

Industry and Regulatory Committee

The work of the Office for Students

Submission from Brunel University London¹

April 2023

Executive Summary

- There is a lack of clarity in respect of the priorities of the OfS.
 - There is concern about the potential for excessive power being exercised by the Chief Executive of the OfS.
 - There is a lack of clarity in respect of the future of quality assurance as a result of the Quality Assurance Agency for Higher Education's decision not to continue as the OfS' Designated Quality Body.
 - Consideration should be given to measuring added value when assessing value for money for students.
 - The costs of compliance and responding to OfS consultations are disproportionate.
 - The OfS should adopt the widely accepted principles of good regulatory practice, working in partnership with the sector.
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Question 1:

Are the OfS' statutory duties clear and appropriate? How successful has the OfS been in performing these duties, and have some duties been prioritised over others?

- 1.1 The duties of the OfS are detailed in Part 1 HERA 2017. The OfS has prioritised four regulatory outcomes (access, quality, employability and value for money) over its other statutory duties.
- 1.2 The duties are reasonably clear. In terms of being appropriate, there is the question as to whether the emphasis upon students encompasses the wider role of universities - including research, for example, which HEFCE previously covered.
- 1.3 It is difficult to see that the OfS has done anything to protect institutional autonomy. The guidance on the [publication of information](#), [free speech](#), and the consultation on [regulating sexual assault and harassment](#) all arguably erode autonomy contrary to its statutory duty. The OfS also has a duty to promote competition and it is difficult to demonstrate any progress in this respect other than the creation of a scheme of registration for new providers.
- 1.4 When the OfS exercises its duties and asks for data, sometimes at short notice, it is difficult to see where it is going as a regulator, what its priorities are and why those data are being requested. This problem is compounded by a lack of dialogue from the OfS.

¹ All enquires should be made to Dr Nicola Rogers, Chief of Staff, Brunel University London

Question 2:

How closely does the OfS' regulatory framework adhere to its statutory duties? How has this framework developed over time, and what impacts has this had on higher education providers?

- 2.1 The regulatory framework adheres to the OfS' own, reduced, regulatory priorities. Many of the registration conditions are very specific and may not last the test of time. For example, there is an ongoing condition of registration to comply with guidance on consumer protection law, which means 2015 guidance issued by the Consumer and Markets Authority (CMA). This was relevant when the framework was written but is now almost 10 years old, with the underpinning legislative framework having been completely rewritten since then. The CMA has concluded its work in HE so this condition of registration - although ongoing – appears to be increasingly irrelevant.
- 2.2 The regulatory framework has not developed significantly, the only addition being the B3 conditions relating to student outcomes. It has been supplemented with significant amounts of “regulatory advice” which offers little in the way of support but requires considerable resource to deliver (see paragraphs 7.5 and 7.6 below).
- 2.3 By way of a further example, the OfS has a statutory duty to be “transparent, accountable, proportionate and consistent”. However, in relation to quality and standards, the Regulatory Framework says that the OfS may choose to use its investigatory powers *before* engaging with providers and, further, the [OfS scheme of delegation](#) (22 September 2020) says that the Chief Executive could for example, make all decisions about investigations, publishing information about providers and make provisional and final decisions about breaches of regulatory conditions.
Centralising power in a single person is not consistent with the statutory duties of the OfS.

Question 4:

Does the OfS have sufficient powers, resources and expertise to meet its duties? How will its expertise be affected by the Quality Assurance Agency for Higher Education's decision not to continue as the OfS' Designated Quality Body?

- 4.1 It is not clear whether the OfS has the resource to take on investigations directly as it has said it intends to do. In order to establish whether this is the case, the OfS should publish information on the investigations it has carried out directly to date, the costs of those and its expectations of the numbers and costs of investigations it intends to handle in the future. It will also need to recruit individuals experienced in quality assurance and external review, who understand the history (especially the last 10 years) of how policy and process have been designed, and can provide advice and guidance for the betterment of an institution and its students.
- 4.2 There is a further lack of clarity in terms of what the outcomes may be, as a direct intervention from the OfS on quality-based issues is not documented. The sector is aware of the OfS powers, but we are yet to see any reports of outcomes, similar to a QAA review or an Ofsted report.

