

REGULATION

BRIEFING 5: REFLECTIONS AND RECOMMENDATIONS



Distinction and Diversity
in Higher Education



JULY 2023

About GuildHE

GuildHE is an officially recognised representative body for UK Higher Education, championing distinction and diversity in the sector. Our 60 members include universities, university colleges, further education colleges and specialist institutions, representing over 150,000 students. Member institutions include some major providers in professional subject areas including art, design and media, music and the performing arts; agriculture and food; education; business and law, theology, the built environment; health and sports.

Recommendations

In summary, the briefing calls for clearer and more consistent accountability and a sharp reduction in the costs of regulatory compliance. It argues that, whilst the legislative framework doesn't make the Office for Students (OfS) wholly independent of government, some crucial aspects of regulatory independence have been lost or compromised and need to be restored; and that as a result of failure to engage (and sufficiently evolve) fit for purpose accountability structures that trust between the OfS and those it regulates has been badly damaged and needs to be rebuilt. Specifically we are calling for the following steps:

- 1 The Education Committee should routinely consider the OfS's annual report via an evidence session with the Chair and chief executive with the option of asking for written evidence from other bodies if necessary.
- 2 The OfS Student Panel should set their own agenda and highlight what they think are important aspects of the student experience for the OfS to consider, and be supported to undertake student-led research.
- 3 The OfS should ensure student involvement across its own regulatory activities, including in quality, Degree Awarding Powers (DAPs), governance investigations, and formalising involvement in the Access and Participation Plan process.
- 4 The OfS should produce a student engagement impact report annually about how it engages students in decision making.
- 5 The OfS should run an annual survey on its own performance as a regulator and must genuinely engage with and respond to the concerns of providers. The Department for Education (DfE) needs to demonstrate how it uses feedback from providers as part of its performance management of the OfS.
- 6 The OfS must change its approach to risk and encouraging compliance, including the associated data burden. This should include disapplying ongoing conditions of registration in providers that have demonstrated compliance and earned autonomy.
- 7 The OfS must ensure a systematic process to prevent regulatory burden further increasing, with a "one in, one out" approach to new conditions of registration.
- 8 The OfS and other post-18 regulators need to work together proactively to avoid duplication, especially with regard to data burden. The DfE should also reconvene the Higher Education Data Reduction Taskforce with a clear timeline for reporting.
- 9 The OfS should consider how it can change the management and governance of the Designated Quality Body functions that it is bringing in-house, incorporating principles of basing judgements on academic expertise, independence of decision-making from government and giving due regard to UK-wide coherence.
- 10 The OfS should demonstrate its capacity for self reflection and continual improvement, and publish clear service standards including in relation to running consultations, responding to queries and communications.



Introduction

GuildHE fully supports effective regulation of higher education. Good regulation helps protect students and assures the quality of the higher education they receive; helps support institutions to thrive; and provides assurance to government and taxpayers that public funding is being well spent and policy objectives met efficiently and effectively. However, ineffective regulation can impose unnecessary costs, stifle innovation and – in higher education – divert resources from frontline teaching and student support. GuildHE's series of briefings have sought to examine the impact of the current regulatory regime and suggest improvements.

We began our programme of briefings and articles in November last year. Since then we have covered a range of topics including regulatory burden and cost, duplicate regulators, alternative approaches to regulation within the current legislative framework, regulating in the student interest and what world class regulation in higher education might look like. The briefings have drawn on examples of regulatory approaches in other sectors and other countries and been informed by the views of students.

This final briefing in the series reflects on some of the key messages in our earlier reports but also on the oral and written evidence provided to the House of Lords' Industry and Regulators Committee inquiry into the work of the OfS as well as subsequent commentary.

In brief, it calls for clearer and more consistent accountability and a sharp reduction in the costs of regulatory compliance. And it argues that, whilst the legislative framework doesn't make the OfS wholly independent of government, some crucial aspects of regulatory independence have been lost or compromised and need to be restored; and that as a result of failure to engage (and sufficiently evolve) fit for purpose accountability structures that trust between the OfS and those it regulates has been badly damaged and needs to be rebuilt.

Accountability

Regulators are powerful. The OfS oversees a system of 2.4 million students in England as well as indirectly influencing the higher education systems in Scotland, Wales and Northern Ireland and the research and innovation system across the UK. Its conditions of registration drive the management and governance systems of the institutions it regulates: institutions with a collective turnover of £40 billion. It can levy fines, impose sanctions, remove a provider's power to award its own degrees, and suspend or remove a provider from the register (in the latter instance effectively ending its ability to trade). Given that, we have argued that world-class regulators must have clear accountability mechanisms to their different stakeholders - to the customers of the regulated bodies, to the wider public through parliament and to those they regulate. "Effective regulation... requires effective accountability"¹.

