

Protecting the Public Interest in Higher Education

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Occasional Paper 15

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With a commitment to widening access to higher education that is rooted in personal, academic and government experience, Bill leads the University's mission to deliver the best possible student experience for an international learning community. He is passionate about the University's record and role in transforming lives, promoting employability and world-leading research.

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Executive summary

This paper argues that the higher education reforms currently making their way through Parliament do not place sufficient emphasis on the public interest. The drive towards competition and marketisation of the higher education sector puts at risk the fundamental purpose of universities to serve the public interest and deliver public benefit.

The loss of direct public funding breaks the established link between funding and regulation in the public interest. The new Office for Students (OfS) is to be tasked with promoting market competition and will take over the historic duty of the Privy Council to secure public interest in institutional governance. Under these circumstances, it is no longer sufficient to secure real public benefit beyond a narrow conception of value for money. Public benefit must be taken to mean sustained engagement with defined subsets of the public and fostering public debate. The Office for Students should be empowered to evaluate the extent to which the sector as a whole is working in the interests of the public – not simply individual institutions.

There are three lenses from which to evaluate public interest: institutions, students and the higher education system as a whole.

At **the institutional level**, the public interest in governance conditions will be crucial. The Code of the Committee of University Chairs (CUC) should be strengthened to recognise the importance of direct engagement with the public and the fostering of debate. Public engagement should not simply be confined to research. Moves to fast-track degree-awarding powers and university title for new providers place the reputation of the sector at risk. Validating partnerships should

be the norm for at least the first three years of operation, with degree-awarding powers awarded for a further three years on a probationary basis.

The **student interest** in higher education is not confined to value for money or future earning power, but also involves personal development. The public has an interest in what kind of citizens higher education institutions are nurturing. In order to protect this, the co-curricular and extra-curricular landscape and arrangements for student representation must have a more central role.

A focus on institutional performance and inter-institutional competitiveness neglects the performance of the **system as a whole**, especially its capability to tackle persistent challenges such as the attainment gap. Encouraging new providers risks spreading existing resources more thinly and increases the chance of provider failure, which could harm students. Although the Government has professed itself sanguine about provider failure this would be catastrophic and is therefore highly unlikely to happen. There is a risk of reduced provision and the aggravation of existing problems, such as geographical cold-spots and the loss of strategically important and vulnerable subjects. The Office for Students should be empowered to assess the market viability of new providers and to address system-level challenges.

Introduction

The Higher Education and Research Bill (HERB) currently before Parliament proposes a number of changes to the higher education regulatory architecture. This paper was conceived as a response to these and parallel higher education reforms, including the Teaching Excellence Framework (TEF), that have been introduced to the English higher education sector over the past five years.¹ I am concerned that as a consequence of the move towards greater marketisation and competition in the sector, we may lose sight of the fundamental purpose of universities to serve and act in the public interest, and to contribute to the flourishing of civil society. This paper explores the ideas of public interest that exist in higher education legislation, regulatory architecture and public debate, and makes proposals for how we might preserve a meaningful shared mission for the public interest in our changing higher education sector.

In the period between this paper's conception and its execution, the English public voted by 53 per cent to 47 per cent in favour of leaving the European Union. The vote exposed major fault lines in British society, between the four nations of the UK, between old and young, between those who have benefited from opportunities created by closer union between countries and those who have felt shut out. Matthew Goodwin, Professor of Politics and International Relations at the University of Kent, has shown that educational attainment is among the critical factors dividing those who voted Remain from those who voted Leave (Goodwin, 2016). The ease with which 'experts'

¹ Although some of the ideas discussed in this paper apply to other parts of the UK, for the purposes of clarity the focus throughout will be on the English higher education system.

were dismissed in the debate was particularly concerning for all who believe in the social and civic value of universities.

The outcome of the vote will reverberate through our politics, economy and society for years to come and is likely to have an impact on universities' ability to recruit non-UK students from both EU and non-EU countries, retain EU staff and access EU research funding. But arguably more importantly, it has placed a real and significant burden on universities to take a more substantial role in civil society, rebuilding public trust through active engagement and offering accessible pathways to expertise that the public sees as relevant and valuable.

The public interest debate

Critics of higher education reform commonly invoke ideas of public good and public interest. Professor Stefan Collini, one of the most vocal critics of the market-driven higher education policy agenda pursued by the Coalition and the subsequent Conservative Government argues, for example:

Much of our contemporary discourse about universities still draws on, or unwittingly presumes, that pattern of assumptions: the idea that the university is a partly protected space in which the search for deeper and wider understanding takes precedence over all more immediate goals; the belief that, in addition to preparing the young for future employment, the aim of developing analytical and creative human capacities is a worthwhile social purpose; the conviction that the existence of centres of disinterested inquiry and the transmission of a cultural and intellectual inheritance are self-evident public goods; and so on (Collini, 2016, n.p.).

Similarly, the recent publication *In Defence of a Public Higher Education: Knowledge for a Successful Society*, posited as an 'alternative' white paper for higher education, criticises the Government's market-driven higher education reforms for undermining the wider public benefits of higher education (Holmwood et al, 2016).

Yet it is equally common for Government policy statements on higher education to invoke the public interest, as in the 2015 Green Paper, *Fulfilling our Potential: Teaching Excellence, Social Mobility and Student Choice*, and the 2016 White Paper, *Higher Education: success as a knowledge economy*:

Higher education (HE) is one of our country's greatest strengths. We have some of the best universities in the world, including four of the world's top ten and ten of the top fifty. Our research base is world class and our universities themselves are engines of both social mobility and economic growth. (BIS, 2015, p.10)

Our universities rank among our most valuable national assets, underpinning both a strong economy and a flourishing society. Powerhouses of intellectual and social capital, they create the knowledge, capability and expertise that drive competitiveness and nurture the values that sustain our open democracy. (BIS, 2016a, p.5)

This dispute over who is speaking in defence of the public interest shows not only that the traditional link between higher education and the public interest has an important cultural and moral resonance in our society but also that our definition of the public interest is fuzzy enough to be co-opted by both sides of the argument. Although, as Professor Ron Barnett has observed, the idea of the public good in higher education is more likely to be mobilised as a reaction to changes in the higher education

landscape of which the interlocutor disapproves rather than as a positive agenda in its own right (Barnett, 2015).

