

## **University of Birmingham response to the Department for Education consultation on behalf of the Office for Students: Securing student success: risk-based regulation for teaching excellence, social mobility and informed choice in higher education**

**December 2017**

The University of Birmingham welcomes the opportunity to respond to the Office for Students' regulatory framework consultation. The University has a long history as a well-run institution. Our autonomy has for many years been central to our success, allowing us to provide excellent education to hundreds of thousands of students across a very wide range of courses, and deliver leading-edge research to benefit society. Founded in 1900, we are one of the original civic universities and take our role as an economic and social anchor within Birmingham and the West Midlands very seriously – indeed, 1 in 50 jobs in Birmingham depends on the University. The University now teaches more than 34,000 students and employs over 7,000 staff from 150 nationalities and backgrounds. We are ranked in the top 100 universities globally by QS, and the top 20 in all domestic league tables. We place great emphasis on the quality of our teaching and education as reflected in our Gold award in the 2017 Teaching Excellence Framework, and our exceptional 2016 QAA review where we received two commendations, no recommendations, and nine areas of good practice. Our student satisfaction is high, our non-continuation rate low, and our graduate employment rate amongst the top five in the country. We have recently opened a secondary school and sixth form – already one of the most popular schools in the area - and have a well-established and successful and highly-praised programme of widening participation to improve access to the University for students from all backgrounds.

We firmly believe that our long track-record of success has been enabled by the regulatory regime, based on co-regulation and a risk-based, proportionate approach. We recognise that the higher education market has shifted significantly in recent years and that it is now necessary to regulate appropriately for providers who present a higher risk. Equally it is vital that the regulatory framework does not undermine the ability of our best institutions to continue to deliver the high quality educational experience that our students expect by placing undue additional burden. In particular, we believe that the framework as currently framed needs to differentiate more adequately between the well-established, high quality, low-risk providers (of all ages) that are the cornerstone of the UK's world-class HE sector, and poor quality providers who pose a higher risk to students.

We welcome the invitation in the introduction to the consultation (p14) to offer views on the proposed approach as a whole as well as to the specific questions. We therefore set out six key themes for our response below, before offering detailed responses to the specific questions.

### **1. The importance and value of institutional autonomy to the student interest should be explicitly recognised and promoted within the regulatory framework.**

The Higher Education and Research Act 2017 (HERA) recognises institutional autonomy as a cornerstone of the UK HE system, and the foundation on which its success in education, student choice, institutional diversity, competition, collaboration and international competitiveness are all built. Whilst the consultation does make reference to institutional autonomy, the University is concerned that the reality of the proposals does not back this up. HERA places a duty on the OfS to 'have regard to the institutional autonomy' of universities; this is very much in the interests of students but is not followed through in the framework. We are concerned that some of the proposals appear to run the risk of breaching the OfS'

statutory duty regarding autonomy, and are concerned that the initial and ongoing conditions of registration set out in the consultation will place an unnecessary and significant additional burden on well-established providers.

We recommend that a fifth objective is introduced, “That students, from all backgrounds, are able to benefit from a world-leading HE sector, which is based on the fundamental characteristic of institutional autonomy.”

**2. The OfS should start from the premise that the majority of providers have the interests of their students at heart, and already have comprehensive systems in place to assure this.**

We note with concern that much of the language in the consultation sets the interests of students and institutions in opposition. Since students are such a vital part of our community, this is both counterintuitive and untrue for the University of Birmingham. As a University, we have well-established and comprehensive systems in place to engage with and protect the interests of our students, underpinned by a [Student Charter](#), developed in partnership with our Guild of Students. Engagement between the University and our students is central to the student interest. We consider this relationship to be most effective when our students view themselves as partners in their own education, working together with their lecturers and the wider institution to achieve successful outcomes. It is not a narrow transactional, quantitative exchange.

Whilst we recognise the need for the regulator to act decisively to prevent or stop abuses, we would also wish to see a recognition that where institutions are well-established, with proven systems of student representation and engagement in quality assurance processes, the OfS should be quick to trust these providers and demonstrably lower the regulatory burden.

**3. Established, low-risk providers need to be given much greater assurance as to how the new framework will be proportionate to risk and therefore less burdensome.**

Whilst we welcome the commitment to free providers “from unnecessary regulation, and those that clearly meet high minimum requirements will receive much less regulatory contact than in the past” (p.27), our analysis of the proposals in the document suggests that well-established providers will in fact be subject to much greater bureaucratic burden than at present. This is in addition to requirements that have already been increasing at pace in recent years.

