



Unwarranted: The OfS Review of Assessment Practices and the Erosion of Institutional Autonomy

Liz Molyneux¹

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Abstract

In England, the relationship between the higher education regulator (OfS) and those it purports to regulate is highly strained. A 2023 parliamentary inquiry into the OfS published an excoriating report which found, among other issues, problems with the execution of its statutory duty to protect institutional autonomy. An OfS policy which evidences this is the requirement for universities to assess spelling, punctuation and grammar. In imposing this mandate, the OfS appears to be *ultra vires* as it has a statutory duty to protect institutional autonomy, specifically defined to include the freedom to determine assessment practices. This paper uses an adapted form of Hyatt's Critical Higher Education Policy Analysis Framework to examine the policy steers and socio-political contexts from which the assessment mandate emerged. The warrants for the policy are analysed with reference to three epistemic beliefs relating to declining literacy, higher education quality and employment. This paper also analyses the OfS's interpretations of its statutory duties in issuing this policy. Despite the highly critical findings of the inquiry, no substantive change in regulatory approach looks likely.

Keywords Higher education regulation · Institutional autonomy · Office for Students · Critical higher education policy analysis framework · Spelling, punctuation and grammar · Culture wars

Introduction

Higher education regulation in England is in a sorry state. The relationship between the regulator and those it purports to regulate has become so strained in recent years that English universities felt compelled to call on the UK Parliament to open an inquiry into the operation and performance of the regulator, the Office for Students (OfS) (Bradshaw et al., 2023). In response to concerns that the OfS was not 'fit for

✉ Liz Molyneux
liz.molyneux@edgehill.ac.uk

¹ Edge Hill University, St Helen's Road, Ormskirk, Lancashire L39 4QP, UK

purpose' (Bradshaw et al., 2023), the House of Lords Industry and Regulators Committee launched an inquiry into the work of the OfS which examined, among other issues, how the regulator was interpreting its statutory duties and whether it was operating with sufficient independence from the government (UK Parliament, 2023). Among the many and varied concerns which were raised by witnesses during the inquiry was an issue over a somewhat bizarre piece of regulation requiring universities to assess spelling, punctuation and grammar. This regulation illustrates the OfS's disregard of its statutory duty to protect institutional autonomy and its lack of independence from the government. After reviewing the evidence, the House of Lords published an excoriating report which recommended that the OfS change its approach to protecting institutional autonomy and found that it lacked both real and perceived independence from the government (House of Lords Industry and Regulatory Committee, 2023). This research paper analyses the OfS's regulation on spelling, punctuation and grammar, and what it reveals about institutional autonomy and regulatory independence in England.

The Requirement to Assess Spelling, Punctuation and Grammar

In October 2021, the OfS introduced a policy requiring all English universities to assess accurate use of spelling, punctuation and grammar (Office for Students, 2021a). The policy was presented as a necessary response to the perceived dissatisfaction among employers with students' levels of literacy and as a mechanism for ensuring quality in higher education. The OfS ominously warned universities 'to take note and adjust their practice' (Office for Students, 2021a, 3). Unsatisfactory approaches such as those which focused on effective written communication or which tied assessment to module learning outcomes would be 'likely to raise compliance concerns' (Office for Students, 2021a, 11) for which the regulator could impose harsh sanctions including the withdrawal of university status and associated access to funding. This position was reaffirmed in the revised regulatory framework published the following year which mandated the assessment of technical proficiency in English (Office for Students, 2022a). A very specific obligation for universities to assess the accuracy of spelling, punctuation and grammar was created, which applied to all students on all courses with very few exceptions.

Given the challenges facing the UK higher education sector in 2021 as it emerged from the COVID-19 pandemic while adjusting to its changing relationship with the EU post-Brexit, it may seem surprising that the OfS chose to focus so acutely on spelling, punctuation and grammar. Assessment of technical proficiency in English in higher education had not been on the agenda and did not merit a mention by successive Secretaries of State and Ministers in their guidance letters to the OfS since the regulator's inception in 2018 (Gyimah, 2018; Hinds, 2019a, 2019b; Williamson, 2021). In fact, it only emerged as a 'strategic priority' for the Secretary of State for Education in March 2022 (Zahawi and Donelan, 2022), five months *after* the publication of the October 2021 review which created the assessment mandate.

Perhaps even more troubling is that the assessment mandate *prima facie* contravenes the provisions of the Higher Education and Research Act 2017 (HERA).

HERA requires the regulator to have regard to ‘the need to protect the institutional autonomy of English higher education providers’ (United Kingdom, 2017, sec 2(1) (a)) which is defined as the freedom ‘to determine the content of particular courses and the manner in which they are taught, supervised and assessed’ (United Kingdom, 2017, sec 2(8)(b)(i)). This section of the act is unambiguous, and so the OfS would appear to be *ultra vires*, acting beyond the scope of their statutory powers.