The critiques of market-driven higher education reform advanced by Professor Collini and others are legitimate but they are unlikely to produce a political effect other than to reinforce the view of the Director of the Social Market Foundation, Emran Mian, that the Left has little of practical value to offer the current higher education debate (Mian, 2016). We have seen many academically-able critiques of the ideological underpinnings and policies of the Coalition and the Conservative Government, but very little in the way of practical and substantive proposed alternatives.

Meanwhile, a preoccupation with tuition fees has led the political Left into an ideological cul-de-sac. The last Labour Government introduced tuition fees and the progressive graduate repayment system because it gives universities the funding and autonomy they need while safeguarding access to higher education. Labour's offer to reduce fees to £6,000 at the 2015 General Election, if enacted, would have resulted in a windfall for well-off graduates and in all likelihood reductions in funding to universities. Some on the Left have since attacked proposed inflationary fee increases, which universities need if they are to sustain their investment in students' education at a time of rising costs. A few Labour parliamentarians have engaged with the HERB, and they are to be applauded for their efforts, but there is a paucity of fresh ideas.

Yet there is a great deal to be concerned about in the White Paper and HERB. Having market competition as the operating model for English higher education risks the quality of students' education, the collective reputation for excellence that the

higher education sector has established internationally, and the sustainability and effectiveness of the higher education system as a whole. It focuses too narrowly on service provision and value for money and fails to acknowledge the wider public benefits that higher education providers and the system as a whole bring to society.

If we believe, as I do, that English higher education has a duty to act in the public interest and for the public good, it is crucial we explain what those interests consist of and how they will be protected in a more diverse and competitive system. This paper explores the principles of the public interest and assesses the Government's plans for English higher education based on the extent to which they enable the higher education system to produce value and benefit for the public. We cannot blithely assume that in a radically changed system some nebulous notion of the public interest will automatically continue. Nor can we claim that those changes must inevitably bring to a close the era in which higher education can legitimately assert that it works in the public interest.

1. Defining the public interest

At present, higher education regulation acknowledges the public interest in two key ways: through public funding disbursed to institutions by the Higher Education Funding Council for England (HEFCE) in the form of grants; and through regulation of individual higher education institutions via the Privy Council.

Under the Government's higher education reforms, the new Office for Students (OfS) will act as the lead regulator of higher education providers with a remit to promote market competition and the interests of consumers/students. While the systems for assuring public interest are to change under the proposed reforms, the understanding of what the public interest consists of remains remarkably consistent through the transition. This should not give comfort to critics of the reforms, however, as it is my contention that we need a new, more expansive definition of public interest. This must mobilise ideas of public good as well as financial assurance, if we are to mitigate the risks of more intensive marketisation and meet the needs of civil society.

Public funding

Under the terms of the Further and Higher Education Act 1992 HEFCE has the following functions:

- administration of funding grants to institutions for the purposes of provision of education, undertaking research, including associated facilities and services (Part II, 65 (1-5));
- undertaking consultation in distribution of funds and

maintaining a balance in support given to institutions of a denominational character, institutions with distinctive characteristics and other institutions (Part II, 66 (1-4));

- provision of advice or information to the Secretary of State (Part II, 69 (1)); and
- securing of provision for the assessment of quality in the institutions that it funds (Part II, 70 (1-4)).

Under the terms of the Act, the Secretary of State has the power to:

- instruct the Funding Council to attach conditions to the funding it distributes, which must not be framed in relation to particular courses of study, areas of research or criteria for appointment of academic staff (Part II, 68 (1-4)); and
- confer additional functions on the Funding Council as s/he sees fit (Part II, 69 (5)).

Arguably the 1992 Act formalised a reciprocal arrangement that had been more relaxed in the era of the University Grants Committee in which regulation, particularly submission to an external quality regime, was imposed on institutions as a condition of public funding (see Shattock, 2012). But this was still some distance from regulation as an absolute requirement. Regulatory conditions included requirements to prove financial sustainability and effective governance, and to subscribe to the Higher Education Statistics Agency (HESA) and Quality Assurance Agency (QAA).

Since public funding has now largely been replaced with student fees, this situation is clearly no longer tenable. In 2014, HEFCE

replaced its Financial Memorandum with a Memorandum of Assurance and Accountability as an interim measure, in which institutions in receipt of public funding agreed to accept the continuation of established regulatory conditions on a quasi-voluntary basis. The HERB creates the conditions for direct regulation on the grounds of student interest, jettisoning the established relationship between public funding and regulatory conditions.

What is the effect of this shift? It is noticeable that HEFCE has no statutory duty to have a concern for the public interest in the distribution of funding. Nor has it any duty to protect or champion the welfare of the higher education sector as a whole, save in sustaining a balance of funding support between different types of institution. HEFCE's organisational culture and ethos has tended to emphasise the public interest: in its description of its role, it describes one of its aims as 'to act in the public interest and be open, fair, impartial and objective'. However, where the public interest has been defined in the HEFCE Financial Memorandum and Memorandum of Assurance and Accountability it has focused on HEFCE's regulatory duty to ensure universities and colleges in receipt of public funds provide value for money and are responsible in their use of those funds (HEFCE, 2010, p.3; HEFCE, 2014, p.3).

As such, the duty placed on the OfS in the HERB to promote value for money in the provision of higher education by English higher education providers could be argued to be simply a formal and overt statement of an existing state of affairs, not a significant policy shift. But the sector may find that the interpretation of the OfS in how it implements that duty is distinctive. The reciprocal relationship between public funding and institutional regulation created a symbolic and

practical expectation that higher education institutions served the public interest. The decoupling of regulation from public funding puts this at risk. The HERB makes provision for the OfS to enforce a 'public interest governance condition' (HERB Part I, 14 (2-3)) intended to ensure that higher education providers perform their functions in the public interest. But if, as I will argue, the principle of public interest is confined to value for money, or even openness and transparency in use of funds, it will not adequately address the developing needs for universities to be open and engaged with the public, nor will it safeguard the long-term sustainability of the sector as a whole.