- 4.3 The role of the QAA has been unclear since the establishment of the OfS, as has the increasing rhetoric around the Quality Code and its non-binding nature. Currently, the Quality Code still stands as the most comprehensive and useful guide to the management of quality and standards. If that is to be increasingly positioned as good advice/practice, institutions will lack clarity on the nature of national standards for quality management. The Regulatory Framework does provide pointers, but as a source of advice, it is more of a cautionary tale than a blueprint for quality and compliance.
- 4.4 Until recently, the QAA, as the quality arm of the OfS, gave some assurance that despite a new regulatory regime, the principles of the Quality Code, and the culture around quality, enhancement, and sharing sector practice, would continue. It is important that the OfS maintains that function so that the sector has something positive and developmental to engage in, and not be in a situation where the focus on the opinions and outputs of the OfS is similar to the approach to Ofsted, where the principal concern of providers is how to survive an inspection.
- 4.5 Fundamentally, if there is not a separate Designated Quality Body (DQB), there is a significant issue of governance, since the OfS will effectively be assessing its own work in the areas previously covered by the QAA. The role of the DQB needs to be carried out independently of the OfS by an independent organisation with a clear remit. ***Were the current system to continue such that there was no independent DQB, there is significant concern that there will be an erosion of quality over time which will adversely impact on the excellent reputation of UK higher education.***

Question 5:

How does the OfS measure value for money for students? How can this be measured in an objective, tangible way that is not based on economic or political judgements about the value of subject areas or types of institution?

- 5.1 The OfS has only a short section about value for money, which was published in January 2020. [Value for money - what should providers do? - Office for Students](#). They mainly describe how they ensure value for money for the students through:
- their conditions of registration especially in relation to teaching quality and TEF;
 - requirements to provide good information to the students by providers adhering to CMA legislation;
 - asking institutions for financial transparency by publishing how they use the money and senior staff salaries.
- 5.2 HEFCE had tried to introduce a return for institutions on how they ensure value for money, which was also minimal in scope. One more profitable approach would be to examine the value added to individuals by focusing on those students from underprivileged backgrounds and see how they progress through their first few years after university. Positive progression could be measured by salaries, professions, entrepreneurship, etc.

Question 7:

What is the nature of the OfS' relationship with higher education providers? Does the OfS strike the right balance between working collaboratively with universities and providing robust challenge?

- 7.1 From a Brunel perspective, the approach has been very much at arm's length. It is a mixture of formal consultations about intended increases to the regulatory scope and reactive responses to self-reporting. But even the reactions to self-reporting have been limited to "keep us informed". There is no advice or direction on how to respond to specific incidents.
- 7.2 This approach runs very much counter to the principles of good public regulation. For example, the Electoral Commission, which oversees the conduct of elections and compliance with political finance legislation in the United Kingdom, issues comprehensive guidance to a range of different participants to both further the understanding of the regulations and assist with compliance. This approach is consistent with good regulatory practice, such that regulators encourage and assist those it regulates to comply with the law through guidance material, training and advice provision. The approach taken by the Electoral Commission is highly valued by participants. For example, a study of election agents conducted after the 2019 election found high overall levels of satisfaction in the rating of the Electoral Commission as a useful source of advice and guidance.²
- 7.3 In general, it is regarded as good practice for regulators to set out their approach and methodology to enforcement and investigations in a written document. That document should not only describe the powers of the regulator but how and when it will deploy them. **We would urge the OfS to adopt this accepted good regulatory practice.**
- 7.4 Contrary to the good practice outlined above, the current approach taken by the OfS is not collaborative and is not carried out in a spirit of partnership. As a consequence, compliance and consultation with the OfS are often burdensome and ineffective. The lack of trust shown by the OfS towards HE providers means that there is the potential for the conditions of registration to be seen as an opportunity for punitive action against HE providers rather than as a desire to ensure that students have a safe, effective and supportive learning environment which enables them to succeed and progress.
- 7.5 The cost of compliance is also considerable and frequently generates significant duplication of effort. For example, the *Data Futures* programme introduced by the OfS (alongside the existing HESA data) has been especially costly, both in terms of person hours and the necessity to hire consultant programmers. Such costs have been further inflated by the changes in requirements introduced by the OfS within the project. We conservatively estimate that *Data Futures* has cost the University around £111k to date, including some £60k of staff time and around £50k on computer programming consultancy. This is in addition to the routine costs of compiling the B3 data on student outcomes, which we estimate take around 544 person-hours per

² Fisher, J. & Kumar, J. (2020) *Attitudes of Electoral Agents on the Administration of the 2019 General Election*. Report Produced for the Electoral Commission

annum, at an approximate cost of £115k. **Overall, the costs of compliance with the regulatory burden imposed by the OfS are considerable.**