Accountability to Parliament

The Lords' Industry and Regulators Committee inquiry into the OfS has demonstrated the value of proper Parliamentary scrutiny, with 60 pieces of written evidence submitted and probing questions

1. <https://publications.parliament.uk/pa/ld200304/ldselect/ldconst/150/150.pdf>



asked of witnesses by the Committee. It engaged all stakeholders - students, universities, government and the OfS - alongside other voices including former Ministers, and those with experience in other HE systems. It has been a thorough process and, whatever its findings, vindicates the request² from the higher education sector for an inquiry (albeit a request made initially to the House of Commons Education Select Committee). As the Lords' Committee said, an inquiry to scrutinise the OfS's work was "both necessary and timely".

But there was no guarantee of such scrutiny – it is at the discretion of relevant Committees. Whether or not this discretionary approach is the right one is a bigger question that has been debated before. On the one hand, it has the advantage of flexibility: with limited resources it allows a Committee to decide when and where to focus their attention on particular issues within their remit. On the other, it can risk leaving an accountability gap with Parliament that would be filled with a more systematic approach.

Almost 20 years ago, the House of Lords' Constitution Committee looked at holding the "Regulatory State" accountable. It recommended scrutiny by a dedicated Parliamentary committee, ideally of both Houses (an idea that resurfaced in April in a report from the Regulatory Reform Group of Conservative Parliamentarians) and that select committees should consider expanding their terms of reference routinely to consider and react to regulators' annual reports and monitor the use of resources. A less discretionary approach is present in other countries. In his HEPI report³ on the Australian approach to higher education regulation, Anthony McClaran noted that the CEO and Chief Commissioner of TEQSA were required to appear before the Senate Estimates Committee three times a year.

On balance, we think the argument for routine scrutiny of regulators is convincing. The Education Committee should routinely consider the OfS's annual report via an evidence session with the Chair and CEO with the option of asking for written evidence from other bodies if necessary.

Accountability to students

GuildHE's earlier briefing⁴ noted how the long history of student engagement, nationally through the NUS and at institutional level through students' unions as well as at a sector-level through QAA and other sector bodies, may mean that expectations of the OfS are higher than of other regulators in other sectors. The OfS acknowledges this, recognising that its name and regulatory approach can create expectations from students it might not be able to meet.

The OfS describes itself as "focused on regulating in the interests of students" operationalised through an organisational strategy that "focuses on two core areas that matter a lot to students: quality and standards; and equality of opportunity". Its student engagement strategy then sets out how students are involved in implementing those priorities – processes that include a student Board member, a student panel, direct student engagement in the TEF and the National Student Survey.

2. Letter to the Chair of the Education Select Committee January 2023 from GuildHE, Million Plus, Russell Group and University Alliance. Available at: <https://guildhe.ac.uk/guildhe-regulation-briefings-series/>

3. <https://www.hepi.ac.uk/2023/06/08/lessons-from-australia-for-the-regulation-of-english-higher-education-by-anthony-mcclaran/>

4. Regulating in the Student Interest. Kate Wicklow, GuildHE, 2023. Available at: <https://guildhe.ac.uk/guildhe-regulation-briefings-series/>



This essentially hierarchical approach – strategy, priorities, student engagement in those priorities – is understandable in a regulator that isn't wholly independent of government but it can create tensions around what is prioritised and why. This was highlighted in evidence to the Lords' Committee from the former Chair and a former member of the OfS students' panel. They described growing tension and less productive relationships between student panel members and members of staff and members of the OfS Board, and the reluctance of student panel members to speak their mind freely. They also gave an example where the panel's interest in inclusive curricula (arguably an important element in the OfS priority of equality of opportunity) was shut down by a senior member of OfS staff giving them the “not that veiled” implication that “if students were to continue to say things that were not aligned to their particular views, the position and the future of the panel may be reassessed.” The evidence before the Lords Committee was that this had had a chilling effect on the willingness of panel members to speak their minds.