Privy Council

Universities established before the Further and Higher Education Act 1992 operate under a Royal Charter, while most post-1992 universities operate under Instruments and Articles of Government. Institutions wishing to amend any of these documents must make further application to the Privy Council, which will judge whether the changes are in the public interest. The Privy Council also retains the power to license institutions to award degrees and to call themselves universities. By these means, the principle is established that there is a public interest in the constitution of universities and in their teaching and research activities, as well as in which organisations should be permitted to award degrees and be called universities.²

Under the terms of HERB, the OfS will take on the role of the Privy Council to grant degree-awarding powers and university title. One rationale for the shift of duties is the reduction of burden on higher education institutions. As Minister for Higher

² There is also a route to university title through Companies House, but as this route is intended to come under the purview of the OfS it is not worth giving it more detailed attention here.

Education in 2006, I oversaw a process of distinguishing the elements of university charters, statutes and instruments and articles of governance in which there was a strong and abiding public interest versus those elements without. That removed the need for institutions to consult the Privy Council on operational matters such as the powers and makeup of Senates and Courts, the structure of the university, university members and academic ceremonies. However, Privy Council control – and hence, a public interest – was retained over all of the following:

- degree-awarding powers, university title, powers and objects;
- functions, responsibilities and overarching powers of governing bodies;
- delegation of governing body powers;
- composition of governing bodies and terms of office of members;
- quora for conducting governing body business;
- overarching powers of Courts and Senates, ensuring that they are subsidiary to the governing body;
- auditors and audit committees;
- academic freedom provisions;
- the definition of university years;
- students' unions, in terms of overarching provisions for establishment and control of students' unions;

- the Model Statute; and
- methods of amending main governance documents (Rammell, 2006, Annex A).

We should expect this list to provide a starting point for any new version that may be published by the OfS in the future. But with the OfS taking on responsibilities formerly held by the Privy Council, it will also be necessary to ensure the OfS is required to take the public interest into account in its deliberations in the same way as the Privy Council has done. It would be peculiar indeed for providers that serve the public interest to be regulated by an entity that does not.

Limitations of the status quo

A feature of the debate over the funding of higher education has been to question whether the balance of funding reflects the balance of benefit. During the top-up fees debates of 2003/04, the Labour Government pointed out graduates accrue significant private benefits from higher education, particularly in salary outcomes, and Margaret Hodge, my predecessor as Minister for Higher Education, was quoted as asking a Universities UK conference whether it was right for 'the dustman to subsidise the doctor' (Smithers, 2002, n.p.). This reflected the view that the total state subsidy of higher education could not reasonably be justified.

A negative consequence of this debate has been the inaccurate perception that a shift in funding towards the graduate – albeit with significant public subsidy through the loan system – represents a consensus among policymakers that the benefits of higher education are predominantly private benefits. It is this misconception that David Willetts

addressed in his *Robbins Revisited* pamphlet, setting out the various benefits of higher education to the individual and to society at large, both economic and non-economic. The benefits are both individual and collective and include better health, greater levels of social tolerance and greater propensity to vote (Willetts, 2013, p.20).

Defining public interest in terms of value for money for the taxpayer or the public purse is a very narrow interpretation. As a consequence, success in higher education is defined as the ability to deliver more for the same level of funding, or to be entrepreneurial in bringing in alternative sources of funding. Universities have risen to the challenge, but this definition of public interest excludes the many other activities that universities have traditionally undertaken in the public interest and have the capacity to undertake in the future.

Real taxpayers have a myriad of expectations and preferences – some merely wish to pay as little tax as possible while others wish to be assured that public money is spent in areas where it can be justified. Beyond the simple payment of tax, the public has a whole range of interests in higher education. Every citizen gains from the skills, professional expertise and civic dispositions of graduates. More specifically, consider the varied interests of NHS Trusts, big industry, small and medium enterprises, the cultural sector, schools and colleges, community and faith groups, charitable organisations, local councils, international partner colleges and universities and students' families. Any higher education provider must engage with a substantial subset of these, if not all of them, and each have their own interests and concerns about what higher education institutions do. Such matters are not absolute; they require real and sustained public debate.

A further criticism of the current definition is that confining our understanding of the public interest to the extent to which individual institutions execute their mission neglects the potential public interest in the effective functioning of the system as a whole. A move to a dynamic market in which diverse institutions compete for students should be understood as a complex system, one in which the various different parts react to each other in unpredictable ways. The aggregated value produced by individual providers may not add up to the total public benefit derived from higher education. From a public perspective, the economic and social benefits of a high-performing system are likely to outweigh the benefits of any particular provider's success, in terms of the competencies of graduates, the wider public access to knowledge, and the economic benefits of higher education as a producer of knowledge that drive innovation and improvements in industry, in public sector organisations and in policymaking. Moreover, as the late Sir David Watson observed, while we have reason to take great pride in our higher education system this should not blind us to its failures, for example, to deliver a sustainable system of lifelong learning and credit transfer (Watson, 2014).

Many publicly-funded universities hold exempt charitable status; others operate as not-for-profit entities limited by guarantee. Some providers operate as limited companies; some are subsidiaries; still others are part of a group structure. As the sector diversifies further we have seen the emergence of a wide range of innovative corporate provider models. Should the corporate form and the status of the provider have a bearing on the extent to which it should be expected to deliver a public benefit?

The case of the charitable status is instructive because universities are in the main exempt charities meaning that HEFCE is their principal regulator and they do not have to file annual reports with the Charity Commission. Charities must provide evidence that they produce public benefit, but universities are exempt because the advancement of education has long been considered an automatic public benefit. Universities do not have to prove that education benefits the public or explain how their approach creates particular specific benefits. The line between activities that deliver a benefit to the public and those from which a profit can in principle be made is not well-established, so while charitable status requires organisations that hold it to be not-for-profit, there is no obvious tension between making money and delivering public benefit except where there is an obvious conflict of interest between one activity and the other.

