stream whilst you take more strategic decisions about your portfolio.

Also, do your properties lend themselves to other forms of letting arrangements such as advertisement hoardings, telecoms apparatus or ATM machines? Alternatively, could leisure or other facilities be opened up to companies and/or the public to hire, such as conference space, lecture theatres, sports facilities or swimming pools?
If surplus space is open land, could you consider car parking or other uses? There may be title and/or planning restrictions that you may need to overcome, but such uses could produce a valuable income stream. In the interim, have you taken steps to ensure the site is safe and secure to avoid issues associated with trespassers or squatters? Investing money up front could save you significant legal and repair costs in the long term.

Driving down costs and maximising revenues from leasehold property

Pro-actively reviewing and managing your property income and costs will also make a real difference to your bottom line. For example:

- **Rent** – are you actively managing your current income streams to get the most out of them? Do you have systems in place to identify problem tenants before they fail and, if a tenant is unable to pay or goes under, do you have a strategy for minimising your exposure and recovering monies from other parties?

- **Service charges** – where you are paying, have you analysed your most expensive charges to check that your landlord is really entitled to recover what has been billed? Where you are collecting, are you sure that you are entitled to claim what you are charging and do you have the paperwork in place to win any challenge?

- **Lease renewals** – are you thinking about your lease renewals strategically and, in a falling market, are you making the process work for you? We have analysed the lease renewal process and, on average, a lease renewal takes 8.3 months. We have worked with clients to refine their processes and have reduced this to an average of 2.8 months, which has resulted in significant costs savings.

- **Dilapidations** – irrespective of whether you are looking to maximise or minimise a dilapidations payout, proactively managing a claim is far more likely to achieve your preferred outcome. Do you have a clear strategy for doing this?

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The new public sector equality duties

The Equality Act 2010 includes a new public sector single equality duty (PSED) with which further and higher education institutions and schools must comply. The PSED will replace the current three separate equality duties relating to race, disability and gender. The new general duty covers all of the eight protected characteristics; age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Marriage and civil partnership are also covered but only for certain aspects of the duty. The PSED will come into force in England and Scotland on 6 April 2011 and in Wales in spring/summer 2011. It is split into two parts: the general duty and the specific duties.

The general duty

In summary, the overarching general duty requires public bodies, including education institutions, to:

- eliminate unlawful discrimination, harassment and victimisation
- advance equality of opportunity
- foster good relations.

Specific duties underpin and aid compliance with the general duty. Most (but not all) public bodies required to comply with the general duty are required to comply with the specific duties.

The specific duties

England

Following a consultation exercise, the Government Equalities Office (GEO) has recently published draft regulations detailing the specific duties and the public bodies to which they will apply, together with a consultation response.

The draft Regulations to which public bodies in England (and certain bodies operating across Great Britain in relation to non-devolved functions) will be subject contain the following requirements:

Publication of information

- Education institutions will have to publish, by 31 July 2011 (31 December 2011 for schools) and at least annually thereafter, sufficient information to demonstrate their compliance with the general equality duty across its functions.
- Institutions with 150 employees or more will have to include information to show the effect their policies and procedures have had on people who share a relevant protected characteristic.
- Institutions must publish:
  - evidence of analysis undertaken to establish whether policies and practices further the aims of the general duty
  - details of the information they considered in carrying out this analysis
  - details of the engagement they undertook with people having these characteristics.

The 31 July date means institutions should immediately begin preparations for compliance if they have not already done so. This may include considering what information they hold which demonstrates compliance with the general equality duty and what qualitative data could usefully be published and ensuring that the information is in a publishable format.

Equality objectives

Institutions (including schools) will be required to prepare and publish, by 6 April 2012:

- objectives which it reasonably thinks that it should achieve to meet one or more aims of the general equality duty
- details of the engagement that it undertook in developing its objectives.

It is important to note that these objectives should cover both staff and students. The EHRC states that the PSED is “a framework to help institutions tackle persistent and long-standing issues of disadvantage, such as gender stereotyping in subject choice [and] attainment gaps between white and black and minority ethnic students”.
Institutions are well advised not to be lured into a false sense of security by a date which seems so far away. Best practice would be to begin planning now for effective and early engagement and not to be sidetracked into other seemingly more pressing issues.