The assessment of spelling may initially appear to be an odd and somewhat trivial cause for the regulator to take on, leading to the question of why the regulator became so committed to the cause that it was prepared to act beyond the scope of its statutory powers to pursue it. This paper attempts to provide an answer. By focusing on an incident in the English higher education sector, this analysis makes a contribution to the theory and method of researching politicised regulation. I use a form of critical discourse analysis to examine the regulator’s justifications for their policy within the contemporary and longer-term temporal context. Specifically, this paper addresses the following research questions:

1. What is the socio-political and epistemic context of the OfS policy on assessment practices?
2. How is warrant employed by the OfS to justify this policy?
3. How did the OfS interpret its statutory powers in issuing this policy?

Critical Discourse Analysis of Higher Education Policy Texts

In their review of policy texts in higher education research, Ashwin and Smith (2015) note that despite significant interest in higher education policy, there is relatively little research which analyses policy texts. Critical analysis of policy texts has the potential to reveal how such texts ‘establish ways of seeing the world that lead to the recognition of particular kinds of problems and not others’ (2015, 1008), and while Ashwin and Smith recognise that policy is more than text, they make the case that nevertheless texts are a very important element of policy. Policy analysts who do not ground their research in policy texts risk working with their own creations which may not be recognised by policymakers. Where policy texts have been the focus of analysis, Tight (2012, cited in Ashwin and Smith, 2015) argues that higher education researchers have tended not to be sufficiently detailed as to how the analysis was conducted. Similarly, Saarinen (2008, cited in Ashwin and Smith, 2015) notes that discursive and textual approaches to policy analysis are rare. This paper attempts to address this shortcoming by including an account of critical discourse analysis (CDA) and the adaptation of Hyatt’s (2013) framework which was used in this analysis.

Fairclough (2015, 6) explains that CDA combines critique of discourse with an explanation of how discourse forms and is formed by social reality. He argues that it is necessary to examine both society and discourse because an understanding of their interrelation provides the foundation for changing societies for the better. Without a clear understanding of how discourse operates within society,

challenging and changing discourse is much more difficult. Central to CDA is the aim to ‘denaturalise’ discourse, that is ‘to reveal taken for granted assumptions, and to surface hidden agendas and dominant views’ (Smith, 2013, 64). This involves the identification of perspectives or states of affairs which are presented as ‘normal’ or ‘natural’ (Hyatt, 2013). By identifying such ‘normalised’ or ‘naturalised’ perspectives, the analyst can then problematise and challenge these perspectives and the assumptions upon which they are based.

This analysis uses a version of CDA based on Hyatt’s (2013) Critical Higher Education Policy Analysis Framework, summarised in Table 1. Hyatt’s framework is a theoretical and methodological approach which provides a ‘mechanism for critically investigating higher education policy discourse, and so equipping analysts to challenge the language, as well as the substance and ideology this discursively inscribes, of policy articulations’ (2013, 43). Hyatt intends the framework to be enabling (2013, 45) while cautioning that in positing a categorical model, ‘there is the danger of over-systematising the units of analysis into rigid units’ whereas using the framework instead calls for ‘flexibility, tentativeness, and reflexive commitment to provisionality’ (Hyatt, 2005, 520). I did not use all aspects of Hyatt’s framework, electing to prioritise elements of the framework which I anticipated would generate analysis most relevant to my research aim and questions. Learning from Bagshaw’s (2020) modifications to Hyatt’s framework, I reordered the elements which contribute to the contextualisation of policy to begin my analysis with contemporary organisations, policy drivers and policy levers. This change is intended to foreground the introduction of the OfS and outline its place in the UKHE regulatory environment before the analysis of temporal context. Also following Bagshaw (2020), and cognisant of Hyatt’s observation that it is closely linked to modes of legitimation (Hyatt, 2013, 52), warrant is dealt with as deconstruction. With this boundary move of warrant from contextualisation to deconstruction, the first section of the analysis leads with contextual information supplemented by reference to the OfS policy text, and the second section draws primarily on the OfS policy text and the assertions of warrant claimed within. Additional texts were used to supplement the analysis and selected for inclusion in this paper on the basis of their potential to contribute to an understanding of temporal context and warrant. In making these changes to the framework, I recognise that another researcher analysing the OfS policy text may make different choices in adapting

Table 1 Critical higher education policy analysis framework (adapted)

Part 1 Contextualisation	Contemporary organisations, policy steering and policy levers Immediate socio-political context Medium-term socio-political context Episteme
Part 2 Deconstruction	Evidentiary warrant Accountability warrant Political warrant

and using the framework while staying true to Hyatt's aim that the framework is used as a tool for critical policy engagement and resistance (Hyatt, 2013, 57).

