

House of Commons Report Stage and Third Reading – Higher Education and Research Bill

17 November 2016

The UK higher education sector is a UK success story that has a global reputation for excellence in teaching and research. The sector offers a diverse range of high quality provision that supports over 2.5 million students from the UK and around the world to achieve their educational goals each year, and is internationally renowned for its strong, innovative and exceptionally efficient research base.

Universities UK (UUK) understands why a new bill has been brought forward at this time as the sector – and the environment in which it operates – has changed significantly since the last major piece of legislation, the Further and Higher Education Act 1992.

The broad outline of the regulatory regime set out in the Higher Education and Research Bill is similar in many ways to the recommendations advocated in UUK's 2015 report on regulation *Quality, Equity and Sustainability*. In particular, we welcome the establishment of a single 'gateway' for degree awarding powers, university title and awarding of grant funding or teaching for all those in the sector.

However, while we are supportive of new legislation in principle, our members still have significant concerns about many aspects of the bill which have remained unchanged during the Commons stages so far.

We welcome the recent amendments tabled by the Secretary of State for Education as a positive step in the right direction – particularly the amendments concerning a new duty for the OfS to monitor the financial sustainability of the sector, restrictions on the Secretary of State's ability to frame guidance in relation to particular courses, and changes relating to UKRI including the addition of postgraduate training in UKRI's functions and the requirement for at least one UKRI board member to have experience of research, science or business in Wales, Scotland or Northern Ireland.

This is further evidence on top of the reassurances given by the Minister for Universities, Science, Research and Innovation during Committee Stage, that government is listening to the concerns raised by universities, students and those working in the sector.

This briefing for Report Stage therefore highlights six of the areas where Universities UK believes there is more to be done. These are:

1. Ensuring the powers of the Office for Students and the Secretary of State are compatible with the principle of institutional autonomy
2. Separating 'quality' and 'standards' in the bill, and ensuring that academic standards continue to be owned by the sector

3. Protecting students, employers and the reputation of the sector by ensuring a suitably high bar for new entrants
4. Strengthening checks and balances for giving and revoking Degree Awarding Powers and University Title
5. Removing the ability for the OfS to validate degrees and clarifying its role as regulator
6. Ensuring the duties of the OfS reflects the diverse range of activities carried out by universities
7. Ensuring that the autonomy of the research councils is protected within the new UKRI structure

1. Institutional autonomy

The UK higher education sector is made up of autonomous and independent institutions, with robust governance arrangements and a high level of internal and public scrutiny. Ensuring that new legislation does not – by design or default – undermine existing autonomy for universities is undoubtedly the biggest area of concern in terms of ensuring the ongoing quality of teaching and learning in the sector for UUK’s members and its Board.

In order to be successful universities need to be able to take their own decisions in order to be flexible and responsive to the environment in which they are working. This is now more important than ever with the uncertainties created by the decision for Britain to leave the European Union. Successive policy statements¹ made by pan-European higher education groups have recognised the fundamental importance of institutional autonomy in delivering world-class, competitive and effective higher education institutions and systems. Reducing autonomy has been linked to lower performance, and over-regulation of ‘autonomous’ institutions through overly bureaucratic accountability mechanisms also have the effect of reducing autonomy and negatively impacting on performance².

We believe that an autonomous system contributes significantly to the global success of the UK’s university sector; allowing institutions to be flexible and responsive to the needs of their students and employers, to think long term about global challenges, and remain free from direct political interference.

The ability for every institution to make the decision about the courses it provides – what it chooses to open or the difficult decision to close a course – should be made free from government interference. We therefore welcome the amendment that *“Guidance framed by reference to a particular course of study must not guide the OfS to perform a function in a way which prohibits or requires the provision of a particular course of study”* to address this concern.

However, autonomy is such a fundamental principle of the UK higher education system that we would want the bill to go further and for the OfS to have regard (under Clause 2) to *“the need to act in a manner compatible with the principle of institutional autonomy”*.