What more could the OfS do to enhance its accountability to students? Our earlier briefing recommended a number of actions the OfS could take both to broaden and deepen its student engagement so that students could be more active partners in decision making. The recommendations drew on best practice elsewhere in the sector and broadly fell into three categories:

- **Governance** - the OfS Student Panel should set their own agenda and highlight what they think are important aspects of the student experience for the OfS to consider, and be supported to undertake student-led research. We also support the NUS proposal that, like its predecessor and like the current and future regulator in Wales, the OfS should allow an observer from the NUS to attend its Board meetings.
- **Agency** - the OfS should ensure student involvement across its own regulatory activities, including in quality, DAPs, governance investigations, and formalising involvement in the Access and Participation Plan process. Similarly, the OfS should expect providers on the register to actively include students in decision making and quality assurance and should champion good practice in student engagement in partnership with the sector.
- **Transparency** - the OfS should produce a student engagement impact report annually about how it engages students in decision making.

Accountability to those who are regulated

Regulators should have mechanisms to hear and take on board the views of those they regulate. In 2022 the Public Accounts Committee (PAC) criticised the OfS for not routinely asking “providers for structured feedback on its own performance as a regulator”. PAC said that such feedback should form part of a set of robust published performance measures and targets established and be used by the DfE to hold the OfS to account for its effectiveness.

In response, OfS commissioned a survey of a sample of providers (it is not clear if this will be repeated). OfS describe the report, published in January, as “independent” and identifying “areas for improvement”. But whilst the report and its findings are independent, the recommendations “were developed following discussions with the OfS”. This is problematic because the actions that the OfS have signed up to are only a partial response to the feedback received.

The survey covered areas such as perceptions of the OfS, clarity of the OfS role and perceptions of the OfS compared to other regulators plus experiences of OfS communications. But feedback on issues other than communications is effectively ignored. Findings critical of the way the OfS regulates are mediated by the OfS into recommendations to communicate better. For example, feedback seeking a differentiated approach based on track record and risk level resulted in the recommendation “consider how to communicate more clearly the rationale for a consistent sector-



wide approach". Concerns from smaller providers about disproportionate burden, a perception "related largely to issues of resourcing, with a lack of economy of scale in terms of the regulatory requirements, particularly data returns" resulted in a recommendation to make communications more accessible by "simplifying language".

Improving the way the OfS communicates with those it regulates is important in itself and is a necessary part of building trust (discussed in more detail later). But it is not sufficient. **Firstly, the OfS must genuinely engage with and respond to the concerns of providers.** However clearly the OfS communicates its rationale, however simple the language it uses, providers still experience regulation that is insufficiently risk-based and disproportionately burdensome. **Secondly, the DfE needs to demonstrate how it uses feedback from providers as part of its performance management of the OfS.**

Proportionality

The OfS is a risk-based regulator. Once a provider meets the initial and general ongoing conditions of registration, further OfS scrutiny, action, inspection and imposed requirements are based on an assessment of risk.

The problem with this is that meeting the baseline of the initial and general ongoing conditions of registration imposes a substantial regulatory burden (and cost) in the first place before the additional, risk-based, elements of scrutiny are imposed. This cost and burden of the ongoing conditions of registration are disproportionate for smaller institutions because meeting the regulatory requirements costs a greater proportion of their (smaller) income and takes resources away that could be directly supporting students. It feels disproportionate to any institution, of any size, that can demonstrate compliance and, logically, lower risk, that there is not the possibility of reduced regulatory requirements to the ongoing conditions of registration. This is perfectly reasonable, not least because:

- the Regulators' Code says as much - regulators should "recognise the compliance record of those they regulate, including using earned recognition approaches"; and
- the legislation (HERA 2017) requires the OfS to keep the initial and ongoing conditions for every institution under review to ensure they are proportionate to the regulatory risk posed by the institution.

But the OfS won't normally do this. Its regulatory framework says the "expectation is that ongoing conditions will seldom be disapplied, as they are all closely aligned with protecting students". As one commentator⁵ argued, it "*appears to interpret "risk-based" as referring only to investigations or other formal inquiries, not to data collection. Hence, it routinely requires the same information from all providers, regardless of their risk in the particular area – and despite this being the major source of bureaucracy and burden.*"

During the pandemic the OfS did suspend certain regulatory requirements, reducing reporting in several areas including reportable events, student protection plans and public interest governance among others. The circumstances of the pandemic were clearly exceptional, but the OfS should

5. Providers must submit to regulation - and the OfS to proportionality. Iain Mansfield. Times Higher Education, 2023. <https://www.timeshighereducation.com/opinion/providers-must-submit-regulation-and-ofs-proportionality>.



use the learning from that time to look again at the scope for meeting the intent of the legislation more fully by reducing conditions for individual providers based on assessed risk.

Doing so would be a sensible, long-term position to adopt for the regulator of a mature, largely compliant industry. It would meet the requirements of the Regulators' Code (regulators should support the economic growth of compliant regulated entities, for example by minimising the costs of compliance). And with the higher education sector experiencing a long-term squeeze on the resources available for teaching, a sharp reduction in regulatory cost should be a priority, especially as it doesn't involve extra funding from the taxpayer.