When engaging with policy through CDA, it is important to recognise that the analysis is an interpretation of an interpretation (Fairclough, 2015). Firstly, the policy text is an interpretation of the social world, both as it is and how it ought to be, as articulated by the policy architects. Secondly, the policy analyst in conducting CDA is engaged in interpretation which will be influenced by her MR, or 'member's resources' such as her background knowledge, assumptions and ideologies (Fairclough, 2015, 155). Hyatt refers to the related concept of 'perceptual relativism'; an analyst cannot free herself of subjectivities and cannot know precisely what occurred in her absence in the past (Hyatt, 2005, 520). However, this does not give the analyst a license to engage in 'ideological cloaking and masquerade', confirming an interpretation of the text already formed prior to conducting the analysis (2005, 520). Therefore, the critical discourse analyst should approach the task reflexively with awareness of the impact of her MR on interpretation. The reflexive account which follows allows the reader to evaluate my positionality and how it may influence my interpretation of the policy text.

Reflexive Account of Positionality

My field is English for Academic Purposes. As an academic English language lecturer, I place a high value on clear and accurate communication. I have benefited from many constructive debates with colleagues on how this can be defined, how it should be taught and how it should be assessed. However, experience leads me to doubt that a uniform assessment policy can be effective in meeting diverse needs. I believe that literacy is empowering in enabling citizens to participate in society and to flourish. Although I recognise that spelling, punctuation and grammar do affect meaning, as an applied linguist I know that it is reductive to equate technical language proficiency with literacy, and to equate literacy with communication. Therefore, when I first encountered the OfS review of assessment practices, I thought it was poorly conceptualised and unlikely to achieve its purported aims. I expected to find that the policy had been hastily constructed without adequate opportunity for consultation and revision. As can be seen from the analysis which follows, my interpretation has shifted quite significantly from this initial position. While it is important to acknowledge that my interpretation is influenced by my MR, I have endeavoured to be robust in my analysis, substantiating claims with evidence and giving fair representations of sources without distortion through recontextualisation. My aim is to provide readers with sufficient information to develop their own views on the issues raised in this paper.

The OfS, Policy Steering and Policy Levers

The OfS was established as the regulator for higher education in England in January 2018 by HERA. This 'fundamentally changed the relationship of English universities and the state' (Bagshaw, 2020, 61) and signalled a switch to a 'more combative

regulatory stance' (2020, 63). The OfS is ostensibly tasked with looking after the interests of students and in ensuring that 'the market works in interests of all stakeholders' (Augar, 2019, 63, cited in Bagshaw, 2020, 55).

The establishment of the OfS is an example of policy steering which Hyatt (2013) describes as the use of a regulatory body to conduct policy in place of direct government control. The UK government steers the regulator via the Secretary of State for Education who provides guidance to the OfS. As is typical for regulators in the UK, the OfS is a designated arm's-length body (ALB). Also not uncommon among ALBs in the UK (National Audit Office, 2021), the nature of the arm's-length regulation and the OfS's relationship with the government is problematic (Ashwin and Clarke, 2022).

The state, via the OfS, uses policy levers to direct, manage and shape change. Steer et al. (2007, 177) argue that policy levers are not neutral tools and that choices about which levers to use are inherently political. The OfS has some very powerful levers at its disposal to enforce compliance with its regulations and can ultimately withdraw a university's status as a registered provider of higher education. English universities are dependent upon their registration with the OfS for their power to award degrees, to draw on funding from the student loans company and to recruit international students. To maintain their status as registered providers, universities must comply with the OfS's conditions of registration. The requirement to assess spelling, punctuation and grammar has been added to these conditions and will be taken by the OfS as a marker of quality (Office for Students, 2022a). Universities who do not specifically assess spelling, punctuation and grammar in a manner deemed acceptable by the OfS risk breaching their conditions of registration and endangering their university status.

Although the regulator has a range of less severe sanctions at its disposal, it was urged in 2021 by the then Secretary of State for Education to use its full range of powers and sanctions. In cases relating to breaches of quality conditions, the recommendation was that the university should immediately be subject to 'more robust measures, including monetary penalties, the revocation of degree awarding powers in subjects of concern, suspending aspects of a provider's registration or, ultimately, deregistration' (Williamson, 2021). For those left wondering whether the OfS would prioritise assessment of spelling in an overall evaluation of a university's quality, the successive Secretary of State for Education provided the answer. In an open letter outlining strategic priorities, the OfS was instructed to begin implementation of an 'inspection regime' of the conditions of registration. One of the three priorities for the inspection of quality was 'rigour in assessment, including appropriate technical proficiency in English' (Zahawi and Donelan, 2022).