¹ Salamanca Declaration, [2001](#); Graz Declaration, [2003](#); Lisbon Declaration, [2007](#); Prague Declaration, [2009](#)

² Easterman et al., [2009](#), [2011](#)

2. Standards

Central to our concerns about the erosion of university autonomy is the need for the government, and the bill, to be clearer in its approach to standards. UUK and others have noted that the bill unhelpfully elides quality and standards – two separate concepts in higher education policy – in a number of places. Whilst there is a legitimate role for the new Office for Students in assessing quality, standards are rightly the preserve of independent academic institutions.

The bill as currently drafted includes a wide latitude for the OfS and government to intervene in academic judgements and standards. It is essential that amendments are made to the bill to improve the definition of standards and clarify that the essential autonomy of independent academic institutions in this area will not be infringed upon by the OfS.

In session 9 of Public Bill Committee the minister provided some clarification and reassurance, saying: *“Let me be absolutely clear... this is not about undermining the prerogative of providers in determining standards. This is about ensuring that all providers in the system are meeting the threshold standards set out in the “Frameworks for Higher Education Qualifications”, a document endorsed and agreed by the sector.*

“We are clear that the Government have no role in prescribing course content or structure and that institutional autonomy, as well as the consequential diversity of content and teaching styles across the sector, are crucial to the reputation and vibrancy of UK HE. However, it is important that we can ensure that the overall quality of HE in this country is not undermined by providers offering substandard qualifications, thus ensuring that students get what they pay for and that the taxpayer receives value for money”.

If this is the intention, then we believe the bill should build on the system and approaches currently in place, which largely meet these objectives already, balancing sector autonomy with effective regulation. As currently drafted, the bill suggests applying to standards the approach currently taken towards regulation of quality. Introducing these changes could lead to a centrally mandated set of academic standards that would be incompatible with a diverse, autonomous and high-quality higher education sector, and would likely be unworkable. This would be a significant departure from the approach currently taken in which institutions are responsible for setting the standards required of students, in line with sector-agreed practices and frameworks – and also goes against the commitments made publicly by the minister which are quoted above.

It is our view that the OfS should be concerned with ensuring appropriate institutional and sector governance and other processes relating to standards, rather than being able to act, potentially, as a higher education version of OfQual. UUK therefore continues to call for changes to the bill (Clauses 13, 25, 26) which

- Separate quality and standards
- Define standards (academic and threshold)
- Recognise that academic standards are sector-owned (and ensuring a sector-owned process for agreeing standards)
- Remove the reference to standards in relation to the TEF
- Give the designated body responsibility for administering registration requirements relating to standards

3. New entrants and probationary DAPs

UUK welcomes competition, collaboration and new entrants to the sector; indeed our diverse membership includes some new providers who meet our membership criteria. However, we believe the bar to entry must be high in order to protect students and the global reputation of the sector.

For students, choosing to go to university represents a significant personal and financial investment – and we must ensure the students have the assurances they need that they are choosing an institution which support them. In 2014, the National Audit Office (NAO) found that dropout rates at nine alternative providers were higher than 20% in 2012/13. This compares to an average dropout rate of just 4% across the rest of the sector.

It is essential that new providers can demonstrate that they can provide high quality higher education. This includes robust governance that maintains academic quality and protects the student interest and a demonstrable track record of delivering high quality education before being granted degree awarding powers.

Our position is straightforward: it is important that any new higher education provider awarding their own degrees or calling themselves ‘university’ meet the same high requirements as existing universities. Appropriately robust market entry standards serve the interests of students by minimising the risk of early institutional failure or the need for intervention by the OfS and we are not reassured that this is currently the case in the proposals put forward by government.

We are concerned that the ability for the OfS to grant probationary degree awarding powers (DAPs) is firmly in the interest of new providers seeking to test entry into the market but is not in the interest of students, who could end up with no degree or a degree which is not valued in the eyes of employers. We therefore remain unconvinced about the introduction of probationary DAPs without further safeguards for students.

UUK recommends that a requirement of provisional DAPs that the provider is validated by a degree awarding body (either another provider takes this role voluntarily, or under the new commissioning arrangements under section 46). Students can in this way enrol with the probationary body fully aware that if the body fails its probation they will receive an award from a named and identified established source in the validating body. If the probationary body passes its probation they will receive its award.