We are particularly concerned that the initial registration process is likely to place a considerable burden on institutions, which will be subject to both the old and new regimes during the transition period. We propose that the OfS introduces a triage system for initial registration, which relies on existing information where possible, and only requests further information when greater assurance is required following an initial risk assessment.

We are also concerned that many of the requirements in the framework are applied to all providers rather than being proportionate to risk as required by HERA, for example student protection plans and additional information to demonstrate compliance with consumer law.

This is particularly true of requirements that are not specified as registration conditions in HERA, such as freedom of speech and senior staff pay.

**4. In the desire to attract new entrants to HE, the barriers to entry have been set too low for Registered Basic providers, resulting in the UK HE kitemark being given away too easily.**

We recognise that the government wishes to attract new providers to the higher education market, and as a successful provider in the current market we welcome this competition where it will help to increase breadth and quality of HE for students from all backgrounds. However, it is vitally important that the OfS does not undermine the world-leading UK HE sector by allowing transient, poor quality providers to enter the market and exploit students. We recognise the desire to attract new providers to register with the OfS but perceive that there is a significant risk that registration with the OfS will be seen as a kitemark for providers without adequate protection for students. In particular, we believe that Registered Basic providers should be expected to have Student Protection Plans. Some students will not recognise the fundamental differences between Approved Providers and Registered Basic providers and this needs to be made clear to applicants. The UK HE kitemark has been built up over many years but could be damaged very quickly. It is too valuable to be given away in this way.

**5. The OfS should take a whole-institution view of value for money and sustainability, recognising that this is fundamentally in the student interest.**

At Birmingham we are committed to offering our students excellent value for money as reflected in our TEF Gold rating, our exceptional Higher Education Review outcome, our high levels of student satisfaction, our graduate employment outcomes, and our continued popularity with applicants.

However, we believe that the OfS should take a whole-institution view of value for money and sustainability, recognising that this is fundamentally in the student interest. We are concerned that value for money is poorly defined in the regulatory framework, and appears to be understood in a narrow, transactional sense or as a tool to trigger efficiency studies as a sanction. Our students gain the most value for money when their qualifications hold their value due to the longevity and reputation of the institution that grants them, since the students are able to benefit from the qualification for the rest of the lives. Value for money should take account of the wider student experience at university, and the benefit of studying in a research-intensive environment. We would note that students, even those on the same course, will not access services provided by the University equally. For example, some will take advantage of enrichment activities more than others, some will require more additional academic support, and others will access more mental health and wellbeing. These are all part of the rounded University offer, but perceptions of value for money may differ based on how much they are accessed by individual students.

Value for money should also recognise the social and economic value that universities offer to their wider communities and the national economy.

**6. The OfS should operate efficiently and have appropriate accountability mechanisms in place to ensure its efficiency and effectiveness.**

Since the framework proposes to transfer much of the cost of the OfS to universities, and therefore in effect to students, it is vital that the OfS operates efficiently and with appropriate accountability to all its stakeholders – students, providers, and taxpayers. The OfS' approach to ensuring its own value for money is insufficiently articulated in the consultation, where the focus appears to be on one section of the OfS assuring the OfS of its own efficiency.

To address these concerns, we propose:

- That OfS registration fees are linked to changes to the undergraduate home fees and thus reflect providers' operating environment;
- That, in addition, an automatic annual efficiency factor is applied to OfS registration fees to reflect the cost reductions that can be achieved through the merger of HEFCE and OFFA, and the discontinuation of elements of HEFCE's work, and to reflect the promise that the OfS will lower the regulatory burden on low-risk providers, thus reducing the amount of resource the OfS requires;
- That the OfS develops mechanisms through which students and providers are able to inform its approach to regulation with a view to minimising cost and reducing burden;
- That the OfS is required to publish an annual value for money report which outlines the ways in which it has sought to reduce the cost and burden of regulation to the sector.