In 2014 a cross-sector working group on corporate forms and structures in higher education reported that effective governance and consistency in regulatory requirements across provider types are much more important to protecting the student and public interest than the specific corporate form of the provider and the need for a student protection regime in the case of provider failure was identified (McClaran, 2014). The diversity of corporate forms requires a careful risk assessment but this ought to be well within the capacity of a well-designed regulatory regime that applies to all providers.

The notion of the public interest potentially extends far beyond the question of who pays for higher education or the actions of any single higher education provider in isolation. Nor, where higher education is concerned, can the corporate form or

status of the provider be part of the equation. Building on the historic principle that there is a fundamental public benefit in the advancement of education, we must consider that where there is potential value or benefit to the public from some aspect of higher education, the public must be considered to have an interest in the effective execution of that aspect. The evidence that we have shows a huge range of wider public benefits from higher education, including local and regional economic benefit, the professional and civic capabilities of graduates, the knowledge and insight produced by research and the valuable civic functions of universities. But in order to make this definition meaningful and applicable in practice, the higher education sector must actively embrace engagement with its publics and the fostering of public debate as part of its mission.

Recommendation

The HERB should be amended to include a duty for the OfS to have due regard to the public interest in its regulation of providers and to make due consideration of the sustainability and efficacy of the sector as a whole in operating in the public interest when carrying out its activities.

Engagement with ‘publics’

Rather than thinking about some abstract and singular notion of ‘the public’, it makes more sense to think about concrete ‘publics’: multiple constituencies with potentially competing demands, but who each have an interest in higher education. Such a formulation is a more accurate representation of the world as universities experience it and it enables us to consider

concrete examples of public interest that pertain to the different activities universities undertake.

There is an important ethical dimension to this shift in that traditional ideas of 'the public' have in practice meant established interests represented by those with the capacity and resources to represent those interests and to influence decision-makers. The spread of digital technology has made it possible for individuals to forge common interests across social and geographical boundaries. While this is a mixed blessing, it has created new responsibilities for universities to respond to the publics.

As well as engaging with and responding to the range of public interests in play, universities also have a long tradition of being spaces in which public debate can occur – indeed as Nick Hillman has argued, it is not clear who else is similarly well placed to fulfil the function (Hillman, 2016, p.61). The protections to academic freedom enshrined in university articles of association and in law (Education Reform Act 1988) protect the public interest through ensuring that academics are free to pursue lines of inquiry and to hold views that may be unpopular without fear of reprisals. Likewise, universities – and students' unions – have a legal requirement to protect freedom of speech under the Education Act of 1986. Simon Marginson, Director of the University College London Institute of Education Centre for Global Higher Education, suggests that one test of a public university should be 'the extent to which it provides space for criticism, challenge and new public formations.' (Marginson 2016, p.11) As I argued in a speech to the Fabian Society in 2007, universities must be open to the light of free debate and free inquiry, lest they become places of darkness, obscurantism and fear (Rammell, 2007). Additionally,

I argued that academic freedom is the most effective means of combating violent extremism.

Our role as institutions of higher education has to be to set a higher standard for public debate through the positive pursuit of speaker events, media engagement and public communications that are well-informed and constructive and that do not fear to address controversial issues. We must equip our students to spot and take down a bad argument, articulate alternatives and prepare to be challenged in their turn, not to self-censor or to censor others. Likewise, we must encourage academics to intervene in public debate with a view to raising the quality of that debate and thereby improving the health of our democracy. HEPI's evidence on students' views towards free speech suggests many universities could be doing more to expose their students to open discussion of issues of free speech and censorship (Hillman, 2016).

With these fundamentals established, I consider there to be three ways of looking at the public interest: in terms of providers, students and the higher education system as a whole. Each of the following sections addresses one of these areas and makes proposals for retaining the public interest as a central feature of our higher education system even as we pursue reforms that appear to threaten it.

2. Higher education providers

One of the early acts of the newly-constituted OfS will be to consult on the conditions of entry to the register of providers. Conditions likely to be included relate to: the payment of fees; student protection; quality and standards; and the public interest governance condition (HERB Part 1, 13 (1)). The public interest in governance condition is to be published by the OfS but must include provision for academic freedom (HERB Part 1, 14 (7)). This will be the first time that all higher education providers, including alternative and private providers, will be subject to the same public interest conditions of registration.

The list produced by the OfS is likely to be the primary mechanism by which individual institutions are held responsible for serving the public interest, replacing the old system of direct Privy Council oversight. The White Paper characterises this shift as deregulation, possibly because the Privy Council tends to take some time to approve even minor changes to governing documents (BIS, 2016a, p.29).

The areas in which the Privy Council currently takes an interest constitute fundamental safeguards for the public interest against unethical or inappropriate practice in governance. These conditions protect students as well as the general public. It is difficult to see how any could be removed, although there may be a case for reducing the burden in each of the areas.

1. Degree-awarding powers, university title, powers and objects – as these are the core functions of a higher education provider within society.
2. Functions, responsibilities and overarching powers of governing bodies – the status of governing bodies

needs to be defined and consistent across the sector so that accountabilities are clear.

3. Delegation of governing body powers – this safeguards against delegation of powers to an inappropriate body.
4. Composition of governing bodies – while OfS should hardly be permitted to take a view about exactly who should sit on higher education providers' governing bodies, the public interest demands that all providers should have a balance in favour of externality on the governing body, a test of fitness to act as a governor (such as an application process) and ideally, student and staff representation on governing bodies.
5. Quora for conducting governing body business – this ensures that capture by special interests is avoided.
6. Overarching powers of Courts and Senates, ensuring that they are subsidiary to the governing body – this is a fundamental part of the defining of accountabilities and the disaggregation of academic from institutional governance.
7. Auditors and audit committees – these ensure there is competent external scrutiny of accounts and regulatory compliance.
8. Academic freedom provisions – to these might reasonably be added freedom of speech provisions, albeit these already exist in law.
9. University years – removing this condition could promote greater flexibility within the system but there

would be a need to ensure that providers are not able to access funding they are not entitled to based on a redefinition of the university year.