This approach is consistent with the expectations of consumer protection law in that students will understand up front what the consequences of a probationary failure will be. Validation will also provide opportunities for development and continuous improvement through the oversight of the validating body, reducing the likelihood the provider will fail its probation.

The Quality Assurance Agency has highlighted the benefits of new entrants working closely with existing providers³. This report shows that while there are some new providers offering innovative and high-quality higher education under the current arrangements, newer and smaller institutions are more likely to fail quality assurance reviews than more established and larger providers. The report also notes that those alternative providers who work closely with universities as their degree awarding bodies tend to be higher performing institutions. Both of the alternative providers who received particular commendations from the QAA in this period have validation arrangements in place with university partners.

4. Degree Awarding Powers and University Title

The bill amends the 1992 Act to give the newly-created Office for Students the ability to give and remove institutions' degree awarding powers (DAPs) and to award or remove the use of university title (UT). The power to grant DAPs and UT currently sits with the Privy Council, which acts on the basis of guidance and criteria set out by the Department for Business, Innovation and Skills (BIS), with advice from the Quality Assurance Agency (QAA). The ability to remove DAPs and UT from a provider is a new power.

The Department for Education will retain a role in providing guidance to the OfS in its use of these powers. However, we are concerned that the bill currently gives the OfS unchecked and unlimited powers in this area. It is a substantial change from current arrangements as the Higher Education Funding Council for England does not have the power to take away the use of the university title, and this is a cause for concern in the sector.

We believe that the focus should primarily be on strengthening the process to ensure that new providers with the ability to develop, flourish and enrich the sector can go forward to gain DAPs and be awarded the use of university title. The OfS should also have appropriate and effective checks and balances in place in terms of how it uses these powers.

UUK is therefore proposing a new clause legislating for a degree of independent oversight of the process for awarding and removing DAPs and UT to provide checks and balances on these very important decisions and ensure these are made at arm's length from government.

In practice, this would require the OfS to take the advice of a specialist committee within the designated quality body, or where no-body is designated the OfS to be required to set up an independent committee along the lines of the existing Advisory Committee on Degree Awarding Powers.

We also propose a legislative requirement that the OfS must have regard to the need to maintain confidence in the higher education sector as a whole in making use of its powers to grant DAPs and university title (Clause 40 or Clause 2).

³QAA Reviews of Alternative Providers Key Findings 2013-15 <http://www.qaa.ac.uk/en/Publications/Documents/HER-AP-Findings-2013-15.pdf>
Hansard <https://goo.gl/hWhBxz>

The use of university title has strong reputational implications. We would therefore want to ensure the criteria for this are sufficiently robust and reflect the important roles of higher education institutions in teaching, research and scholarship, as well as wider civic and social roles.

5. Validation and the OfS as regulator

Clause 47 – the ability for the sector’s regulator (the OfS) to also validate degrees – is the only clause of the bill UUK strongly suggest should be removed from the bill.

In our view it is a conflict of interest and therefore wholly inappropriate for a regulator to participate in the market which it regulates. No other regulator is empowered to act in this way for good reason.

There are no circumstances in which we think this would be appropriate, even as a ‘backstop’ power. The policy intent is covered by Clause 46, which allows the OfS to make arrangements with a higher education provider to act as a ‘validator of last resort’. We therefore urge the minister to revisit this section of the bill.

We understand that the OfS is not simply HEFCE by a new name and that its remit and duties are designed to reflect the new environment as well as its regulatory role. But we do not know whether the intention is that the OfS is a Specified Regulator for the purposes of the Legislative and Regulatory Reform Act 2006.

Specified Regulators are obliged to comply with the principles of the Regulator’s Code, or explain why they are not complying. It includes the requirement that regulatory activities must be based on risk, be evidence-based and reflect the specific compliance records of those they are regulating. This would give us confidence that the OfS should act in a proportionate, evidence-based manner when carrying out its functions.