- 7.6 A further issue is that the OfS issues regular consultations which do not appear to represent genuine attempts to consult the sector. At Brunel, those consultations to which we have responded have proved to be very costly in person-hours. For example, the recent consultation on the TEF required comments from some 20 staff, totalling approximately 60 person-hours at an approximate cost of £2,200. Other examples include the consultations on regulating student outcomes, which involved seven members of staff, totalling some 96 person-hours at an approximate cost of £3,000. Despite the considerable cost of engaging in the consultations, the outcome of these has rarely led to changes of any consequence - a view shared by colleagues at other institutions. **Overall, the cost of engaging with OfS consultations is considerable, with little tangible return for the considerable effort and cost involved.**
- 7.7 Such a situation creates a clear disincentive to invest resource in the consultation process. As a responsible institution, we must regularly assess the costs and benefits of engaging in a wide range of activities. In the case of OfS consultations, we find that the cost and effort involved in providing a response are not warranted, the result being that the OfS becomes less aware of the views of HEIs. This is regrettable as HEIs are committed to providing a good student experience and supporting students, and our knowledge and experience in such matters are much closer to students' needs than that of the OfS. **A partnership model, built on the principles of good regulatory practice is much more likely to be positive for the student sector.**
- 7.8 The language used in communications with providers further adds to the impression that OfS does not work in partnership with the sector. The opening statement on the consultation on Harassment and Sexual Misconduct ([Consultation on a new approach to regulating harassment and sexual misconduct in English higher education \(officeforstudents.org.uk\)](#)), extract below, which is not very "friendly". *"We had hoped to see concerns about harassment and sexual misconduct addressed through effective self-regulation by universities and colleges. We have undertaken a range of activities to support the sector, including the development of sector-wide effective practice, guidance and resources through our Catalyst funding programme, through which we provided £4.7 million to 119 projects to tackle sexual misconduct, online harassment, and hate crime, including religion-based hate crime. In April 2021, we set clear and consistent voluntary standards in our statement of expectations to support providers to develop and implement effective systems, policies and processes, to prevent and respond to incidents of harassment and sexual misconduct.*

The independent evaluation of our statement of expectations, published in November 2022, found that the statement has led to some improvements in the policies, systems and processes designed to address harassment and sexual misconduct and increased recognition of this as a serious issue. However, it also found clear variations in practice. Approaches in some universities and colleges did not always achieve their aims. In particular, disclosures of incidents were not always properly followed up with formal reports. Some universities and colleges have either been slow to take up the statement of expectations or have not sufficiently prioritised this issue. There has also been a lack of focus on forms of harassment that are not

sexual harassment. Our evaluation ultimately concluded that while some progress has been made, it has not been sufficient’.

- 7.9 The OfS made itself clear from its inception that it does not seek to establish a relationship with providers but is determined to remain at arms-length as a regulator. This has not proved to be an effective approach. There is little evidence that it seeks to influence behaviours through collaboration, as practised successfully by HEFCE. Further, in the absence of appropriate guidance being provided by OfS, there is a concern that attempts by providers to bridge that void, for instance, through seeking guidance from the OfS on issues of ambiguity, would be taken by the OfS as being indicative of lacking competence or judgment on the part of the institution. HEIs receive numerous OfS consultations throughout the academic year that generate a significant amount of work for the HEIs, yet there is little evidence that the OfS has taken onboard those representations (see paragraph 7.6. above, for example). In sum, confining activity to providing ‘robust challenge’ and generating excess cost through large-scale consultation and increased regulation does not in and of itself, generate better outcomes for students. A partnership model, where the OfS and providers have a shared vision, is much more likely to deliver that goal.

Question 8:

What systemic financial risks are present in the higher education sector? Is there the potential for significant provider failures if these risks crystallise, for example through an unexpected reduction in numbers of overseas students or an unexpected increase in pension costs? Are these risks limited to particular groups of providers or are they widespread or systemic in nature?

- 8.1 A downturn in overseas students could drive a lower-tariff institution to insolvency or, at the very least, lead to an auditor refusing to sign off a going concern statement, effectively closing the institution overnight. This is in the context of universities already absorbing the inflationary reduction of home tuition fee income being frozen at 2017 levels.
- 8.2 Actuarial reassessments of pension deficits are unlikely to cause cashflow issues at an institutional level, but a pension trustee requiring increased contributions at unaffordable levels could cause institutions to leave existing schemes. Such a situation would run the risk of creating a snowball effect of trustees further increasing contributions and leading to further exits from pension schemes.
- 8.3 The continued tuition fee freeze will reduce the affordability of some programmes that are more expensive to run – particularly those with high capital costs in STEM areas - leading to a reduction in choice for students and reduced competition – both of which are statutory priorities of the OfS.