

## **The Teaching Excellence Framework and the regulation of the higher education market**

### **Introduction**

The Higher Education sector (HE) has recently experienced regulatory reforms that are intended to increase competition and introduce a market based<sup>1</sup> HE sector. Government policy increasingly sees the relationship between Higher Education Institutions (HEIs) and students as one of business and consumer.<sup>2</sup> Tuition fees have increased and the cap on student numbers has been removed but questions continue to be raised about whether the market can effectively regulate HE to ensure the 50% increase in funding since 2007/08 results in improved quality and value for money for students and tax payers.<sup>3</sup>

There is a paradox in Government policy. The stated intention is to deregulate on the supply side, moving towards what it describes as a “risk based approach”, removing barriers to entry.<sup>4</sup> The hands-off approach, promoting competition so as to achieve efficiencies, is not however applied consistently on the demand side. Instead, new forms of intervention, including legal regulation, have been introduced, not least in the form of the Consumer Rights Act 2015 (CRA) and Teaching Excellence Framework (TEF).<sup>5</sup>

In this paper, recent HE sector policy initiatives, including the CRA and TEF, will be considered in the light of the Government’s stated aims of increasing competition and quality.<sup>6</sup> Particular attention will be paid to the role of information in encouraging competition and quality. Limitations to the initiatives will be suggested and consideration will be given as to whether they can be addressed by recent policy changes including TEF subject-level and teaching intensity pilots.<sup>7</sup>

Forthcoming changes to the education and training of solicitors will also be considered. The Solicitors Regulation Authority (SRA) will remove the pathways route to qualification and replace it with the centrally set Solicitors Qualification Examination. The move from course standardisation may result in more diversity of courses and the role of law firms in determining which courses give the best employment prospects will increase. This can be seen as enhancing the role of the market, but raises the question of whether law students have adequate information to make the right choice, not only for themselves, but also to ensure an efficient market.

The paper concludes that, while the policy changes may not have delivered an effective market, consumer regulation has encouraged HE providers to improve the integrity of information available to students on their chosen course.

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<sup>1</sup> Office of Fair Trading ‘Higher Education in England, An OFT Call for information’ (OFT 1529, 2014) ‘OFT CFI’, 3.4.

<sup>2</sup> Provisions in the Higher Education and Research Act 2016 should make it easier for new providers to enter and failed providers to leave; Competition and Markets Authority ‘UK higher education providers – advice on consumer protection law’ (CMA 33, 2015) 11-12. ‘CMA Guidance’

<sup>3</sup> Economics Affairs Committee, *Treating Students Fairly: The Economics of Post-School Education* (HL 2017-19, 139); Committee of Public Accounts, *The Higher Education Market*, (HC 2017-19, 693)

<sup>4</sup> Department for Business, Innovation and Skills, *Success as a Knowledge Economy: Teaching Excellence, Social Mobility and Student Choice* (Cm 9258, May 2016) ‘The White Paper’, 19.

<sup>5</sup> Higher Education and Research Act 2017, s.25.

<sup>6</sup> White Paper (n 4), 32

<sup>7</sup> Department for Education, ‘Teaching Excellence Framework: Subject level pilot specification’ (DFE 182, 2017)

## Information

The justification for intervention in the form of the CRA and TEF is to improve information available to students, as poor information could cause a market failure.<sup>8</sup> Information in the HE context is seen as essential to ensure certain desired outcomes.<sup>9</sup> In terms of competition, access to information, which allows the consumer to differentiate between providers based on their preferences, is expected to drive effective competition in the HE market.<sup>10</sup> This should encourage HEIs to be responsive to student preferences, to “raise their game, offering consumers a greater choice of more innovative and better quality products and services”.<sup>11</sup> Students, as informed consumers, are expected to make better informed choices which should enhance “student engagement, satisfaction, retention and success whilst at university and employability after university”.<sup>12</sup> An explicit link is made between the need for greater competition within the market, the availability of information and good graduate outcomes. While graduates are viewed, at one level, as critical to the UK economy and economic growth,<sup>13</sup> for the graduates themselves, a university education warrants a strong graduate premium and low graduate unemployment rates.<sup>14</sup> With students having invested heavily in their higher education, the ability to make an informed choice as to what and where to study is critical to the desired outcomes of high quality and student-focused higher education.<sup>15</sup>