We note that the framework consultation is wide-ranging and contains many new proposals and systems for the OfS to develop and implement. We have already proposed that the OfS takes a triage approach to initial registration, and would also suggest a phased approach to the roll out of the framework, which will include consultation with the sector on specific details as required. The initial focus should be on ensuring a smooth process for registering providers, leaving consultation on the fuller details of the regulatory framework for consultation later in 2018. This would have the advantage of allowing the OfS to develop the framework based on its experience of operating it.

## Specific questions

The following section responds to the questions set out in the consultation document. Note that for questions requiring agreement or disagreement, the options are Strongly disagree / Slightly disagree / Neutral / Slightly agree / Strongly agree.

### 1. Do you agree or disagree that these are the right risks for OfS to prioritise?

Slightly disagree

The UK has a world-class HE system and the OfS has a key role to play in its future success, recognising the substantial benefits that HE provides to students, communities, and all UK citizens. Whilst we support the four student outcomes set out in the consultation, the implication of the framework is that these can be achieved independently of the arrangements made by providers.

The Higher Education and Research Act 2017 (HERA) recognises institutional autonomy as a cornerstone of the UK HE system, and the foundation on which its success in education, student choice, institutional diversity, competition, collaboration and international competitiveness are all built. HERA directs the OfS to have regard to this autonomy, which allows universities to continue to be places of challenge and free speech, irrespective of the political trends of the day. Whilst the consultation does make reference to institutional autonomy, the University is concerned that HERA's acknowledgement of its importance to the success of universities and their students is not backed up by the reality of the proposals. Indeed, in some cases the nature of the proposals appear to run the risk of breaching the OfS' statutory duty regarding autonomy, for example in relation to degree classifications, deciding what institutions pay their senior staff, and efficiency studies. The example provided in paragraph 301 exemplifies this concern, suggesting as it does that the OfS will monitor employment outcomes at course-level and intervene solely on the basis of this metric, requiring courses to be redesigned and introducing sanctions such as student number controls where progress is not made quickly enough. We would be alarmed if this proved to be a real example of how the OfS operates.

Since institutional autonomy is fundamental to the delivery of the four objectives and firmly in the student interest, we support the proposal being made by other respondents for a fifth objective to be introduced to the framework: "That students, from all backgrounds, are able to benefit from a world-leading HE sector, which is based on the fundamental characteristic of institutional autonomy." This would underpin the delivery of positive outcomes for students across the four existing objectives.

To reinforce this point further, we also propose that the Part II of the consultation document (commencing on page 43) is expanded more fully to reflect that a world-class HE sector is built upon autonomous institutions that have the freedom to choose how they select and teach students, design and deliver courses, award degrees, and recruit and reward staff.

### 2. Given all the levers at its disposal, including but not limited to Access and Participation Plans, what else could the OfS be doing to improve access and participation and where might it be appropriate to take a more risk-based approach?

Whilst we welcome the assurance that the OfS will not set access and participation targets for institutions, we would welcome reassurance as to what is intended by the suggestion that the OfS will intervene if “real progress on access and participation” is not made. Effective approaches to widening participation and student success must take account of institutional context including location and demography of the student cohort, and the OfS’ approach should recognise this. Indeed, some of the most effective approaches have been through collaboration between universities, which HEFCE and OFFA had a role in promoting. We hope that the OfS will continue the OFFA focus on identifying and facilitating the dissemination of effective practice and modes of evaluation.

It is also worth noting that universities such as Birmingham do a significant amount of widening participation work which supports students from all backgrounds to progress to many parts of the HE sector and not just our own university. The University of Birmingham secondary school and sixth form is a signature example of this; this required not just a large financial investment from the University but also a major investment in staff time and effort. We would welcome greater recognition of this type of broader activity in the Access and Participation Plans.

At present, universities have to submit an Access Agreement every year, and submit an annual monitoring return. In line with the OfS’ intention to reduce bureaucracy on low-risk providers, we would welcome a move to a three year or five year submission (based on the targets we have set ourselves), supported by annual monitoring against milestones. A university which wanted to make a significant change to its approach within this 3 year or 5 year plan could still re-submit a plan at any time. In addition, during the transition year we recommend that the OfS relies on existing OFFA-approved widening participation plans to allow time for effective consultation on the new Access and Participation plans, and for them to be assessed.