The OfS is not the only regulator higher education institutions engage with and certainly not the only cause of disproportionate burden. In GuildHE's evidence⁶ to the Industry and Regulators' Committee we showed the extent of regulatory duplication caused by the various post-18 regulators failing to work together and the costs this imposes. This is particularly problematic with data. HE providers often have to return data on the same students to multiple regulators in different formats and to different timescales. This fails the Regulators' Code principle of "collect once, use many times" when requesting information and also that regulators should share information with each other "to help target resources and activities and minimise duplication."

So, what is to be done? The evidence provided to the Lords' inquiry suggests a number of practical changes that can, together, sharply reduce the cost of regulatory compliance. **Firstly, the OfS must change its approach to risk and associated data burden.** In the Australian system, similar concerns about a similar regulator were addressed, including applying "earned autonomy" to reduce burden on providers that were consistently compliant and also by simplifying data requests, reducing the number of risk indicators by 75%. **Secondly, ensure a systematic process to prevent regulatory burden further increasing.** GuildHE has suggested a "one in, one out" approach for proposed new conditions of registration. The Association of Heads of University Administration (AHUA) has proposed impact assessments for any new regulatory requirements coupled with independent assessment of regulatory impact so that regulation can be removed or updated where it isn't achieving its objectives or is poor value for money. **Thirdly, the OfS and other post-18 regulators need to proactively work together to avoid duplication, especially in regard to data burden.** It is positive that Robert Halfon acknowledged this problem in giving evidence to the Committee and made clear his desire for a more streamlined system but **the DfE should demonstrate leadership to make this happen by, for example, making it a key objective for all the post-18 bodies that they sponsor. The DfE should also reconvene the HE data reduction taskforce with a clear timeline for reporting.**

Independence

The OfS is not independent of the government. Its Chair, Chief Executive, the Directors of Fair Access and of Free Speech, and the members of its Board are government appointments. Legislation defines the ways the Secretary of State may issue guidance (to which the OfS must have regard) and give directions. This is familiar enough, broadly mirroring the arrangements for its predecessor, HEFCE (though the Secretary of State has slightly more freedom of movement when it comes to giving guidance to the OfS).

6. <https://committees.parliament.uk/writtenevidence/119971/html/>



But a great deal of concern has been expressed and a great number of questions have been asked by the Lords' Committee about the relationship between the government and the OfS and whether the right balance had been struck between government guidance and regulatory independence. Much of that discussion was about whether government guidance was too prescriptive and too frequent. Some was also about the position of the Chair and whether it was appropriate for him to retain the government whip in the House of Lords rather than moving to the cross benches.

These two aspects of independence, or at least the perception of independence, are related. Most Ministers like to pull levers to affect change. They have an electoral mandate and rightly want to use the powers available to them to deliver their policies. Therefore, for any semi-independent body such as the OfS there will always be a relationship to be managed, a balance to strike between Ministerial guidance and all the other things to which they must have regard. It is well evidenced that some recent Ministers have been highly interventionist and prescriptive. But time will tell on how well the OfS succeeded in managing that aspect.

The OfS makes the case that they resisted government pressure on scrapping the NSS and on the blended learning review. The higher education sector points to how the OfS adopts favoured Ministerial positions such as the 'requires improvement' TEF category, despite it going against the recommendations of the independent review and how it moves rapidly to formal interventions on certain topics without allowing an opportunity for a self-regulatory approach (eg in relation to the consultation on harassment).

What is clear though is that the widely held perception that the OfS is too close to Ministers isn't helped by the position of the Chair. In evidence, there were different views expressed about whether it was customary for members of the House of Lords to resign the party whip on being appointed as a Chair of a regulator. But an Institute for Government article in 2018 was clear - it was the "*custom for appointees to regulators and other sensitive public bodies to resign their party whip and become crossbenchers*" and that when Baroness Dido Harding kept the party whip on becoming Chair of NHS Improvement, despite the urgings of the Health Select Committee, it was the "*exception rather than the rule*".

But there are aspects of the legislation where independence is required. HERA 2017 intended higher education regulation to involve separate designated quality and data bodies: DQB and DDB. The DQB and DDB are clearly intended to be independent - they cannot be bodies to which the Secretary of State appoints members. Whilst HERA allowed for those functions to be brought in-house where no suitable body was available, this was clearly the fall-back position. Whatever the truth of the "*private grief*"⁷ between the OfS and the QAA, the fact remains that the sector has been left with a long term position that is not what Parliament wanted and that doesn't have the organisational and governance independence that was envisaged by the creation of the DQB.