Prior to the introduction of the CRA and TEF, information available to prospective students included third-party ‘choice tools’<sup>16</sup> such as websites and league tables. These private sources of information were supplemented by the government endorsed KIS data on the UniStats website, and information available on HEIs’ websites. While the information provided through these channels has been regarded as increasingly ‘user-friendly’,<sup>17</sup> issues have been identified concerning the quality of the information, and access to it.<sup>18</sup> A Call for Information in 2014 by the OFT on HE in England, dealing with the usefulness and accessibility of existing information, identified gaps in information about the learning experience and course outcomes. Accessibility of the information, and the way it was displayed gave cause for concern.<sup>19</sup> The information required to provide a more ‘rounded’ picture of the learning environment included information on inputs such as contact hours, class size and

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<sup>8</sup> Anthony Ogus, *Regulation: Legal, Form and Economic Theory* (Hart Publishing, 2004)

<sup>9</sup> The Higher Education Market (n 3)

<sup>10</sup> OFT CFI (n 1), 4.5.

<sup>11</sup> White Paper (n4) para 7. Competition and Markets Authority ‘An effective regulatory framework for higher education: a policy paper’ (CMA 42, 2015) 20, highlights that quality in the context of HE is difficult to define and can be interpreted differently by different students, institutions, employers and government, and students may also change their views about what quality means before, during or after their course. Any attempt to define quality by reference to a particular set of criteria carries the risk of excessive or uneven regulation. By contrast, the TEF makes an assumption of what the ‘student’ would define as quality.

<sup>12</sup> OFT CFI (n 1) para 4.4.

<sup>13</sup> The White Paper (n 4) refers to research that indicates a 1% increase in the share of the workforce with a university degree raises long-run productivity by between 0.2% and 0.5%; and around 20% of UK economic growth between 1982 and 2005 came as a direct result of increased graduate skills accumulation, para9.

<sup>14</sup> White Paper (n 4) para 18. Finding employment is identified as the most important outcome of higher education by the White Paper, para 18.

<sup>15</sup> CMA policy paper (n 11) para 1.5.

<sup>16</sup> OFT CFI (n 1), para 4.9.

<sup>17</sup> OFT CFI (n 1) para 4.10

<sup>18</sup> OFT CFI (n 1)

<sup>19</sup> OFT CFI (n 1), para 4.12.

teaching approach as well as employment prospects.<sup>20</sup> So far TEF has only partially addressed these concerns.

The 2016 government White Paper which preceded the Higher Education and Research Act 2017 identified that the conditions required to realise a freely competitive HE market do not exist. Poor information provision is identified as a key factor with little market pressure on HEIs to present information to differentiate themselves, particularly on teaching quality.<sup>21</sup> Students lack the information required to make an informed decision as to what and where to study<sup>22</sup> which gives little incentive to HEIs to improve teaching quality. The White Paper seeks to provide “incentives for all institutions to improve and focus on what matters to students, to society and the economy”.<sup>23</sup>

Nobody would decry the availability of valid information to help students make the best informed personal choice but HE is considered to be a “post-experience good”, where the individual student may not be able to judge the personal benefit to them at the start of the course, and possibly not until some time after they have graduated.<sup>24</sup> This limits the effectiveness of information available prior to selecting a course and provider for the individual student. The post-experience nature of education also limits the role that ex-ante information can play in promoting competition and an efficient market. As a post-experience good the quality is not known before the student has been through university and quality can be interpreted differently by different students.<sup>25</sup> Although increasing, or mandating, the availability of information can be seen as a low-cost non-intrusive regulation by law makers, its consequences can be to deter the adoption of better regulation, and to put burdens on enterprises while actually impairing consumers decisions. Consumers can be overwhelmed by a surfeit of information and make economically rational decision to ignore much of it.<sup>26</sup> This places limits on how effectively the increase of information and reliance on student choice can meet the wider objectives such as the enhancement of quality of teaching.<sup>27</sup>

## Consumer Law

Consumer regulation also focuses on information provision. The CMA considers that an effective system of consumer protection law can be an adequate source of market regulation to protect consumers provided they are “well informed about what they are purchasing, and not at risk of being significantly harmed by poor quality”.<sup>28</sup> Responses to the OFT CFI raised concerns that there were significant gaps in the information available to students as well as concerns about the

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<sup>20</sup> OFT CFI (n 1), para 8.3.