The Tabloid Press in the Immediate Socio-Political Context

To understand the rationale for this use of policy levers and policy steer, it is useful to examine the immediate socio-political context. This entails consideration of what was happening at the time that the policy was enacted, including what was in the news (Hyatt, 2013).

As mentioned previously in this paper, there was no sign that the assessment of spelling, punctuation and grammar in universities was on the agenda for the OfS or for the government prior to 2021 and it did not appear among the regulator's strategic priorities for the sector. And then, on 23 June 2021, the OfS announced a review of 'assessment practices that disregard poor spelling, punctuation and grammar' (Office for Students, 2021b). On 7 October 2021, the review was published (Office for Students, 2021a). In March the following year, assessment of technical proficiency in English was identified as a strategic priority for the OfS by the then Secretary of State and Minister for Universities (Zahawi and Donelan, 2022). By November, the requirement to assess technical proficiency in English had been cemented in the revised regulatory framework which set out the conditions of registration for universities in England (Office for Students, 2022a).

A clue as to what precipitated the review is helpfully included in the policy text itself: 'Earlier in 2021, reports in the press suggested that some higher education providers might have adopted policies and practices that could undermine the integrity of assessment by disregarding poor spelling, punctuation and grammar' (Office for Students, 2021a, 3). Dickinson (2021) has persuasively argued that the report in the press which triggered the review was a scare piece in the Daily Mail on 10 April 2021 which mistakenly reported that the OfS was instructing universities *not* to penalise students for poor spelling, punctuation and grammar. In response to the headline 'Fury as education regulator tells universities that marking students down for bad spelling is ELITIST' (Henry, 2021), the OfS issued a statement refuting the allegation. A few days later, on 15 April 2021 during a Commons session on compensating students for lost teaching and rent during COVID, the then Minister for Universities, Michelle Donelan MP, stated that she was 'appalled by the decision of some universities to drop literacy standards in assessments' and promised that 'we will act on this' (Hansard, 2021, column 483). Two months later, the OfS review of assessment practices was announced.

This account has identified a candidate for the proximate trigger for the review but it does not explain why a mistaken headline on assessment practices would provoke such a strong response from the government and from the regulator. For that, analysis of the medium-term socio-political context may provide some insights.

The Culture Wars of the Medium-Term Socio-Political Context

This section of the contextual analysis situates the synchronic events recounted above within the political and cultural era. In recent years, there has been a sizeable increase in media coverage of culture wars (Duffy et al., 2021), and 'symbolic issues and questions of identity occupy a larger and more antagonistic position in the general culture than they did 10 or 20 years ago' (Anthony, 2021). Although there is nothing particularly new about cultural conflicts gaining media attention, D'Ancona (cited in Anthony, 2021) notes that a significant and very recent development is the speed with which Cabinet ministers respond. He posits that this could be due to the enormity of the tasks facing the government in an era of Brexit and the pandemic. It

is ‘practically a political rule that when confronted with a number of tough priorities, the first job is to hunt around for easier options’ (Anthony, 2021).

And while ‘nobody has officially declared a ‘culture war’ against universities’, the higher education sector does seem to be ‘coming under increasing fire from ministers and the press’ (Beech, 2022). In his analysis of the anti-woke culture war in the UK, Cammaerts (2022, 740) shows how culture war discourses traverse several ‘fields of action’ to shape public opinion and influence law-making. This aptly describes the influence of the tabloid press on the government and the regulator in this instance.

Culture war issues can span a wide array of topics, and although topics do not have to consolidate around a political identity, there is often a ‘traditionalist’ group and a ‘progressivist’ group occupying polar ends of the spectrum, with roughly half of the population holding moderate positions between these two extremes (Duffy et al., 2021, 7). Culture war issues often involve values and identity, and erupt where there are stark differences in worldviews. Opponents in a culture war display a tendency to invoke commonsense arguments, or at least those which appear to be common sense according to a particular worldview. Raising standards by assessing spelling, punctuation and grammar is likely to have commonsense appeal to the traditionalist faction in a culture war and may therefore look like an easy win to politicians struggling with intractable problems.

Declining Standards and the Episteme

The final section of the contextual analysis examines the episteme. Hyatt’s framework employs Foucault’s notion of the episteme to examine what constitutes knowledge or truth in a particular era, and how dominant ideologies and discourses are naturalised into acceptance as the way things are (Hyatt, 2013, 48).

