

# Our response to the Office for Students supplementary consultation on the publication of information about higher education providers

Universities UK (UUK) is the collective voice of 140 universities in England, Scotland, Wales, and Northern Ireland. Its mission is to create the conditions for UK universities to be the best in the world, maximising their positive impact locally, nationally, and globally. Universities UK acts on behalf of universities represented by their heads of institution.

This document outlines UUK's response to a [supplementary consultation](#) from the Office for Students (OfS), which amends proposals in [December 2020](#) on publishing information about higher education providers.

## Summary

1. We agree that certain information should be in the public domain to support transparency within the sector and beyond. Students, taxpayers and government need to be confident that robust regulation is in operation and students need to be able to make informed choices when applying for university. As part of this, it is also important for institutions to understand what information and how the OfS will publish.
2. We oppose the approach outlined in this consultation. The proposals in this consultation move away from a considered case-by-case approach on publication of information on investigations and sanctions toward a blanket position to 'normally' publish. We believe that publishing information requires careful judgement to avoid unintended consequences. We favour the original proposals set out in December 2020, where deciding what and when to

publish is a balanced judgement. This would be in the interests of the students, providers, the public and the regulator itself, for the following reasons:

- a. The December 2020 proposals set out a series of factors that the OfS would draw upon to make a judgement (legal cases, the student interest, the public interest and the provider interest). This acknowledges the complexity and sometimes competing interests of cases that should weigh into a decision about whether to publish.
  - b. We believe that a move towards publishing large volumes of information and investigations would contribute to misinformation and damage individuals and institutions where investigations are either personally or financially sensitive.
  - c. Publication of an investigation pre-outcome will increase costs for the impacted provider in terms of managing media, student, applicant and other stakeholder queries at a time when responding is difficult due to the ongoing investigation. Providers would much prefer to invest their resources into enhancing students' experiences at university rather than dealing with speculation.
3. We believe that the proposal expecting to 'normally' publish information conflicts with the Post-16 Education and Skills Act 2022. The act states 'the OfS must consider' the interests of students, providers and the public, this means there should not be a presumption in favour of publication. The act is, however, compliant with the December 2020 proposals which we favour.

## Definitions

4. There is no regulatory definition or sector understanding of what the terms 'investigation' (both formal and informal) and 'provisional decision' refer to. If the OfS were to move forward with this proposal there would need to be clear definitions to avoid an inconsistent approach. Beyond the definition, there is also no common understanding or transparency on how these investigations are conducted. In particular, the frequency in which investigations are instigated, the process and typical timescales. The OfS has signalled that guidance on the conduct of investigations will be published but until that guidance is available, it is difficult to take a view on what about an investigation is made public.

5. There will be a disparity between the evidence needed to mount an investigation compared to a decision made about compliance. It is currently unclear what the evidence threshold is for launching an investigation, and how this might differ from the evidence for making a provisional decision.

## Statutory compliance

6. We believe that the proposal to ‘normally’ expect to publish information conflicts with the Post-16 Education and Skills Act 2022, which states in Section 33, paragraph 67A:

*In deciding whether to publish a notice, decision or report under subsection (1), the OfS must, in particular, consider—*

- a) *the interests of—*
  - i. *students on higher education courses provided by English higher education providers,*
  - ii. *people thinking about undertaking, or who have undertaken, such courses, and*
  - iii. *English higher education providers,*
- b) *the need for excluding from publication, so far as practicable, any information which relates to the affairs of a particular body or individual, where publication of that information would or might, in the opinion of the OfS, seriously and prejudicially affect the interests of that body or individual, and*
- c) *the public interest.*

7. It is clear that the text ‘the OfS must consider’ means there should not be a presumption in favour of publication. In practice many items are likely to meet the provider, individual or public interest, but the OfS must consider these in turn when assessing when and whether to publish. We recommend that the OfS should remove the term ‘normally’ from their proposals, and instead make decisions in line with the factors in Annex C of the December 2020 consultation.
8. Although beyond the scope of this consultation, it is important that all bodies that publishing information on higher education are mindful of the impact it

can have. For example, before bodies instruct the OfS to disclose information (such as through HERA's section 78) the requesting body should also consider the factors in Annex C to avoid unintended consequences.