10. Students' unions – to ensure openness, fairness and freedom of speech within students' unions.
11. The Model Statute – this affords staff protections from summary dismissal and requires providers to undertake consultation before making staff redundant. It is an important further safeguard for academic freedom, especially in a post-tenure age.
12. Methods of amending main governance documents – if governing documents can be amended without due process and scrutiny, then the balance of power and accountability is upset.

Significantly, the White Paper does not identify any particular areas that the Government feels public interest oversight could be dispensed with.

While important safeguards for the public interest, these conditions do not commit providers to significant proactive activity for the public benefit, yet universities in general do tend to undertake work for the public benefit. This tendency is reflected in the Committee of University Chairs (CUC) Code of Governance, a set of principles and practices for good governance that universities commit themselves to on a voluntary 'comply or explain' basis. The Code includes positive endorsement and guidance on probity in the use of public funds, securing equality and diversity, infrastructure for corporate social responsibility, regulation of students' unions, promoting academic freedom and freedom of speech and

scrutinising the quality of the student experience (CUC, 2014).

The CUC Code is due to be updated in 2018, the same year as the start of operations for the OfS. As the sector expands to accommodate more diversity of providers, there is a strong case for the CUC Code to be reviewed in tandem with the development of the revised list of areas in which there continues to be a public interest. At present, the CUC Code implicitly presumes that activities like promotion of equality and diversity and corporate social responsibility are part of the intrinsic corporate ethos of universities. Future iterations of the Code may wish to advance these positive elements of good corporate governance more robustly and the OfS may wish to refer to the Code explicitly in making judgements about the quality of provider governance.

Moreover, there is an absence within the CUC Code of how governing bodies can be assured of public debate and public engagement in the institutions they are governing; in other words, how the institution is engaged in dialogue with its various publics. It is increasingly recognised that public engagement cannot be simply a one-way street in which universities graciously allow access to their stock of knowledge and expertise to organisations, policymakers or individuals. Nor can these publics reasonably expect universities to carry out their research and dissemination activity to narrowly-defined parameters, given that an important function of universities is to expand our established sense of what is possible. As such, engagement through dialogue, solicitation of feedback and negotiation of priorities is necessary.

The National Co-ordinating Centre for Public Engagement (NCCPE) is currently funded by HEFCE and its devolved

equivalents, the Research Councils and the Wellcome Trust, as a vehicle for promoting knowledge exchange. Under the proposed reforms, the OfS will have no responsibility for research and by implication the public engagement agenda. In order to secure the wider public interest in ensuring public engagement with higher education providers at the corporate level, as well as with research and expertise, it would be helpful to make public engagement a clear reference point within the regulatory architecture.

Recommendations

As part of the further development of a public interest governance condition and the supporting Code of Governance, each provider should be asked to designate a set of ‘publics’ with whom it seeks to engage, and give an indication of the means by which it fosters public debate and engagement with those publics.

The OfS should be empowered, as part of its ongoing regulation and monitoring of the sector, to undertake and publish a periodic review on the extent to which the public interest is safeguarded and advanced through the public-interest infrastructure.

Degree-awarding powers and university title

A cornerstone of Government proposals to stimulate competition in higher education is the plan to make it possible to fast-track the process of winning degree-awarding powers and university title and to scrap the minimum student number requirement to be called a university (BIS, 2016a, pp.29-30). New providers will be able to gain degree-awarding powers on a three-year probationary basis on the day they open.

This suggests a failure of policy memory, given the last Labour Government's introduction of Foundation Degree awarding powers to high-performing further education colleges in the Further Education and Training Act 2007 (which as the relevant Minister I took through Parliament). It prompted concerns from Conservative MPs that the Government was 'damaging the hard-won reputation of our universities' and risking the international brand of UK higher education (Wilson, HC Deb 21 May 2007, v.460 c.1045). The Government accepted an amendment stipulating that Foundation Degree awarding powers would be awarded provisionally at first and only be reviewed after a full six years – and these were recognised and established providers of education.

Jo Johnson, Minister of State for Universities, Science, Research and Innovation, has argued that requiring new providers to partner with an established university to validate degrees is 'akin to Byron Burger having to ask permission of McDonalds to open up a new restaurant' (Johnson, 2015). This analogy is ill-chosen. A new provider is welcome to enter into and leave validating partnerships at will, and has a wide range of universities to choose from, so new providers are free to shop around for their preferred validating partner. By entering into a partnership, the tools and techniques of quality assurance are shared and novice errors avoided. These arrangements have a proven track record of safeguarding the hard-won reputation of our higher education sector. While not all partnerships conclude amicably, this signals a potential need for new protections for those entering into validation partnerships, not the exposure of students to additional risk.

It is important to recognise the potential impact of a significant

failure of an untested provider. Although the Government has optimistically written a student protection clause into the HERB (Part 1, 13(1)(c)), in reality there is no regulatory means to assure students of continuity of study if their provider fails. All providers (rightly) retain control of their admissions policies and cannot be required to accept a student from another provider. As a best case scenario, the student could seek a refund or compensation, but small providers would be likely to struggle to meet their financial obligations. Validating arrangements therefore offer better protection to students that a single provider with a student protection plan can guarantee.

Recommendations

The Government should solicit advice from the Quality Assurance Agency (QAA) and international equivalents on how its proposals to fast-track degree-awarding powers and university title will be perceived internationally and whether it is in line with international standards.

Where a provider has no track record of provision, its offer should be delivered in partnership with a validating provider for at least three years, followed by a further three years when degree-awarding powers could be held only on a probationary basis.