<sup>21</sup> White Paper (n 4), para 19.

<sup>22</sup> White Paper (n 4), 43. The importance of these decisions is highlighted by the fact that they are ‘one-off’ decisions involving significant investment. High economic and social costs are associated with switching part way through a course and is thus unlikely, OFT CFI (n 1), para 4.2; and CMA Guidance (n 2) which highlights the importance of these decisions being properly informed and linked to consumer protection law.

<sup>23</sup> White Paper (n 4), 43.

<sup>24</sup> CMA policy paper (n 11), 17-18; Roger Brown, *The Myth of Student Choice* ‘VISTAS: Education, Economy and Community’ Volume 2 (2) 2012; David Weimer and Aidan Vining, *Policy Analysis: Concepts and Practice* (5<sup>th</sup> edn, Pearson 2016), 74.

<sup>25</sup> CMA Policy Paper (n 11) para 5.2

<sup>26</sup> Onri Ben-Sharar and Carl E. Schneider ‘The Failure of Mandated Disclosure’ (2011) 159 *University of Pennsylvania Law Review* 647.

<sup>27</sup> Roger Brown ‘Competition and Choice in Higher Education’ (2014) <http://cdbu.org.uk/competition-and-choice-in-undergraduate-education> [accessed 8 August 2018]; The OFT CFI (n 1) para 4.7; Broadbent, *Information, information, information ... overload?* (2014) 48 (3) *The Law Teacher* 359–366; Weimer and Vining (n 24), 74.

<sup>28</sup> CMA Policy Paper (n 11) para 7.1.

accessibility of terms and conditions, the ability of students to understand them, and the extent to which they are fair and proportionate.<sup>29</sup> The CMA published advice to help HEIs comply with consumer protection law and understand their responsibilities towards undergraduate students.<sup>30</sup> The advice focuses on information provision, terms and conditions and complaint handling and processes.<sup>31</sup>

With regard to information provision, the advice covers the information that must be provided to prospective students at three stages: research and application stage, offer stage and enrolment stage.<sup>32</sup> For prospective students researching their choice of subject and institution, the focus of the consumer protection legislation is the imposition of a general duty not to make a misleading omission or, put more positively, for 'material information' to be provided in a way which is clear, intelligible, unambiguous and timely.<sup>33</sup> 'Material Information' refers to the information which the average consumer needs, according to the context, to take an informed transactional decision.<sup>34</sup> In this regard, the CMA highlights the importance to students of having full information about their courses and fees upfront.<sup>35</sup>

The intention of the CRA is to consolidate consumer law rights and obligations in one place. While the applicable information provisions discussed remain outside the scope of the Act, anything that is said or written pre-contract to the student in the provision of that information, e.g. in the prospectus, is treated as a term of the contract if taken into account by the student in deciding to enter into the contract.<sup>36</sup> The CRA further consolidates the existing unfair terms legislation<sup>37</sup> and all contracts, rules and regulations that students are bound by are subject to the test of fairness under the Act.<sup>38</sup> The contract between the HEI and student is one for the provision of educational services under the Act and as such it provides that the service will be performed with reasonable care and skill.<sup>39</sup> The CRA provides additional remedies, alongside the usual common law remedies,<sup>40</sup> for breach of that duty and in the provision of inaccurate information with the introduction of a right to require

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<sup>29</sup> OFT CFI (n 1) para 1.11; Concerns were also raised about the timeliness and accessibility of the processes that deal with student complaints and prompted the OFT to ask the CMA to undertake a compliance review to identify practices which may result in harm to students in breach of consumer protection legislation. OFT CFI (n 1) para 1.13.