**3. Do you agree or disagree that a new Quality Review system should focus on securing outcomes for students to an expected standard, rather than focusing on how outcomes are achieved?**

Strongly disagree

The current co-regulatory model of quality assurance has brought significant benefits, enhancing the quality of provision, addressing student priorities and interests through direct engagement with students, and supporting the global reputation of UK HE – something clearly in the student interest. The most effective way to engage students on matters of quality assurance and standards is through a co-regulatory model with providers. Co-regulation has led to positive cooperation and sharing of good practice between institutions; a loss of this under the new framework would not be in the student interest. As a University, we have a range of networks and mechanisms to engage our students on matters concerning quality at all levels of the University. We would therefore welcome a stronger commitment to co-regulation with providers on the maintenance and development of standards.

We support the QAA as the Designated Quality Body responsible for performing assessment functions for English HE. Delegation of responsibility for the assessment of quality and standards will be essential to avoid a situation where the OfS undertakes a combined role of regulator, funder and quality assurer, something which is critical in retaining a system of independent review and assessment. We would also support the maintenance of a UK-wide

approach to quality and standards through the UK Standing Committee for Quality Assessment, the QAA, and the devolved national sectors.

In respect of Student Outcomes we believe the focus should not be on “securing outcomes for students to an expected standard”: it is for providers themselves to determine the standards required of their students (with reference to the appropriate sector-determined external frameworks). We would strongly oppose any move away from this as it would jeopardise institutional autonomy. We recognise there is value in minimum standards developed by the sector as is the case through the current QAA Subject Benchmark Statements.

Importantly, the quality of the academic experience does not alone, and in itself, guarantee successful outcomes for students. While providers can be expected to support students to achieve their potential, the achievement of specific standards and outcomes relies upon the student’s own participation.

The Quality Review System should acknowledge key systems through which providers maintain standards and support students to achieve successful outcomes (including the sector-wide external examiner system and standard processes such as programme approval, monitoring, and review). However, the focus of the Quality Review System should not be on the detail of how these processes operate.

In terms of student mobility, it is important that the OfS, together with the designated quality body, work together to ensure international comparability in the standards and quality of higher education qualifications. For this reason, we support suggestions being made by other respondents that objective 2 be reworded to recognise the importance to students that their qualifications are internationally recognised:

All students, from all backgrounds, receive a high-quality academic experience, and their qualifications hold their value over time in line with internationally-recognised standards.

**4. Would exploring alternative methods of assessment, including Grade Point Average (GPA), be something that the OfS should consider, alongside the work the sector is undertaking itself to agree sector-recognised standards?**

Yes

It should be noted that GPA is not a method of assessment per se; it is a method of representing student achievement.

We are in the vanguard of GPA adoption as an institution and we are therefore supportive of GPA in principle. The OfS could play a role at sector-level in supporting the development of GPA as one approach to classification, however, we do not believe that the OfS has a role to play in considering how the sector should undertake assessment or marking (regardless of the classification mechanism).

In a diverse sector that is based upon the principle of institutional autonomy, it would be inappropriate for a regulatory body to impose a universal model for recording student outcomes.

It is also worth noting that although there is, as yet, no robust evidence that there is a grade inflation problem, GPA of itself would not necessarily resolve this.

**5. Do you agree or disagree that a student contracts condition should apply to providers in the Approved categories, to address the lack of consistency in providers' adherence to consumer protection law?**

Strongly disagree

This requirement needs to apply to all providers not just those in the Approved categories.

The framework creates a simplistic and unhelpfully hard distinction between the interests of a student on the one hand – or 'consumer' – and the obligations of a higher education institution - or 'provider' – on the other. The evidence from English higher education is that the interests of students are well served by an effective and well-established HE sector. As the Minister himself acknowledges in his introduction "we are justifiably very proud of our world class sector" (p.4) and having globally leading universities is very much in the student interest.

The relationship between students and institutions cannot purely be viewed as a consumer / provider model. As a University, we have also developed a [Student Charter](#), in partnership with our Guild of Students, which sets out in detail the roles, responsibilities and expectations for students of the University and vice versa. The Charter makes clear commitments to our students across a wide range of areas including: transparency on costs; availability of support services and resources; and expectations on quality and standards, equality of opportunity, and student engagement. It also sets out the responsibilities of students to contribute to the ongoing development of our vibrant student community.