One exception to the rule could be where a provider has a strong track record of high-quality delivery outside the UK. The judgement of this could rest with QAA, who could be tasked to work with equivalent quality bodies in other countries to judge the comparability of quality and standards in the new provider's country of origin. Work of this nature would also support the development of

transnational education, which is *de facto* expanding the idea of the public that universities serve beyond the limits of the UK taxpayer.

3. Students

The student interest in higher education is multifaceted and extends well beyond the simple pursuit of value for money. As parties to a contract for specific services, the student interest is in whether those services are delivered to an adequate standard. There are obvious imbalances of power and information between higher education providers and students. As such, the integration of compliance with consumer law into the regulatory system and moves to introduce student protections, however limited, are welcome features of a diverse higher education market.

Students also have an interest in the economic returns to higher education. As graduates, students can expect to be employed at a higher rate than non-graduates, in work that is more professionally satisfying and, in the main, that is paid at a higher salary. While there is some variation in economic returns between graduates of different subjects and levels of qualification, and higher education is only one of the variables that affects one's lifetime earnings, a higher education qualification is a sensible investment (Britton et al, 2016; BIS, 2013).

Furthermore, students have an interest in their own personal development and individual growth. It would be an exaggeration to claim all students aspire to personal transformation as a part of their higher education experience. Yet the vast majority commit to an extended course of learning voluntarily, rise to the challenge of seeing that course through to completion, and supplement their experience with participation in the social dimensions of university life. The simple acquisition of new friends fosters personal development,

as does engagement in the various sporting pursuits, student societies and travel and volunteering opportunities that universities offer. Through higher education, students are exposed to different attitudes, outlooks and views. As a consequence, students are personally transformed through higher education, a phenomenon that is not adequately captured by the concept of value for money.

There is a public interest in ensuring that universities comply with their contracts with students, operate fair and transparent admissions policies and offer opportunities for learning and personal development of an appropriate quality. The public, after all, includes the parents and relatives of students and employers of graduates, and the public at large benefits from the quality and reputation of English higher education. There is also a public interest in sustaining economic returns to higher education, given that student loans are funded through the public purse.

There is also a more specific public interest in what students are able, and disposed, to do as a result of undertaking a course of study in higher education. Our students are future citizens: professionals, key workers, business leaders and policymakers. As such, students' learning outcomes are not solely a matter of individual student interest but a question of what kind of society we wish to be and what role we perceive higher education as having in fostering citizenship.

There is much debate about the meaning of citizenship and any definition must be provisional and normative. In my view, the term 'citizenship' encompasses:

- the knowledge accrued during a course of study and

the understanding of where that knowledge can be appropriately applied to create additional value for society;

- an ethic of personal responsibility within a global community, including understanding of questions of sustainability, an intercultural perspective and an ability to be critical in making judgements about what is happening in the world;
- confidence in one's personal agency to challenge and have an effect on the status quo underpinned by an appropriate skillset; and
- a more developed sense of the value of civil society and a willingness to make a personal contribution to its functions, for example through participation in political processes and debates, charitable donations, membership of a civic organisation or volunteering roles.

Key to this definition is that the development of citizenship cannot be secured simply through the acquisition of decontextualised knowledge, though the curriculum is fundamental. Much work has already taken place to enhance the academic curriculum to incorporate sustainable development, for example. The co-curriculum and extra-curriculum is vital in offering different kinds of opportunities for learning as well as different ways of learning, particularly through active participation in projects that contribute to civil society and engage the public. One example of this is the University of Bedfordshire's Refugee Legal Assistance Project in which students, under supervision, support refugees housed in the local community to complete the paperwork that will enable them to reunite their families. The University also houses

Media Junction, a student production company, and Guildford Street Press, giving students direct relevant work experience as well as a point of liaison with local community organisations.

A second important sphere for the development and practice of skills associated with citizenship is that of the student voice. Students' unions serve a vital function within university governance in representing the collective student interest and the diversity of student interests. While incorporating the student voice into university decision-making and academic quality and service provision is a crucial source of insight and feedback, the intrinsic value of the student voice lies in the personal and political development of the students involved. Students' unions foster a political culture by creating a quasi-public space for deliberation, debate and the pursuit of social change. They also ensure that extra-curricular opportunities incorporate an element of student leadership through student-led sports, societies and volunteering.

Under the proposed reforms, the OfS will have a duty to promote value for money for students, and the Teaching Excellence Framework (TEF) will over time give ever-more sophisticated signals about which institutions are delivering the best teaching. Notwithstanding significant reservations about the merits of seeking vertical differentiation between diverse institutions, it will be hugely important to ensure that the judgements the TEF makes, and the OfS's wider judgements of value for money, are not confined to the standard of service and the economic returns, important as these are. The reputational stakes in TEF are high and as such could encourage risk aversion and a focus on the most direct and efficient route to qualifications and graduate level employment, reducing innovation and investment in students' personal and citizenship development

and in the student voice.

The Government has adopted the laudable goal of doubling participation by the lowest socio-economic groups in higher education by 2020 and increasing the numbers of Black and Minority Ethnic (BME) students. Yet there is a risk that if the definition of good teaching is focused solely on service delivery and economic returns, students from less well-off backgrounds, with less experience of higher education cultures and who may have experienced social marginalisation – and who are thereby potentially less powerful and informed as consumers – may be offered a less rich experience and emerge with lower levels of social capital. We cannot be confident that student consumer demand will in all cases fuel investment in students' personal transformation, given that students can hardly know the scale of their own potential and the opportunities that will develop them in advance.

Currently, the Government has a contradictory approach to the student voice: recommending that the student voice be incorporated into TEF submissions while at the same time sounding a note of concern about the 'transparency and accountability' of students' unions (BIS, 2016a, p.60). It is also worth recalling that students' unions are by and large a feature of the publicly-funded higher education sector, though arrangements for the collective representation of students do exist in some alternative and independent providers. Effective incorporation of the student voice within the developing regime must recognise not simply the value of soliciting student opinion and feedback but acknowledge the importance of effectively practising collective student representation and participation in governance – an argument that a Liverpool Guild of Students Vice President, Emma Sims, made in the HEPI

response to the higher education Green Paper (Sims, 2016).