What’s changed
The new PSED is, according to the Government’s Equalities Minister, “a powerful means of embedding equality considerations into all the policies and practices of the public sector. The Duty brings to an end the era of Government-inspired bureaucratic targets and shifts power to local people”. Essentially, there is a significant shift from a ‘rights-based’ approach to an ‘information-based’ approach, as exemplified by the shift away from the right of stakeholders, such as trade unions, to be consulted towards a requirement to publish information about ‘engagement’ with those stakeholders, a term new to the equality duties. The guidance states that this is “a broad term which covers a range of activities, from formal public consultations to direct engagement with people from protected groups”.

Amidst fears that it may affect the priority with which equality is treated, institutions will also no longer be required to publish an equality plan setting out the steps they intend to take with a view to achieving their equality objectives.

Scotland and Wales
The Scottish Government and the Welsh Assembly Government have each consulted on their own proposals and will publish Regulations setting out their plans for specific duties for relevant Scottish or Welsh public bodies in due course.

What should institutions be doing now?
Although institutions will have a head start as far as race, disability and gender is concerned, institutions may be well advised to start to gather information and to begin to ‘engage’ stakeholders with regard to the ‘new’ strands as soon as possible. This will enable them to properly consider what objectives they may be able to achieve.

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Events

We will once again be supporting our sector groups this year by delivering workshops and plenary sessions and sending Eversheds delegates along. As always, we would love to see you if you are there! Here’s an update of activities for Spring 2011:

AHUA Conference 4–6 April 2011
The AHUA Annual Conference will take place from 4–6 April 2011 at the University of Exeter. Eversheds is delighted to be sponsoring this year’s event where Diane Gilhooley and Nicola Bennison will be delivering a session on topical HR issues.

Eversheds/IDRAS/JISC Legal Seminar 11 April 2011
This seminar at our London offices aims to alert senior managers in institutions providing higher education courses of the need to review student procedures and methods of resolving student claims and complaints given the advent of higher tuition fees and the growth of a consumer culture amongst students.

UHR Conference 17–18 May 2011
The UHR Annual Conference will take place from 17–20 May at the Marriott Renaissance Hotel in Manchester. Eversheds is delighted to be providing sponsorship for this event where Diane Gilhooley will be speaking.

Conferences and seminars

We have recently released our new National Seminar programme for 2011 with a range of new and exciting topics from social networking and shared services to managing performance and mediation – we are sure you will find something of interest! For full information on our programme please visit www.eversheds.com/training and select ‘Education’ from the subject box.

Eversheds in print ...

Eversheds have been working closely with the UK HE International Unit on a Guide to UK HE for Overseas Universities. This publication is due to be launched by the International Unit in June/July 2011.

We have also been helping the International Unit with its report ‘Guide to Staffing Strategies for UK Universities’ by John Fielden and Erica Gillard, due to be published in March 2011.

If you want further details please contact Louise Stewart louisestewart@eversheds.com or Elizabeth Farnell at the International Unit elizabeth.farnell@international.ac.uk

The team expands...

We would like to extend a warm welcome to Craig Luton, Solicitor, who joins us from Pinsent Masons. Craig will be based in our Cambridge office supporting the company commercial team.

Laura Stanley, Business Manager – Education, has moved on to another role with Eversheds. Louise Stewart took over Lauren’s role on 1 February. Elizabeth Keates joined the team on 28 February as Client Services Co-ordinator.

Good news – we are number 1!

The Eversheds Education team has been ranked in Band 1 again in the Chambers & Partners and Legal 500 directories, and is the leading adviser in the Further & Higher Education Financial Yearbooks.

Following these excellent results, we would like to take this opportunity to thank our clients for their kind comments and ongoing support.

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Under the Data Protection Act, you may request details of personal information we hold about you. Our address for information requests is Eversheds LLP, Eversheds House, 70 Great Bridgewater Street, Manchester M1 5ES for the attention of Louise Stewart (telephone on +44 161 831 8119 or e-mail louisestewart@eversheds.com). If at a future date you believe that any information we hold about you is incorrect or incomplete, you should write to or e-mail us without delay at the above address. Any information which is incorrect or incomplete will be corrected promptly.

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