The first commonsense position underpinning the OfS assessment policy is the belief that literacy standards are declining and that this decline must be reversed for the good of the nation. In writing about the National Literacy Strategy in the English school system, Goodwyn (2011, 2) notes that ‘history and debates about literacy repeat themselves’ and he traces concerns about falling standards to the 1970s. Goodwyn argues that concern for falling standards ‘was ill-founded and certainly not based on evidence’, and that the Conservative government of the 1980s and 1990s ‘manufactured a crisis in standards of literacy’ which was used as the basis for successive governments, including New Labour, to launch a mission to ‘raise standards’ (2011, 2). A lack of evidence of falling literacy standards did not forestall the implementation of policies to address the decline as exemplified by Kenneth Baker, Secretary of State for Education in 1989: ‘[The National Curriculum] means clear standards for reading, writing, spelling, punctuation, grammar and handwriting ... Common sense is winning out’ (Stubbs, 1989, 248).

Perhaps unsurprisingly, these policies did not sate the appetite for further interventions in schools to reverse the decline in literacy. Ball (2021, 102) refers to ‘policies of nostalgia’ to describe Michael Gove’s desire to introduce literacy assessments in schools during his stint as Secretary of State for Education in the

early 2010s. Gove promised that education would go ‘back to basics’ (Ball, 2021, 104) and that there would be ‘proper marks given once more for spelling, punctuation and grammar’ (Ball, 2021, 106).

Writing in the 1980s, Stubbs observed that ‘English language is a rallying point in the current educational and political debates’ (1989, 235). Grammar was used symbolically to represent wider social values, whereby a ‘return to the traditional grammar marks a return to the associated values’ (Myhill and Jones, 2011, 49). The literacy debates which raged in the 1980s occurred at a ‘time of rapid social change and enormous social uncertainty. At such times, language becomes a focus of debate, because of the ways in which it symbolises social and personal identity’ (Stubbs, 1989, 241). It is not hard to see the parallels with contemporary England and the resurgent interest in exercising control over language.

However, a significant point of departure from the rhetoric on declining literacy standards in the 1980s and the rhetoric today is over the effects of the decline on the nation. In the 1980s, declining literacy was associated with a descent into crime, expressed succinctly by Norman Tebbit during his time as Chairman of the Conservative Party:

If you allow standards to slip to the stage where good English is no better than bad English, where people turn up filthy ... at school ... all those things tend to cause people to have no standards at all, and once you lose standards then there’s no imperative to stay out of crime (Tebbit, 1985, quoted in Stubbs, 1989, 241).

In a similar (but perhaps less dramatic) vein, Prince Charles worried about the link between poor English, poor character and a shortage of playwrights:

We’ve got to produce people who can write proper English. It’s a fundamental problem. All the people I have in my office, they can’t speak English properly, they can’t write English properly. All the letters sent from my office I have to correct myself, and that is because English is taught so bloody badly. That is the problem. If we want people who write good English and write plays for the future, it cannot be done with the present system, and all the nonsense academics come up with. It is a fundamental problem. We must educate for character (Prince Charles, 1989, quoted in Stubbs, 1989, 244).

In contrast, today’s rhetoric on declining standards links literacy to employability and economic growth. Hyatt explains that ‘education is viewed as one part of the machine for furthering the economic prosperity of the country’ and quotes New Labour Prime Minister Tony Blair: ‘If we don’t have a first-class well-educated workforce, then we can’t compete... It is the single biggest driver of increased productivity’ (Blair, 2000, quoted in Hyatt, 2005, 528). Today, the OfS appeals to the interests of employers and the economy to justify the imposition of the assessment policy: ‘Employers rely on the qualifications awarded to students’ but if graduates are ‘unable to communicate effectively’, employers will incur costs ‘training graduates in basic English’ (Office for Students, 2021a, 3).

The second epistemic commonsense position which underpins the assessment policy relates to quality. The changing discourses on quality in higher education have been linked to changes in university funding since the early 1990s and increased marketisation which led to ‘a more intense focus on the ‘quality’ of higher education’ (Ashwin et al., 2015, 610). Although quality is a contested term, definitions of quality which relate to equipping graduates with skills for employment have become much more dominant than alternative narratives which conceive of educational quality in terms of knowledge, criticality or transformation.

These epistemic positions combine to give the commonsense views that:

- 1) Literacy standards are low and this must be addressed by assessing spelling, punctuation and grammar (because who could reasonably argue in favour of declining literacy and against the assessment of spelling, punctuation and grammar as its panacea?)
- 2) Higher education should be high quality (because who could reasonably argue in favour of low quality education?)
- 3) High quality education entails preparing students for graduate employment (because who could reasonably argue in favour of graduate unemployment?)