There are a number of occasions in the bill where “if it appears to [the OfS]” is used, most significantly in relation to the powers of enforcement (monetary penalties, suspension, deregistration and refusal to renew an access and participation plan at sections 15 - 21). This ‘appears to’ formulation appears frequently elsewhere in legislation, including in the current Further and Higher Education Act 1992 but with some important differences to note. Few, if any, of the examples use the formulation in the context of the decision to take enforcement action, which is what is raising concern about its use in the bill. We therefore suggest that use of the phrase “has reasonable grounds to believe” which is used elsewhere is substituted in the bill.

6. Duties of the OfS

Clause 2 of the bill sets out the broad role and remit of the OfS, with a set of 'general duties' that the OfS must have regard to in fulfilling its functions. Collectively these set out some guiding principles of the OfS, and so the broad approach that will be taken to regulating the sector.

We maintain that a broader version of clause 2 is needed to reflect and what a regulator needs to do and who it needs to work with to function effectively. The lack of a holistic overview of universities including the sustainability of institutions and the health of the sector is a major concern to our members.

The role of the OfS should be extended to allow the OfS to provide advice to the secretary of state on matters relevant to its remit, without specific instruction by the secretary of state to do so (this is in line with FHE Act, Clause 69 (1)(b))

And we still consider that the bill could go further than the amendment for the OfS to monitor the financial sustainability of the sector (as in the government amendment, 14 November 2016) and take a more holistic view of the sector by having a duty to have due regard to the financial health and viability of providers when it exercises its decisions. This does not mean that the OfS would have responsibility for any institution in financial difficulty, but that in exercising its duties - and in cooperation with UKRI – it should ensure that in taking decisions it considers the impact on the financial health of the sector.

We propose:

- Inserting a general duty to maintain confidence in and integrity of the higher education sector
- Amending the general duty on competition to require OfS to promote collaboration where this is in interests of students, employers and in the public interest.
- Amending the general duty on choice to insert a requirement to support part-time and other alternative modes of provision
- Inserting a general duty for the OfS to have regard to the financial health and viability of providers when it exercises its duties (in addition to the government's new section on monitoring the financial health of the sector)
- Strengthening the role and independence of the OfS by requiring that the Secretary of State have due regard to advice which it gives.

7. The autonomy of the research councils

Until now, the seven research councils⁴ that provide project-based funding are established under the Science and Technology Act 1965, each as a body incorporated by Royal Charter. The Royal Charter is the legal document which sets out the role and mission of each Council. Each has a clear and protected identity and set of responsibilities, with funding allocated directly to each council. Under the established Act, while changes to research councils can be made, these must involve the Privy Council.

The proposals set out in the HERB will see each of these independent councils merged in to a single body, UK Research & Innovation (UKRI), alongside the research functions of HEFCE (to be known as Research England) and Innovate UK, and the nine chief executives replaced by a single Accounting Officer. The Royal Charters of the councils will also be removed. These changes have the potential to improve coordination between different parts of the research funding landscape, to enhance capabilities in relation to interdisciplinary research, to deliver economies of both scope and scale across the research funding landscape and to provide a clearer and more coherent strategic 'voice' for UK research. However, the loss of independence and autonomy of the seven councils as enshrined through the Royal Charters has raised significant concerns, not least from the perspective of the Haldane principle. In the proposed Bill (clause 85 (2)), the SoS has the power to:

- (a) add or omit a Council, or*
- (b) change the name of a Council.*

This can be done without consultation or direct parliamentary scrutiny. The ability to fundamentally reform the research landscape without proper consultation significantly reduces the autonomy and status of the individual councils. Both Research England and Innovate UK are given additional protections in the HERB: the SoS cannot change or omit either of these units by regulation. This appears to be an inconsistency, and ensuring that all councils have the higher level of protection would help demonstrate that they continue to be autonomous units.

We therefore propose:

- Inserting a requirement for the SoS to undertake consultation before proposing to add or omit a council, or change the name of a council
- Strengthening parliamentary scrutiny for any proposals to add or omit a council, or change the name of a council, by requiring the SoS to obtain an affirmative resolution.

Note that parliamentary scrutiny should not be seen as a proxy for consultation with the sector.

⁴ Arts and Humanities Research Council; Biotechnology and Biological Sciences Research Council; Engineering and Physical Sciences Research Council; Economic and Social Research Council; Medical Research Council; Natural Environment Research Council; Science and Technology Facilities Council

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