<sup>30</sup> CMA Guidance (n 2)

<sup>31</sup> The CMA Guidance (n 2) focused on compliance with three pieces of consumer protection legislation: Consumer Protection from Unfair Trading Regulations 2008; Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013; and Unfair terms legislation.

<sup>32</sup> CMA Guidance, 21.

<sup>33</sup> s.6(1) Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277 (CPRs) .

<sup>34</sup> Ibid. s.6(3)(a).

<sup>35</sup> CMA Guidance, 24. See page 25 for a list of what 'course information' is taken to include. Of interest from a TEF perspective (possible overlap) appears to be "information about the composition of the course and how it will be delivered, and the balance between the various elements, such as the number and type of contact hours that students can expect (for example, lectures, seminars, work placements, feedback on assignments), the expected workload of students (for example the expected self-study time), and details about the general level of experience or status of the staff involved in delivering the different elements of the course". CMA Guidance, 30, highlights some potential overlap in 'material information under the CPRs and the 'pre-contract information' that must be provided under Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

<sup>36</sup> CRA 2015, s.50.

<sup>37</sup> The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (UTCCRs) and Unfair Contract Terms Act 1977 (UCTA) are consolidated in Part 2 of the CRA.

<sup>38</sup> CMA Guidance, 40. CRA 2015, s.62.

<sup>39</sup> CRA 2015, s.49, is a term of the contract that cannot be excluded, CMA Guidance, 65, formerly provided in Supply of Goods and Services Act 1982, s.13.

<sup>40</sup> Of termination in case of serious breach or damages.

repeat performance or a price reduction.<sup>41</sup> The practicalities of having recourse to such remedies for poor teaching provision, and specifically repeat performance in the HE context, has however been questioned, as it can result in a loss of funding, career opportunities and resulting living costs.<sup>42</sup> Students rarely transfer provider and will not recover fees unless they can demonstrate they were misled.<sup>43</sup> The value and deterrent effect on the HEIs of these remedies may well be limited. The lack of empowered consumers who can switch providers without financial penalty does not promote an effective market.<sup>44</sup>

Following publication of the advice, the CMA commenced a compliance review to establish whether the advice had been successful in raising awareness among HEIs of their consumer law obligations and whether compliance had improved. It further sought to identify whether evidence of non-compliance remained.<sup>45</sup> While the review confirmed that awareness among HE providers had increased significantly with examples of positive change in practice, there were also examples of non-compliance, including with regard to the accessibility and adequacy of information provided to prospective students, for example in relation to additional course costs and undergraduate degree course variation.<sup>46</sup> As such, consumer protection legislation to date has raised awareness of the need to provide accurate information but it is less clear whether it acts as an adequate source of market regulation to protect the interests of students as consumers and as an effective incentive to improve the quality of HE teaching provision. While the CRA introduces new remedies, the value of these to consumers and deterrent effect from breach by HEI's may be limited. Compliance with consumer protection provisions and specifically those set out in the CMA guidance continues to be a focus of regulation under the oversight of the Office for Students (OfS) which, as a consumer focused, sole market regulator, is also charged with administering the TEF.<sup>47</sup>

### Teaching Excellence Framework

The on-going work to improve HEIs compliance with consumer protection legislation, the proliferation of available information in the form of KIS and league tables, and post-experience nature of higher education which limits the impact information has on effective competition, has not diminished the Government's inclination to intervene. Improving information to HE applicants is seen as essential for effective competition and the maintenance of quality.<sup>48</sup> The CMA found that the HE sector in England is to a large extent characterised by healthy competition between providers who have a strong reputational incentive to provide high quality education and to actively compete for students, but still concluded that students find it difficult to assess the quality of courses before they start. A wrong choice can result in a poor learning experience and long term detriment which justifies the need for further regulation.<sup>49</sup> The White Paper maintained that good quality teaching results in good graduate outcomes and as such quality should be among the 'key drivers' of a

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<sup>41</sup> CRA 2015, s.54; CMA Guidance, 66.