Our Student Charter complements our well-established and comprehensive systems of student engagement which protect the interests of our students, including:

- Student representation through the Guild of Students, which has regular meetings with the University Executive Board and provides members of University Council and Senate;
- Student-staff liaison committees within Colleges, Schools, and Departments;
- Internal and external student surveys;
- Student participation in the University's integrated quality review process (Vice-Chancellor's Integrated Review);
- Information for students which was developed based on CMA guidance, including applicant webpages, programme information, course costs, and fair and transparent student contracts;
- Policies to protect students, including a Code of Practice on Student Concerns and Complaints, and those regarding teaching out programmes which are being closed.

This comprehensive model balances our legitimate expectations of our students as partners in their education with their rights as consumers. With this in mind, we note with concern that much of the language adopted in the consultation suggests the OfS will view student-provider interactions primarily through the narrow lens of consumer law. We would welcome greater assurance and clarification as to how the OfS will ensure that its market regulator role "will not be at the expense of deep, trust-based higher education experiences" (p.45).

This will also need to recognise the responsibilities that universities have in relation to their students which do not fit within the consumer framework model, for example Tier 4 visa requirements, student disciplinary matters (including academic dishonesty), the



administration of student loans and other payments, student mental health and wellbeing, oversight of students' unions, and Prevent.

We would urge the OfS to take a more risk-based approach to regulation in this area, and to regard such institutions as capable of exercising co-regulation in partnership with the OfS and sector bodies.

In relation to the specific issue of consumer law, we note the implication within the consultation that universities do not have student contracts and are failing to comply with the CMA guidance. This is not borne out by the CMA Consumer law compliance review (summer 2016), the [UUK self-assessment questionnaire](#), and the fact that following that review only a small number of enforcement actions have followed.

P35 of the consultation suggests that the OfS could “play an enforcement role” in relation to student contracts and consumer rights, also questions “whether students would benefit from the use of model contracts with providers”. This would not be appropriate. The requirement for a student contract is already governed by Consumer law, and guidance from the CMA. The way to enforce contractual issues is through the court, the CMA or, for students, through the OIA. There is a risk that differing interpretations of student contract regulation by the CMA and the OfS will cause confusion and raise uncertainty.

## **6. What more could the OfS do to ensure students receive value for money?**

At Birmingham we are committed to offering our students excellent value for money. We have made significant investments into major new student facilities, academic staff:student ratios, digital technologies, student welfare and services, and our careers service. We maintain a sustained emphasis on the quality of our programmes. This is reflected in our TEF Gold rating, our exceptional Higher Education Review outcome, our high levels of student satisfaction, our graduate employment outcomes, and our continued popularity with applicants.

However, we believe that the OfS should take a whole-institution view of value for money and sustainability, recognising that this is fundamentally in the student interest.

The global strength of a University like Birmingham is built on a number of interconnected factors: an ability to attract academics from across the world, excellent teaching, world-class research, first-rate facilities, links to businesses and cultural organisations, a social and economic anchor role for our local community, and international partnerships. We are careful to invest in and nurture each of these elements both individually and collectively, since they are what makes the University successful. This success is profoundly in the student interest, since it increases the quality of the education they receive whilst they are with us and enhances the reputation and value of their qualifications when they become our alumni. For this reason, the needs of students cannot reasonably be separated from the needs of institutions.

We are concerned that value for money is poorly defined in the regulatory framework, and appears to be understood in a narrow, transactional sense. Our students gain the most value for money when their qualifications hold their value due to the longevity and reputation of the institutions that grant them, since the students are able to benefit from the qualification for the rest of the lives. The OfS' understanding of value for money should therefore draw on the views not just of current students, but also others who benefit from the programmes notably alumni and employers.

It is important to stress that student fees contribute towards the rich experience that students receive whilst studying at a University such as Birmingham. This goes well beyond the specific course that they are studying. During their three to five years with us, our students engage with students studying a vast array of other courses, from Medicine to Music, and with students from around the world. They are able to participate in internships, industrial and international placements, schemes such as Languages for All and Music for All, societies, political activity, volunteering, and enrichment activities. This wider environment is vital to our students being able to develop the personal and professional skills that are integral to graduate-level jobs, meaning they are better able to realise their ambitions and to contribute fully to our society and economy. Being at a well-founded, comprehensive university is a life-transforming experience.