## **Unintended consequences and misinformation**

9. We believe the OfS should typically publish information only after a full investigation has been completed and if the provider is in breach of one or more ongoing conditions of registration. This is important to protect any individuals involved and to ensure students (past, present and future) do not see their education called into question unfairly. As the OfS itself acknowledges “revealing the existence of an investigation may result in public misunderstandings or speculation about whether wrongdoing has taken place”.
10. Publicising the existence of an investigation will be perceived as a sanction by stakeholders and will be damaging even if it is not then justified. In many cases, such an approach may not be proportionate and could expose the investigative team to political, media and public pressure. This risks damaging institutions and the students as part of them. Decisions to publish require considered judgement on whether the benefits gained from transparency at an early stage outweigh the potential risks. Therefore, we believe the outcomes of an investigation (such as where an institution is cleared), should be given the same prominence as in the original announcement.
11. We recognise that publishing information about an investigation may lead to people coming forward with additional information. However, we also know that the fact an investigation is likely to be made public could put off people, particularly where they may be identifiable. There are potential negative consequences for the mental health of students and staff due to increased public scrutiny. These are factors that the OfS should consider carefully on a case-by-case basis.
12. The OfS have correctly noted the importance of correcting inaccurate information in the public domain related to investigations. We agree with this. However, there is a risk that these proposals may contribute to speculation before an investigation has concluded. Media reports about new investigations or referrals are likely to generate further speculation and unverified comments and assertions about the issues in question. This may

deter recruitment which then has a knock on effect on the investment a provider can engage in. Pre-emptively releasing information does not give the OfS any ability to control how that information is used or reported upon. The OfS should ensure any publications are sufficiently contextualised to avoid misinterpretation.

13. It is unclear from the consequential amendment whether published information about the sanction would be withdrawn if successfully appealed. It is also unclear how long references to historic sanctions will be recorded on the OfS register. Once an issue has been resolved we believe it would be inappropriate for the sanction to remain recorded on the OfS register.

## **Burden**

14. The OfS has a statutory duty to have due regard for its regulatory activities to be “transparent, accountable, proportionate and consistent, and targeted only at cases in which action is needed.” The OfS’ policy for publishing information should be in line with these objectives, rather than likely to generate additional work for providers and the regulator itself.
15. We need a process which enables the OfS to conduct high-quality investigations where there are concerns. The presumption to ‘normally’ publish’ is likely to replace the time and resource on these announcements rather than focusing on completing investigations where there is genuine student interest. If the OfS proceed with this approach then they should monitor the rate of transfer from investigation to sanction. Having a large number of investigations that do not lead to further action being published would not be in the student, provider or public interest.
16. Publication of an investigation pre-outcome will increase costs for the impacted provider in terms of managing media, student, applicant and other stakeholder queries at a time when responding is difficult due to the ongoing investigation. Providers would much prefer to invest their resources into enhancing students’ experiences at university rather than dealing with speculation. This issue is particularly pertinent given the lack of transparency on the evidence threshold needed to begin an investigation.
17. We note that the OfS will issue a notice when an investigation is closed without any further action. Media outlets are unlikely to afford the same attention to a cleared notice as they do to the commencement of an

investigation or a referral notice. Therefore, in most cases, the reputational damage will already have been done. The OfS need an approach that recognises this and enables them to make informed and proportionate judgements.

18. The OfS should communicate with providers before any announcement of an investigation. It will be important that providers can develop communication plans for students and the public.

## **Referral to other regulators**

19. It is appropriate that the OfS will refer some cases to other regulators. Where the OfS is likely to do this the topic is likely to be an area outside of the OfS' remit and expertise. A referral may be sent to a regulator but then not judged necessary for further action. Publishing referrals in this way has a strong chance of generating public misunderstanding. If the relevant body decided not to investigate then we think it would be inappropriate for this to be recorded on the OfS website. We believe these decisions are best held by the investigating body.
20. Approaches to publication vary across different regulators, with some only publishing once an investigation is complete. It is unclear what public interest there would be in a referral being published when doing so could conflict with the internal practice of a regulator.
21. We are concerned about how the closure of investigations will be communicated where responsibility sits with another regulator. There is a risk that the OfS would not be able to update their referral in a timely manner to reflect the status of the investigation. This is likely to raise a provider's risk profile.