If there is a public interest in the wider civic benefits of higher education, these need to be captured in more meaningful ways than currently exist. Existing work on student engagement and learning gain is helpful: for example, some of the learning-gain pilots that HEFCE is currently funding include exploration of how to measure critical thinking, and the National Student Survey (NSS) will incorporate questions on the student voice from 2017. The recent consultation on the *Destination of Leavers from Higher Education (DLHE)* survey opened up the possibility of exploring measures of subjective wellbeing as a graduate outcome (HESA, 2016a). There is scope for a formal agenda to emerge, one that takes the impact of higher education on personal and civic development more seriously.

Recommendations

A cross-sector working group should be convened to examine the opportunities for measuring and recognising personal development and citizenship as an outcome of higher education, and make recommendations to OfS on how to incorporate this formally into the regulatory architecture.

Provision for the collective student voice to be heard should be among the conditions set for entry to the register of providers, and effective regulation of students' unions (or their equivalent) should be retained on the list of public interest principles applicable to the governance of higher education providers.

Chapter B4 of the UK Quality Code should be updated to place an expectation on providers to make appropriate provision

to enable students to achieve their civic potential in addition to their academic, personal and professional potential.

Current proposed TEF criteria (BIS, 2016b, pp.13-16) are focused on courses, with the extra-curricular environment mentioned only once, in relation to resource provision. These criteria could be more generous in enabling universities, in partnership with students' unions, to articulate and provide evidence of their development of co-curricular and extra-curricular learning environments that promote the personal and civic development of students.

A credit framework should be developed to recognise co-curricular and extra-curricular activities as part of the quality regime. This would ensure that these activities were recognised as an inherent element of the learning environment and that they were delivered to an appropriately high standard.

4. The higher education system

The Government has placed its faith in market competition as a driver of academic quality, improved student experience and choice. Market competition, fuelled by consumer choice and supplemented by regulation of individual providers, is assumed to be sufficient to maximise the available benefits within the system. There is certainly evidence of competition within the system, though universities are often more inclined to compete over their status and reputation than the quality of the student experience. As a consequence, the market signals available to prospective students – who are hardly exemplary well-informed consumers in any case – are unreliable. The TEF is an attempt to address this problem through generating a market signal that is linked to academic quality. In this regard, the TEF is a political acknowledgement of the failure of the higher education sector to behave like a conventional market.

The problem with this approach is that it assumes all innovation and change in higher education comes through competition. This may indeed be the case in some areas. Research productivity, for example, appears to be stimulated by competition; we may find that innovation in teaching follows a similar trajectory. Nevertheless, in the case of research, Government policy is moving towards a more strategic and co-ordinated approach with the creation of UK Research and Innovation. Competition is not judged sufficient to sustain a flourishing ecosystem in which benefits are maximised.

To some extent, the performance of the system as a whole can be judged by the aggregated performance of the providers within the system. The current UK Performance Indicators include measures of widening access to higher education,

retention, student employability and research output. The OfS will have to deal with the challenge of assessing aggregate sector performance when a large number of providers struggle to produce an adequate data return: the recent HESA publication of alternative provider data reported on only 63 alternative providers when earlier estimates from the Department for Business, Innovation and Skills (BIS) suggest that there were more than 700 in operation (HESA, 2016b; BIS, 2016).

Beyond this challenge, there are further areas that are important, serve the public interest and cannot be delivered through market means or measured by aggregate outputs. These are to do with the capabilities and resilience of the system and the spread of provision.

The higher education system must be able to respond meaningfully to sector-wide challenges, such as rapid technological developments, new responsibilities for governors, the prospect of wider use of metrics in research assessment, the challenge of recruiting working-class boys into higher education, the persistence of the BME attainment gap and the changing labour market. Such challenges have historically been addressed through funding for strategic development projects in providers, supported by the curation and dissemination of good practice by sector agencies. As a consequence of reductions in public funding, most sector agencies have had to seek institutional subscription to continue their work and while there is still some funding available to support strategic sector development, it is not clear whether these funds will continue to be available in the future. The OfS will need to be able to identify and support the development of capacity in the sector, especially in areas where the business

case for institutional development requires proof of concept. There will also be a need to understand in greater depth approaches to capacity building that are inclusive of the wider range of providers.

The higher education sector needs to be financially resilient, so that estates and equipment can be maintained, additional costs of supporting students from disadvantaged backgrounds met and so that investment can be made in the enhancement of the student experience. The latest HEFCE report on the financial health of the higher education sector in England shows that institutions collectively have reasonable operating surpluses, thanks in part to a one-off tax credit for research and development expenditure, and so this is by no means a signal of long-term health. In fact, the authors suggest that in the medium to long-term the sector will need to generate larger surpluses to cover the full economic costs of all activities and remain financially sustainable (HEFCE, 2016).

The entry of alternative providers into the system is justified on the basis of fostering competition, enhancing choice for students through sector growth and forcing established providers to innovate. **Yet we are not seeing new and innovative forms of provision springing up in higher education cold spots. Instead we are seeing a concentration of alternative providers in London and the South East, offering primarily Business and Arts courses (BIS, 2016c).** All this would make some sense if demand for higher education was flourishing. Yet the September UCAS figures for 2016 entry published in September show that while some growth was seen 2012-2015, English institutions saw a mere 4,500 increase in applicants from 2015-2016, an increase of only 1 per cent (UCAS, 2016). Although the increase in the number

of 18-year olds after 2020 may make some difference, for as long as demand is limited, encouraging the proliferation of providers cannot serve the public interest: it widens the range of providers that are financially insecure, increasing the risk that some providers may exit the market, with the associated upheaval to students and the public.

The White Paper is sanguine about the prospect of provider 'exit', claiming that provider exit would indicate 'a healthy, competitive and well-functioning market' (BIS, 2016a, p.38). The reality is that institutional diversity will make it challenging for institutions to pick up students from a failing provider, especially where those students are international, due to visa restrictions and low appetite for risk in this area. Likewise, paradoxically, the more the market encourages innovation the more difficult it will be to transfer students from one institution to another.