Missing and Misplaced Warrants in the Policy Text

The analysis of warrant demonstrates how the OfS relies on these commonsensical views to justify its assessment policy. Warrant refers to the ‘justification, authority or reasonable grounds’ for an act, policy statement or belief (Cochran-Smith and Fries, 2001, 4). Evidentiary warrant is the establishment of a position based on empirical data and facts and may include reference to quantitative data. The accountability warrant is the grounds for action based on outcomes, for example a claim to be improving standards (Hyatt, 2013), which has commonsense appeal (Cochran-Smith and Fries, 2001, 8). The political warrant is a claim to be acting for the public good or national interest, and not just for a privileged few. Cochran-Smith and Fries argue that the evidentiary warrant often receives the most attention, but caution that it can only be properly understood by making explicit the assumptions, values and political purposes underlying the accountability and political warrants. Together, the three warrants comprise a ‘common sense’ position (2001, 4).

Evidentiary Warrant

The evidentiary warrant provided by the OfS to justify the assessment policy is weak and relies heavily on commonsense views towards low literacy standards for its persuasive appeal. Although a number of justifications for the policy are included in the OfS review of assessment practices (Office for Students, 2021a, 3), for only one of these justifications is there an attempt to substantiate a claim with reference to external sources. However, closer inspection of this claim and the data used in

its support indicate that it does not provide robust support for the OfS assessment policy and may even present empirical evidence to the contrary.

The OfS reasons that universities must assess the accuracy of spelling, punctuation and grammar because employers incur training costs if they recruit graduates who cannot communicate effectively in basic English. This is supported by the statement that '[t]here is some evidence to suggest employers are struggling to recruit students with the right skills' (Office for Students, 2021a, 3). Three sources are referenced in a footnote to support this. However, all three sources refer to literacy and none of the sources mention spelling, punctuation or grammar.

The first source used by the OfS is a report from the CBI and Pearson (2019). The report contains data on employers' attitudes to literacy and numeracy as a combined unit, and it refers to young people without distinguishing between graduates and non-graduates. So although it might be possible to use this report to support the OfS's assertion that there is some evidence to suggest employers are struggling to recruit young people with the right skills, it would be inaccurate to infer from this that employers are struggling to recruit graduates, or that literacy has been identified as a significant issue.

An alternative reading of the report indicates that concerns over graduate literacy may not be a priority for employers. Literacy is not mentioned in the key findings, and there are no recommendations related to literacy in the report. Moreover, the category of 'academic results and qualifications' received the highest satisfaction ratings from employers (CBI and Pearson, 2019, 25). This suggests that the assessment of spelling, punctuation and grammar in universities is not an area of particular concern among the employers surveyed for this report.

The second source is a report from the OECD (Kuczera et al., 2016). This report also refers to the broader concept of literacy and not accuracy. The example of literacy which is given by the OECD relates to responding appropriately to instructions on an aspirin bottle, pointing to a functional view of literacy which is quite different from the OfS's focus on technical proficiency. The OECD report does include data on relatively weak literacy levels among graduates in the UK compared to comparable countries but situates this within the context of relatively weak literacy and numeracy among UK adults as a whole and emphasises the importance of early intervention with children to address this. Although not a priority, the OECD suggests that universities should not graduate students with low basic skills, 'leaving institutions to work out how to deliver that outcome' (Kuczera et al., 2016, 14).

The third source is an article from The Times newspaper which features comments from an OECD director who argues that poor graduate literacy is contributing to the high proportion of graduates in non-graduate jobs (Woolcock, 2018). This implies a causal connection between university education and graduate under-employment. Versions of this argument surface quite frequently: If there is a high proportion of graduates in non-graduate employment, it is because universities are educating students below the standard required by graduate employers. Tomlinson (2018) challenges this logic, explaining the limitations of considering employment only from the supply-side. Graduate employment 'is a complex and multi-dimensional issue shaped by demand-level factors in the labour market as much as supply-side provision' (2018, 716).

This analysis of evidentiary warrant demonstrates that the empirical justification for the OfS assessment policy is weak, with no evidence put forward which relates to spelling, punctuation and grammar or assessment practices at universities. Even so, the commonsensical views that literacy is under threat and that universities should prepare students for employment are clearly on display.

Accountability Warrant

Analysis of the accountability warrant reveals how the OfS appeals to outcomes and the raising of standards to justify their assessment policy:

Our aim is to protect students, employers and taxpayers from approaches to assessment that are likely to erode standards across the sector rather than maintaining rigour... Our regulatory objectives reflect the things that matter to students: high quality courses, successful outcomes, and the ongoing value of their qualifications (Office for Students, 2021a, 4).

The assertions to be acting on behalf of these stakeholders are not substantiated in this review. Employers' views from the CBI and Pearson report have been misrepresented in service of the OfS's agenda. The student voice is 'eerily silent' (Dickinson, 2021), as is the taxpayer's. Nevertheless, 'quality' and 'outcomes' must be pursued in the face of eroding standards. Through the use of composite case studies, the OfS speculates on the impact of various assessment practices. But 'standards' and 'successful outcomes' are never defined, and no erosion of standards has been observed or documented. The use of these vacant terms strengthens the accountability warrant. It is common sense to want protection from eroding standards. Surely we are all in favour of higher quality and successful outcomes.