In its triennial report on the performance of the QAA, the OfS cited a conflict of interest as one of the reasons why it was not suitable to continue in the role of DQB. The OfS view was that, despite the changes made to the QAA's management and governance arrangements, as a membership body for higher education providers there was a conflict with the potential to undermine the quality

7. Lord Cromwell, House of Lords Industry and Regulators Committee, 2023.
<https://parliamentlive.tv/event/index/22e82652-d991-490c-8efd-3657a0455c6c>

and standards assessments undertaken. Leaving aside whether the OfS's judgement was correct (and the fact that Parliament knew that QAA was a membership body when it envisaged it in the role of DQB) we are now left with a different potential conflict - that DQB functions intended to be carried out by a body independent of government will be carried out by a body that is not. **The OfS should consider how it can change the management and governance of the DQB functions that it is temporarily bringing in-house to demonstrate maximum independence from the government. This would help provide assurance about the assessments of quality and standards it undertakes in the DQB role.**

Trust

The OfS's changed approach to communications is welcome and is a useful start to rebuilding a relationship of trust between the regulator and those it regulates. Institutional visits, online sessions with opportunities to question and the move to publish more information about their regulatory approach (as in the briefing on financial sustainability and market exit) are all helpful in promoting greater mutual understanding. But more and clearer communication isn't sufficient on its own. It needs to be part of a fundamental shift in tone and approach.

This shift has been variously characterised - AHUA called for "a more collaborative and developmental dialogue....that seeks improvement and innovation alongside robust regulation". More pithily, and drawing on possible lessons from Australia⁸, the OfS should "recognise explicitly that the sector comprises 'partners', not 'objects'."

An earlier briefing⁹ suggested **this shift in approach would likely involve encouraging compliance**, including through sharing intelligence about concerns with a provider, requiring and monitoring an action plan **and only moving to enforcement where this fails. It would recognise and embrace the value of co-regulation**¹⁰. As Universities UK's evidence showed, the sector does this already, including through the joint UUK/GuildHE work to address concerns about grade inflation. And, as discussed above, **it would recognise compliant behaviour by partners through earned trust.**

It would also need the OfS to demonstrate a capacity for self-reflection and continual improvement. We also believe that the OfS should **publish clear service standards to address the problems of asymmetrical regulation** – with the OfS making "ever more urgent demands on providers for information whilst at the same time regularly missing their own deadlines"¹¹. **It would also recognise that effective engagement with the sector would help the OfS undertake its role.** As AHUA pointed out "the sector has a lot of experience of being regulated and can help the OfS get better at it."

Fundamentally, **a data driven approach to regulation needs to operate in an environment of effective communication, mutual understanding and trust** if it is to be successful. Andy Youell

8. <https://www.hepi.ac.uk/2023/06/08/lessons-from-australia-for-the-regulation-of-english-higher-education-by-anthony-mcclaran/>

9. Regulation of Higher Education in England - is there another way? Smita Jamdar, GuildHE, 2022. Available at: <https://guildhe.ac.uk/guildhe-regulation-briefings-series/>

10. <https://committees.parliament.uk/writtenevidence/119966/html/>

11. Introduction - Burden, cost and overlap. Alex Bols, GuildHE, 2022. Available at: <https://guildhe.ac.uk/guildhe-regulation-briefings-series/>



argued¹² that making judgments about quality through data analysis “requires a deep understanding of the reality that the data purports to describe and an understanding of how that complex reality has been mapped to the data definitions.....if a regulator wants to make judgments about individual institutions on the basis of data then it must understand these issues for every institution that it regulates.”

Aspects of this approach are already working practice in parts of the OfS. The regulation of access and participation is widely seen as more consultative, developmental and engaged, and more likely to be effective as a result. **We believe that this approach should be the norm across all OfS activity.**

Finally, **rebuilding trust requires change from both sides. Higher education institutions and sector bodies** have to prove those critics wrong that doubt the sector's commitment to addressing legitimate concerns about teaching quality, the student experience and value for money. The sector **has to embrace the benefits of effective statutory regulation and “acknowledge, as many institutions already do, the role that a regulator can play in ensuring a sector-wide response to the great thematic challenges** that inevitably arise in organisations as embedded in our society as higher education institutions.”¹³

12. <https://guildhe.ac.uk/great-expectations-data-in-regulation/>

13. <https://www.hepi.ac.uk/2023/06/08/lessons-from-australia-for-the-regulation-of-english-higher-education-by-anthony-mcclaran/>

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