<sup>42</sup> Salima Mawji 'Consumer Rights Act 2015: further and higher education' (June 2017) Westlaw Insight

<sup>43</sup> Public Accounts Committee (n 3), 12

<sup>44</sup> *ibid*

<sup>45</sup> Competition and Markets Authority, 'Consumer law compliance review, Higher Education undergraduate sector findings report' (July 2016).

<sup>46</sup> *Ibid*, 4, 18.

<sup>47</sup> White Paper (n 4), 66. Higher Education and Research Act 2017, ss.23-25; Office for Students 'Securing student success: Regulatory framework for higher education in England. (OfS 2018.01, February 2018). To simplify the HE regulatory environment, the OfS combines the regulatory functions of HEFCE and OFFA. Compliance with the CMA advice is a condition of registration of a provider with the OfS.

<sup>48</sup> Public Accounts Committee (n 3)

<sup>49</sup> CMA policy paper (n 11), 17-18.

prospective student's choice and their investment in HE.<sup>50</sup> The information available to students however "can be hard to find, inconsistent and inadequate, making it hard to form a coherent picture of where excellence can be found within and between different higher education providers".<sup>51</sup> Further, the White Paper advances the view that the type of information available (and required under consumer protection legislation) fails to match students' needs and priorities.<sup>52</sup>

The TEF seeks to address these shortcomings with existing information provision by introducing "sector-wide rigour to the assessment of teaching excellence."<sup>53</sup> The Government's position is that TEF provides "clear, understandable information" to students, supported by a rating system about where teaching quality is outstanding with the aim of making it clear to students where the best provision can be found. It should inform competition within the HE market and drive up the standards of quality as a result.<sup>54</sup>

The purpose behind the TEF is laudable and all-encompassing: to better inform students about what and where to study, to raise esteem for teaching, to recognise and reward excellent teaching and better meet the needs of employers, business, industry and the professions in identifying the best graduates.<sup>55</sup> Interestingly the priorities, in assessing quality and in choosing what and where to study, were identified as contact hours, class size and lecturer training, for which a lack of information is said to exist.<sup>56</sup> These input metrics did not appear in TEF2 but do appear in some guise in the subject level pilot study. TEF takes quantitative data from the National Student Survey NSS,<sup>57</sup> HESA and ILR<sup>58</sup> and the Destination of Leavers Survey from Higher Education (DLHE).<sup>59</sup> These metrics have been criticised as unreliable 'proxy' measures of quality in learning and teaching in HE.<sup>60</sup> In addition a 15-page written statement by the providers<sup>61</sup> defined the metrics with which to judge teaching excellence across three criteria: teaching quality, learning environment and student outcomes and learning gain.<sup>62</sup>

### **Intervening to regulate price but losing other policy levers**

The Government wanted to link increases in student fees to the TEF which would create some price differentiation in tuition fees and put some brake on the fees charged by providers rated Bronze. The Government however concede the immediate direct link between TEF and student loans in the face of opposition from the NUS and the House of Lords and the need to pass the legislation before

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<sup>50</sup> White Paper (n 4), 43.

<sup>51</sup> Ibid, 43-44.

<sup>52</sup> Ibid, 44

<sup>53</sup> Ibid, 44

<sup>54</sup> White Paper (n 4), 13. The TEF rating system defines three possible levels of excellence: Bronze, Silver and Gold.

<sup>55</sup> Department of Education 'Teaching Excellence Framework: Year Two Specification' (DFE 232, 2016), 'TEF Year Two', 5.

<sup>56</sup> White Paper (n 4), 44.

<sup>57</sup> Will be used to measure teaching quality with reference to the teaching on my course (NSS Q1-4), assessment and feedback (NSS Q5-9) and the learning environment with reference to academic support (NSS Q10-12).

<sup>58</sup> Will be used to measure the learning environment with reference to non-continuation.

<sup>59</sup> Will be used to measure student outcomes and learning gain with reference to employment or further student and highly skilled employment or further study, 6 months after graduation.

