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CAN AN OfS AND A TEF PREVENT ENGLISH UNDERGRADUATE HE BECOMING THE MIS-SELLING SCANDAL OF THE 2020s? – Is there a regulatory solution?

**Christopher Hodges, MA PhD FSALS, Professor of Justice Systems,
University of Oxford**

&

**David Palfreyman, OBE FRSA MA MBA LLB, Fellow, New College,
University of Oxford, and Director, Oxford Centre for Higher
Education Policy Studies**

- 1. This Paper explores what form the regulatory architecture for English HE might take as the TEF (Teaching Excellence Framework) is established and if the HE Bill 2016 is passed to create the OfS (Office for Students).**
- 2. The TEF is discussed further in OxCHEPS Occasional Paper No. 60 (Palfreyman, ‘The TEF 2020?’).**
- 3. Here we build on that Paper and its endorsement of the HEFCE’s new policy of requiring HEI governing bodies to ‘sign-off’ on teaching quality in the way that they also have to take responsibility for the institution’s annual accounts. In addition, here we build on the Paper’s suggested development of a standard student-university contract-to-educate incorporating a template of University representations concerning the quantum of teaching and about the format for assessment that are then to be robustly enforced as binding terms in the student-consumer’s interest by the OfS, the CMA,**

and Trading Standards. Such an unashamedly consumerist approach can't but be less costly than the reliance over recent decades on 'the HE quality-policing industry' that has generated a bewildering string of acronyms and left behind a cascade of failed agencies while the quantum and quality of undergraduate teaching has been steadily short-changed by universities. On the student:university contract-to-educate see Chapter 12, pp 328-447, of Farrington & Palfreyman, 'The Law of Higher Education' (Oxford University Press, 2012).

- 4. In this Paper we urge the HE industry and its new regulatory regime to consider the applicability to HE of the evolving concept of EBR (Ethical Business Regulation) – as discussed by Hodges in 'Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics' (Hart Publishing, 2015). Hodges explains the EBR idea and outlines current examples of and empirical evidence for the application of EBR across a range of economic activities.**
- 5. In short, EBR is based on an understanding of why people either observe or break rules, and on how the appropriate organisational culture can engender better performance and greater innovation to underpin business success as well as fair customer-service delivered in the context of an effective regulatory framework. The EBR model seeks to ensure that organisations and their employees do the right thing, and speak up in sharing relevant information in open relationships, so as constantly to learn and improve. It transcends both top-down external enforcement of regulatory compliance and also internal institutional compliance mechanisms; it is about embedding within the entity a culture of trust and fair delivery, of reflection, and of improvement, as well as an open relationship among all involved – albeit with there remaining, of course, the ultimate long-stop of enforcement via legal sanctions as part of a formal regulatory regime and in accordance with general consumer protection law. Hodges sets out the potential of EBR in the context of: the Government's 'Better Regulation' policy drive; the expanding**

‘Primary Authority Scheme’ overseen by the BEIS; and case-studies from the successful regulatory experience of, inter alia, the Civil Aviation Authority, the Food Standards Agency, various consumer ombuds, and specific companies.

- 6. The detailed academic basis of EBR in terms of behavioural psychology and responsive regulatory practice is summarised in a Paper by Hodges published by BEIS –**

<https://www.gov.uk/government/publications/ethical-business-regulation> . EBR is based on the concepts of ‘a learning culture’, ‘a collaborative culture’, ‘fair and proportionate responses’, ‘supportive and responsive regulation’, and the practical actions needed both by the business entities themselves and also by their regulatory/enforcement bodies –

and indeed by Government itself when establishing regulatory frameworks such as that currently proposed in the HE Bill 2016 for English universities and aiming at greater consumer protection of the fee-paying undergraduate student now incurring long-term loan debts of £40-50,000.

- 7. The EBR approach, we suggest, is entirely in keeping with wider relevant interesting initiatives that place great emphasis on the culture of the service provider, such as UNCTAD’s 2016 ‘Manual on Consumer Protection’ (United Nations Conference on Trade and Development at**

<http://unctad.org/en/PublicationsLibrary/webditcclp2016d1.pdf>

) and the FRC’s 2016 ‘Corporate Culture and the Role of Boards’ (Financial Reporting Council at

<https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Corporate-Culture-and-the-Role-of-Boards-Report-o.pdf>).

- 8. We propose that the EBR concept, based on the regulatory experience of other industries and areas of economic activity (both private-sector and public-sector), should be explored for possible sector-wide application to HE – preferably via a couple of *pilot studies in volunteer universities* as initiated by HEFCE and then taken over by the fledgling OfS (if duly created). Any such pilots would, presumably, be undertaken in**

conjunction with the CUC (Committee of University Chairs) and the UUK (Universities UK as 'the trade body' for the traditional, incumbent HE industry); and would take into account such UNCTAD and FRC material as cited in para 7 above – as well as the application of the Nolan principles to the role of regulators (forthcoming - September 2016 - a Report from the Committee on Standards in Public Life).

- 9. As over in the USA the \$1.25 trillion student debt mountain and the inflation of HE fees at a greater rate even than for US health-care becomes a hot-issue in the current presidential election campaigning, here in England the level of university fees at £9000 pa (and likely to increase to £9250 from 18/19, and beyond in later years) is already higher than for almost all US public universities - but exactly the same concerns of value-for-money in relation to the teaching quantum and quality and also in terms of graduate un/under-employability apply (Palfreyman & Tapper, 'Reshaping the University: The Rise of the Regulated Market in Higher Education', Oxford University Press 2014). Government, having over recent years slowly retreated from funding HE as a free public good and having introduced and steadily raised tuition fees, has a clear duty to ensure that the student-consumer is protected against mis-selling of this costly experience good and the HE industry has equally clear legal obligations to conduct its trade in accordance with consumer law (see, for example, the August 2016 Paper from the 'intergenerational foundation' on 'The Graduate Premium: manna, myth or plain mis-selling?' at www.if.org.uk). If the present provision of undergraduate HE is not to be potentially the massive mis-selling scandal of the 2020s (as this decade has witnessed the tortious addressing of the repeated mis-selling scams in the financial services industry), then the Government, the HE industry, the Governing Boards of individual universities, and whatever HE regulatory regime is eventually established must ensure that the student-consumer is truly put at the heart of the C21 university operating within an efficient and competitive market-place.**

And this must become a market-place that does not cheat the student-consumer, that provides value-for-money by way of the quantum and quality of undergraduate teaching, and through increasingly effective competition delivers pedagogical innovation and reduced prices/fees.

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