Outside London, it is difficult to think of an example of two similar institutions serving the same students and publics side by side in the same geographical region. Provider exit in these circumstances, therefore, would simply look like a reduction in access to higher education, in addition to the seismic economic shock to a town or region caused by the loss of jobs, loss of skills, and loss of economic benefit of students and university staff. Employers that had built up a relationship with a provider would be faced with the prospect of starting again from scratch with a new, less conveniently located provider. The reputation of the sector would be placed at risk solely because of an unjustifiable faith in market forces. In reality, I consider it unlikely that the Government would be able to take the political risk of allowing a provider outside London to exit the market without taking steps to intervene.

While there is space for specialist provision in any system, there is also a clear case for maintaining pluralistic institutions as well. This ensures a diversity of subject provision and choice across the country, making it possible for students who are unable or less willing to travel for study to access those subjects – and subsequently contribute to their regional economy. There is also an important interdisciplinary dimension to pluralistic institutions for they enable students and the public to be exposed to thinking and practice across a whole range of subject areas and for different disciplines to work together to address complex problems. In 2008/09, the Government asked HEFCE to incentivise the creation of new university campus centres in under-served areas of the country as part of its University Challenge agenda (HEFCE, 2009). The OfS should be equipped to rise to these and similar challenges in the same way.

A fully marketised system would allow providers to proliferate in some geographical locations, while tolerating geographical cold spots where there is a perception that the effort involved to generate demand for higher education is too great. It would encourage intense competition in the provision of Business and Law qualifications in London, while accepting the total loss of subjects for which there is lower demand in some parts of the country, no matter the wider public benefit of the continuation of those subjects or the reduction in access and opportunity. It would also promote a further reduction in part-time provision, accepting that the business case for provision of part-time options is difficult to justify when the market in prospective young full-time students is easier to access.

Recommendations

The OfS should be empowered to assess system-level capacity and support sector-level interventions to enable collaborative strategic development across the sector where there is a public interest case for undertaking this work.

The OfS should be required to take a view on the viability of new providers as well as their capability to provide a quality offer. New providers should be required to provide an assessment of market demand for their product.

The OfS should undertake regularly to audit the spread and diversity of provision across the country and make recommendations for addressing where markets remain underdeveloped in overall provision, in specific subject areas or in the balance of specialist and pluralist providers in any part of the country. Over time, a system similar to the provision of housing could develop in which higher education providers are required or incentivised to offer particular subjects or modes of study in particular geographical locations as a condition of being allowed to deliver in well-established markets, building on current arrangements for the protection and promotion of strategically important and vulnerable subjects.

5. Conclusion and summary of recommendations

The Government's reforms do not hopelessly compromise the ability of the English higher education sector to continue to act in the public interest and deliver benefit for the public. Indeed, in many respects the reforms do not depart very far from the established status quo of public interest. But in a more diverse and competitive sector, the status quo is no longer sufficient.

A misplaced faith in market mechanisms risks diminishing the range of valuable public benefits that higher education brings: the benefits of engagement with the public, the development of graduate citizenship and a capability within the sector to rise to large-scale social challenges and ensure a high-quality, sustainable and diverse offering where it is needed.

Addressing these issues requires a more formal acknowledgement of public interest in the regulatory architecture. By undertaking this work we can ensure the promise of higher education to act in the public interest is retained, even as we move further towards a more competitive, market-driven environment.

Recommendations

- 1. The HERB should be amended to include a duty on the OfS to have due regard to the public interest in its regulation of providers and to make due consideration of the sustainability and efficacy of the sector as a whole in operating in the public interest when carrying out its activities.**

- 2. Each provider should be asked to designate a set of 'publics' whom it seeks to engage, and give an indication of the methods by which it fosters public debate and engagement with those publics.**
- 3. The OfS should be empowered to undertake and publish a periodic review on the extent to which the public interest is both safeguarded and advanced through the public interest infrastructure.**
- 4. The Government should solicit advice from QAA and international equivalents on how its proposals to fast-track degree-awarding powers and university title would be perceived internationally and whether it is in line with international standards.**
- 5. Where a provider has no track record of provision, its offer should be delivered in partnership with a validating provider for at least three years, followed by a further three years during which it can only hold degree-awarding powers on a probationary basis.**
- 6. Where a provider has a track record abroad, QAA should be tasked to work with equivalent national quality bodies internationally to judge the comparability of quality and standards in the new provider's country of origin.**
- 7. A cross-sector working group should be convened to examine the opportunities for measuring and recognising personal development and citizenship as an outcome of higher education, and make**

recommendations to the OfS on how to incorporate this formally into the regulatory architecture.

- 8. Provision for the collective student voice should be among the conditions set for entry to the register of providers, and effective regulation of students' unions (or their equivalent) should be retained on the list of public interest principles applicable to the governance of higher education providers.**
- 9. Chapter B4 of the UK Quality Code should be updated to place an expectation on providers to make appropriate provision to enable students to achieve their civic potential in addition to their academic, personal and professional potential.**
- 10. TEF criteria should be more generous in enabling universities, in partnership with students' unions, to articulate and evidence their development of co-curricular and extra-curricular learning environments that promote the personal and civic development of students.**
- 11. A credit framework should be developed to recognise co-curricular and extra-curricular activities as part of the quality regime.**
- 12. The OfS should be empowered to assess system-level capacity and support sector-level interventions to enable collaborative strategic development across the sector where there is a public interest case for undertaking this work.**

- 13. The OfS should be required to take a view on the market viability of new providers as well as their capability to provide a quality offer. New providers should be required to provide an assessment of market demand for their product.**
- 14. The OfS should undertake regularly to audit the spread and diversity of provision across the country and make recommendations for addressing where markets remain underdeveloped in overall provision, in specific subject areas or in the balance of specialist to pluralist providers in any part of the country.**

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He argues that the public interest should be reflected in legislation and calls for restrictions on the award of degree-awarding powers as well as wider recognition of the civic benefits of higher education.

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