<sup>60</sup> Mike Neary 'saul Teaching Excellence Framework: a critical response and an alternative future' (2016) 12 (3) Journal of Contemporary European Research 690-695, 691.

<sup>61</sup> In 22% of judgements the panel used their discretion to revise the metrics outcome following consideration of the written statements. For HE or alternative providers the move was mainly from bronze to silver although three were downgraded, silver to bronze. More Further Education colleges were downgraded.

<sup>62</sup> TEF Tear 2 (n55), 19.

Parliament dissolved for the 2017 General Election. It was said that the link between TEF and increase in student fees was worth £1 billion<sup>63</sup> which was seen as an incentive to HEI to focus on education, but this figure should be viewed in the context of the £28 billion University income, the majority of which comes from education.<sup>64</sup> If education income has not driven market forces to improve the quality of education provision before TEF, it is by no means certain that it will do so subsequently. The conversion of existing information to a simplified eye-catching label is more likely to feed into the reputational differentiation of universities. The results of TEF2 have not disturbed the Oxbridge and Russell Group reputational position.<sup>65</sup> TEF could end up again being about reputation rather than detailed data.

TEF may fail to generate a direct financial incentive to improve education. The introduction of student loans, to reduce the budget deficit,<sup>66</sup> has lost the Government an important policy lever. The relative income per student for providing different courses has changed. The higher cost 'Group A' courses such as medicine saw income increase by only 6% between 2011 and 2017. For 'Group D' low-cost humanities courses, funding increased by 47%. This could influence Universities' incentives to move from the more expensive STEM subjects to 'chalk and talk' subjects such as Law. The Government's ability to influence and encourage more students to enter STEM subjects is reduced. This may however be addressed by the Education Review announced in February 2018 which is tasked with looking (again) at how students and graduates contribute to the cost of their studies as well as the graduates' earnings potential and their benefit to the economy and the Government's Industrial Strategy.<sup>67</sup>

### **All outputs, no inputs**

TEF uses existing data as proxies for teaching quality. The extent to which these give a valid picture of quality has been subject to criticism elsewhere.<sup>68</sup> The concern addressed here is that, while other pre-existing data sets did not ignore inputs such as staff student ratios (SSR)<sup>69</sup> to date TEF is based entirely on outputs. The TEF benchmarking process<sup>70</sup> does not take account of the impact of factors such as tariff entry points and cross-subsidising of courses and other input data. This is surprising considering the Government acknowledges that what "best predicts educational gain is measures of educational process: what institutions do with their resources to make the most of whatever students they have."<sup>71</sup> The various Government reports discussed in this paper acknowledge the

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<sup>63</sup> White Paper (n 4), 51

<sup>64</sup> Universities UK, 'University Spending Explained' <<http://www.universitiesuk.ac.uk/facts-and-stats/Documents/university-spending-explained-summary.pdf>> accessed 8 August 2018}

<sup>65</sup> OFS 'TEF outcomes' <<https://www.officeforstudents.org.uk/advice-and-guidance/teaching/tef-outcomes/#/>> accessed 8 August 2018.

<sup>66</sup> Chris Belfield and others, 'Higher Education funding in England: past, present and options for the future' (Institute for Fiscal Studies Briefing Note BN211, July 2017) IFS Briefing Note BN211'. Since 2011, the contribution of HE spending to the deficit has declined by £5.7 billion (around 10% of the current deficit), while university funding has increased.

<sup>67</sup> Department of Education, Review of Post-18 Education and Funding, Terms of Reference, February 2018 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/682348/Post\\_18\\_review\\_-\\_ToR.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682348/Post_18_review_-_ToR.pdf)> 8 August 2018

<sup>68</sup> Neary (n 60)

<sup>69</sup> Most league tables take account of staff student ratios and entry tariffs points. The Guardian League table gives a value added score and spend per student.

<sup>70</sup> The TEF benchmarking process takes account of characteristics of the students at the provider, including factors such as age, ethnicity and subject of study. Each provider has a unique benchmark based on its students' characteristics.