Political Warrant

In addition to the assertion to be protecting the interests of students, employers and taxpayers displayed in the excerpt above, the OfS makes a further claim that the assessment policy is justified as a public good, or 'social benefit':

Introducing [unsatisfactory assessment] policies may have lowered standards, which in turn may have contributed to greater proportions of students being awarded higher degree classifications. Rather than helping individual students, the provider's policies could disadvantage them later in their studies or when they enter the workforce. Employers may be affected if the graduates they employ are unable to perform written tasks to an appropriate standard. All of these effects would be detrimental to taxpayers, who would have contributed to the funding of courses that had not delivered the intended social benefits. (Office for Students, 2021a, 7)

It could be argued that the social benefits of university education encompass, for example, active citizenship, improved mental and physical health, reduced levels of crime, and innovations in research and development among many others (Willets, 2015). However, these alternative interpretations of social benefit do not seem to be under consideration. Instead, the social good is to be understood only in relation to economic productivity, providing further reinforcement of the commonsense position which values higher education only in terms of employability.

This analysis of warrant has shown that the OfS's justifications for their assessment policy rely heavily on the commonsense views that the policy is necessary to address low literacy standards, to improve quality and to promote employability. The OfS claims to be acting on behalf of students, employers and taxpayers and to be acting for the public good. The OfS has not provided any empirical evidence or sought the view of students, employers or the taxpayer in framing this policy. This is no barrier to enactment for a policy with commonsense appeal which appears to have been created for political expediency in an attempt to secure an easy win in the culture wars. The final section of this analysis now turns to the question of how the OfS interpreted its statutory duties in pursuit of this assessment policy, and contends that this pursuit is *ultra vires*.

Statutory Protection of Institutional Autonomy

The OfS was established with the passing of HERA in 2017. HERA section 2 sets out the general duties of the OfS, which begins with 'the need to protect the institutional autonomy of English higher education providers (United Kingdom, 2017, sec 2(1)(a)). Institutional autonomy is defined as the freedom of higher education providers to 'determine the content of particular courses and the manner in which they are taught, supervised and assessed' (United Kingdom, 2017, sec 2(8)(b)(i)). The OfS assessment policy unambiguously creates the expectation that technical proficiency in English must be assessed and gives one example from five composite case studies of an assessment approach which would meet this expectation. This is *prima facie* in contravention of the statutory duty to protect institutional autonomy, and specifically the freedom of universities to determine assessment practices. During a formal consultation on revising the regulatory framework, this was raised with the OfS who responded with an alternative interpretation of their section 2 duties, indicating that they had no intention of protecting institutional autonomy:

On the points raised relating to institutional autonomy, while the OfS is required to have regard to the need to protect institutional autonomy, we are firmly of the view that we do not have an absolute obligation to protect autonomy (as appears to have been suggested in consultation responses). In considering whether and how to regulate in the interests of students, we must balance our various general duties, including requirements to have regard to the need to protect institutional autonomy, the need to promote the quality of higher education courses, and the need to promote equality of opportunity (Office for Students, 2022b, para 60).

In this excerpt, the OfS refers to its statutory duties to promote quality (United Kingdom, 2017, sec 2(1)(b)) and to promote equality of opportunity (United Kingdom, 2017, sec 2(1)(e)) which must be weighed against the statutory duty to protect institutional autonomy (United Kingdom, 2017, sec 2(1)(a)). The OfS asserts that it is tasked with ‘deciding how to balance any tensions [before making] a judgment about the appropriate course of action’ and stresses that the duty to protect institutional autonomy should be interpreted ‘in its proper context’ (Lapworth, 2018).

It is the contention of this paper that the proper context for interpreting the OfS’s statutory duties ought to be the statutory context of those duties. To evaluate whether the OfS can invoke its duty to promote equality of opportunity to justify the imposition of an assessment practice which infringes institutional autonomy, it is instructive to return to HERA. Although section 2(1)(e) does indeed require the OfS to have regard to ‘the need to promote equality of opportunity in connection with access to and participation in higher education’, a subsequent section in HERA limits this duty and clearly states that the promotion of access and participation cannot be used as a pretext for eroding institutional autonomy nor for prescribing assessment practices:

(1) In performing its access and participation functions, the OfS has a duty to protect academic freedom including, in particular, the freedom of institutions—

(a) To determine the content of particular courses and the manner in which they are taught, supervised and assessed (United Kingdom, 2017, sec 36(1)(a))