<sup>71</sup> Graham Gibbs *Dimensions of quality* (Higher Education Authority, 2010), 43 ; Department of Education 'Teaching Excellence Framework: Subject level pilot specification' (DFE 182, July 2017), 44

role of inputs such as contact hours but Gold-rated institutions tend to have the largest class sizes and there is no evidence their students' rate teaching staff any higher.<sup>72</sup>

The pilot on teaching intensity, as part of the subject level pilot, is a start to redress the balance.<sup>73</sup> Contact hours and large class sizes are considered to have an impact students' perception, engagement and depth of learning.<sup>74</sup> The teaching intensity pilot looks at class sizes and SSR per class by two dimensions: hours and group size. Data gathered at module level will be aggregated to subject-level but will not differentiate the form of teaching by lectures, seminars etc. or grade and experience of staff. A weighting, based on five bands, will be awarded on number of hours taught by the SSR for each hour, to give an aggregated measure at subject level called the Gross Teaching Quotient.<sup>75</sup> To aid validity two measurements of data are used: firstly from providers, not only on the contact hours weighted by SSR per class, but also on placement and field work activities; and secondly from students on their perception of whether the contact hours are sufficient for their studies. The data is a supplementary to the subject-level metrics. It will be considered as part of the holistic judgement in the second step alongside other narrative background information submitted by providers. It is hoped the pilot will inform the extent to which the assessors can use the teaching intensity data to make judgements and how to expand collection of the data in the future.<sup>76</sup> It may also contribute evidence on the relationship between teaching intensity and teaching excellence.<sup>77</sup> The pilot is a welcome start to redressing the balance by looking at the important contribution resource input data can make to teaching quality.

### **Economic Data**

Following a review of TEF2 the Government halved the weighting of the NSS metrics. While the metrics have been criticised the decision reduces the student voice on the quality of education. At the same time in order to 'strengthen the way that TEF holds providers to account for delivering excellent teaching', supplementary metrics on Longitudinal Education Outcomes (LEO) data looking at employment and earnings outcomes up to 5 years after graduation, will add to existing graduate salary metrics from the DLHE survey.<sup>78</sup> Rather than trying to assess the quality of the activity in the classroom, greater emphasis is being placed on economic factors such as graduate earnings and resources expended to improve SSR and teaching intensity. TEF is moving towards a rating based on economic data supplemented by the provider's narrative. LEO and teaching intensity measure concrete data but their value may be lost when combined with other proxies to give the simplistic TEF rating. If the objective is to improve information available to the student then the wider publicity and availability of LEO will allow students to consider the information themselves, and its use in league tables and other compilations can supplement the TEF rating.

### **Increase in resources should be matched by increase in disclosure and governance**

University income from fees has increased by 25% since the 2012 funding reforms.<sup>79</sup> The increased income and move to a market based approach to HE has not been accompanied by any significant

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<sup>72</sup> Jonathan Reeves and Nick Hillman *The 2018 Student Academic Experience Survey* (HEA, 2017), 7

<sup>73</sup> TEF Subject level pilot specification (n 71) the same set of 10 TEF criteria used for TEF Year 2 are used for 35 subjects identified by HESA.

<sup>74</sup> Gibbs (n 71); White Paper (n 4)

<sup>75</sup> TEF Subject level pilot specification (n 71), 63

<sup>76</sup> Department of Education 'Teaching Excellence and Student Outcomes Framework: subject level Consultation Document (DFE 2018), 28

<sup>77</sup> TEF Subject level pilot specification (n 71), 49, the pilot will consider whether bands are the best way to express the data and where they should fall.

<sup>78</sup> Department of Education 'Teaching Excellence and Student Outcomes Framework: lessons Learned from Year Two (DFE 271, October 2017), 47

<sup>79</sup> Belfield (n 66).



review of governance of HE providers, nor any increase in financial disclosure requirements. While TEF has increased the focus on projected student earnings, an economic output, there is no consideration of differing financial inputs. When income for HE was state provided and more modest, oversight by Government bodies such as HEFCE might have been adequate. Risk for quality provision has however remained almost entirely with students and taxpayers rather than being transferred to the institutions. In an era of increasing income from fees, governance of HE providers and the information on how they spend their students and tax payers' money appears to be inadequate.

Only 20 % of students consider they are given enough information on how their fees are spent.<sup>80</sup> While a few HE providers do volunteer information on financial spending in a user friendly form, the practice is not as ubiquitous as it is for local authorities or even privatised utilities. It should become obligatory for HE providers to disclose how their spending is split between research, education, estates, administration and how much is spent per student on particular courses of study. The move to subject level TEF is an opportunity for HE providers to disclose spending per student by course.

Students studying the low-cost 'Group D' courses could consider not only their earning potential but also whether their fees are cross subsidising other students. Full transparency would also ensure that increased funding benefits the student and their education.<sup>81</sup> Some of the financial data might be complex but it could be re-packaged by third party intermediaries, including the private league tables, to be user friendly for potential students. Disclosure and transparency would also allow for better independent scrutiny of individual HE providers financial and management performance.

## Legal Education

Legal education will soon experience changes to the manner of regulation by the SRA. In March 2018 the Legal Standards Board approved the new framework proposed by the SRA for the centrally set Solicitors Qualifying Examination (SQE).<sup>82</sup> In August 2018 the SRA selected Kaplan as the assessment organisation to develop and run the SQE<sup>83</sup> and will return to the Legal Standards Board in 2019 for approval of the detailed rules to bring the SQE into force in 2020 or shortly thereafter. The removal of elements of course standardisation, such as the Qualifying Law Degree (QLD), means there will no longer be any oversight of course content or resources. Providers will be able to determine their own academic approach to undergraduate and professional training provision. The unifying factor will be the centrally set SQE and market forces. The market for solicitors will be determined by law firms who decide who they want to train and employ. Students embarking on courses need this information to make decisions about what and where to study. The SRA plans to publish data on providers' success rate for the SQE, but as students may study at more than one institution before taking the SQE, the authenticity of the data is not yet known. It will not give any information on the market. The market may diverge as larger law firms take more control of the provision of legal education while smaller firms themselves face uncertainty as to what courses produce the best trainees. The removal of course standardisation, such as the QLD, may eventually

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<sup>80</sup> HEA Survey (n 72), 17

<sup>81</sup> While 52% of students considered spending on campus development was a reasonable use of tuition fees, spending less on buildings and sports/social facilities was seen as the most preferred way to save money. HEA survey (n72), 17 and 2017 HEA Survey, 48. and the small % of fees spent on education at some US private institutions

<sup>82</sup> Legal Services Board 'LSB approves framework for SRA's new admission requirements for solicitors (27 March 2018)

<[https://www.legalservicesboard.org.uk/news\\_publications/LSB\\_news/PDF/2018/20180327LSB\\_Approves\\_SR\\_A\\_SQE\\_Application.html](https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2018/20180327LSB_Approves_SR_A_SQE_Application.html)> accessed 26 August 2018.

<sup>83</sup> SRA 'Kaplan appointed as SQE assessment organisation (1 August 2018) <https://kaplan.co.uk/insights/article-detail/insights/2018/08/01/kaplan-appointed-as-sqe-assessment-organisation> accessed 26 August 2018.

give more choice but opens up a long period of great uncertainty for law students. This is very much at odds with Government policy where informed choice is meant to drive quality of provision. It could leave law students enrolling on courses that, unknown to them, cross subsidise students on other courses, and uncertainty as to whether their eventual qualification will be attractive to law firms.

## **Conclusion**

Recent policy changes have resulted in an increase in funding but have not delivered an effective market. TEF was intended to focus HEIs on teaching quality but it appears to be too early for this to have made a significant impact on student decision making.<sup>84</sup> The existence of a HE market is called into question and the policy of relying on information to regulate quality has significant limitations. Changes to consumer regulation have however delivered an ethos in which HEIs take greater care in the information provided to applicants and students. While the increase in information may not have delivered market forces to improve quality individual students are better informed about the course they choose.

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<sup>84</sup> Reference to survey of students who are aware of TEF rating