It is similarly illuminating to consider the regulator’s duty to promote quality in the context of related statutory provisions in HERA. The OfS makes the argument that the assessment of technical proficiency in English is a justified infringement of institutional autonomy because the regulator is promoting quality (Office for Students, 2021a, 11; Office for Students, 2022b, paras 186 and 194). HERA section 23 requires that when making an assessment of quality, the OfS must use ‘sector-recognised standards’ where they exist, and must assess ‘against sector-recognised standards only’ (United Kingdom, 2017, sec 23(3)). SEEC, a consortium of higher education providers in the UK, has created just such a standard. Their credit level descriptors for higher education include descriptors relating to expected standards of communication (SEEC, 2021). HERA clearly stipulates that the OfS is required to defer to the SEEC sector-recognised standard for quality; it cannot be displaced by the regulator’s unilateral assertion of its own measure of quality.

The OfS and Principles of Best Regulatory Practice

Before concluding, it is worth noting the final statutory duty listed in HERA section 2. The OfS is obliged to have regard to the principles of best regulatory practice, including that regulatory activities are ‘transparent, accountable, proportionate and consistent’ (United Kingdom, 2017, sec 2(1)(g)(i)), and are ‘targeted only at cases in which action is needed’ (United Kingdom, 2017, sec 2(1)(g)(ii)). The assessment policy was based on a review of practices at a small number of universities who

have not been identified. The case studies and commentary are based on composite accounts, so it is not possible to examine these assessment practices in context to discover the extent to which they have any of the negative impacts which are attributed to them by the OfS. This contravenes the statutory requirement that regulatory activities are transparent and accountable. Moreover, the Secretary of State encouraged the OfS to investigate assessment of technical proficiency in English as part of an inspection regime (Zahawi and Donelan, 2022). Sanctions following an inspection where quality is deemed to be an issue can be particularly severe. As the OfS considers the assessment of spelling to be an indicator of quality, universities who do not assess spelling in the manner prescribed by the OfS risk incurring severe sanctions. This contravenes the requirement that regulatory activities are proportionate. Lastly, no evidence relating to the impact of spelling, punctuation and grammar assessment practices in universities has been presented, and yet the requirement to assess in the manner prescribed by the OfS applies to all students on all courses with very limited exceptions. It is not possible on this basis to argue that regulation in this area is 'targeted only at cases in which action is needed' (United Kingdom, 2017, sec 2(1)(g)(ii)).

Conclusion

This paper has used a form of critical discourse analysis to examine an instance of politicised regulation in English higher education. The government, via the OfS, introduced a policy requiring universities to assess spelling, punctuation and grammar on all courses for all students with very limited exceptions. This policy appears to have been introduced in response to a scare piece in a tabloid newspaper, and relates to an issue which is likely to be popular with the traditionalist faction in the culture wars. The policy has persuasive appeal to those who fear that the UK is facing a decline in literacy and want to see standards raised. Commonsense positions which have been promulgated for decades are engaged to provide the pretext for reigning in academic freedoms and institutional autonomy. Statutory protections are brushed aside by a combative regulator, unconcerned by criticism that it lacks independence from the government (Lapworth, 2022).

When HERA was being debated in Parliament, there was considerable discussion on the issue of institutional autonomy. Section 2(1)(a), which requires the OfS to have regard to the need to protect institutional autonomy, was not included in the government's original draft of the bill, and it was only added later via an amendment from the House of Lords (2017). This amendment was 'designed to provide robust and meaningful protection of this important principle' (Hansard, 2017, column 1448). The analysis presented in this paper suggests that the provision is not providing the robust and meaningful protection which was intended.

Dissatisfaction with the regulator and concerns about whether it is 'fit for purpose' (Bradshaw et al., 2023) resulted in the launch of an inquiry from the House of Lords Industry and Regulators Committee (UK Parliament, 2023). The Committee concluded that there were issues with the OfS's approach to protecting institutional autonomy and that it did not operate with sufficient independence from

the government. The committee cited the OfS policy on the assessment of spelling, punctuation and grammar as illustrative of this, urging the regulator to improve in these areas (House of Lords Industry and Regulatory Committee, 2023).

Despite this, there are few grounds for believing that regulation of the sector is likely to improve anytime soon. In responding to the Committee's criticisms of its apparent disregard for institutional autonomy, the OfS merely reiterated its intention to continue to give more weight to its other duties, offering only a vague and meandering promise to 'consider how we can explain more fully in future how we approach balancing our duties' (Office for Students, 2023, 5). Perhaps even more discouragingly, the OfS declined to respond to some of the Committee's findings that it acts without sufficient independence from the government, deferring instead, and apparently without irony, to the government for comment on these matters (Office for Students, 2023, 24). The sorry state of higher education regulation in England looks set to continue.

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Declarations

Conflict of interest The corresponding author states that there is no conflict of interest.

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