For these reasons, we are very concerned to note concerns raised by other respondents in relation to paragraph 150 of document B, which states that providers will be expected to ensure that the use to which they put funds received from the Student Loans Company “is consistent with the purposes for which those funds were given” and suggests that the fee charged must “directly relate to the student's course of study”. We recognise the importance of ensuring that student support funding is used responsibly to prevent fraudulent activity, but would welcome assurance that this will not introduce a wider requirement to demonstrate that fees are invested in activities which relate only to a students' course. This would be extremely concerning; it would impinge on our ability to offer a rich, rounded experience for all of our students, and its undermining effect on institutional autonomy would be alarming. Indeed such a narrow interpretation would severely compromise the requirement to use a third of the fee income above £6,000 to fund widening participation activities.

The proposed framework does not appear to consider the broader economic, social and cultural value which a university such as Birmingham delivers to the UK and our local region across the full range of our activities. [Research undertaken by London Economics](#) on behalf of the University found that the University:

- contributes £3.5 billion annually to the economy;
- supports 15,545 jobs in the West Midlands region, with almost one in 50 jobs in Birmingham depending upon the University;
- has more than 22,000 pupils participating in the University's outreach activity each year;
- supported its students and graduates to start more than 50 new businesses in 2014/15;
- had almost 1,700 people, who completed a programme with the University in 2014-15, move on to work in the healthcare sector;
- has research and knowledge transfer activity worth £885 million.

It is vital that the regulatory environment should facilitate and support universities to deliver this kind of impact for the benefit of our students, local community, and the UK economy. Reducing regulation to a narrow transactional relationship which is determined by a narrow concept of the value for money offered to an individual student on an individual course will irretrievably damage the huge benefits that we are able to offer our whole student body now.

To address these concerns we propose that the framework includes a definition of value for money, which is based on a rounded perspective from students, alumni, and employers, and which recognises the importance of whole-institution sustainability as crucial to the student interest. We also propose that value for money statements should be focused on providing students with information about how an institution invests money received from students and

other sources to support the student experience, including transformative experiences beyond the classroom.

Finally, we would also propose that the OfS commits to engagement with individual HEIs to gain an informed, whole institutional view of funding and sustainability and thus an informed picture of the whole sector.

**7. Do you agree or disagree that a registration condition on senior staff remuneration should apply to providers in the Approved categories? Are there any particular areas on which you think should the OfS should focus when highlighting good practice?**

Slightly disagree

We recognise the need for transparency on senior pay and as an institution we have already taken steps to enhance further our reporting to address the issues raised. However, we are concerned at its inclusion as a registration condition: there is no reference in HERA to senior staff pay and there is therefore a requirement for the OfS to justify its inclusion as an ongoing condition of registration in relation to the risk of not meeting objective 3, and in particular as to how this is a proportionate response to that risk. HERA provides that "the OfS must ensure that the initial registration conditions applicable to an institution and its ongoing registration conditions are proportionate to the OfS's assessment of the regulatory risk posed by the institution". It is unclear why senior staff pay presents a risk to value for money as VCs' pay represents a very small proportionate of overall income at most universities, including Birmingham.

We are concerned that the publication of such detailed information at an individual level will undermine our ability to compete in an international market for academic talent, and presents a significant risk of salary inflation rather than reduction.

We support the need for greater transparency in senior staff remuneration but have concerns about the regulatory burden that will be imposed by the detailed requirements on providers to publish in their annual financial statements information on individual role descriptions, benefits packages, performance, decision processes and justifications (as set out in paragraph 165 of document B). This would be very onerous, and since many on this level of pay are senior academics, or NHS clinicians, this approach will lead to lengthy and repetitive documents. This is particularly true for a university with a large Medical School, such as Birmingham.

Senior staff remuneration should take into account the size and complexity of the organisation, university performance across a range of strategic objectives (including education, research, local and international partnerships, social and economic benefits), and the global and highly-competitive nature of recruitment to senior leadership positions in higher education. An autonomous institution must be free to set its remuneration levels to attract and retain such staff, since they are key to the academic performance of the university and its reputation, all of which is in the student interest.

Rather than requiring highly-detailed and prescriptive reporting, we propose that providers should be required to have transparent reporting mechanisms in place at the institutional level including details as to how decisions on senior pay have been reached. Providers should be expected:

- To adopt the Committee of University Chairs' Remuneration Code when it is published during 2017/18;
- To have a Senior Pay Review policy in place which is reviewed annually by Remuneration Committee and approved by the provider's governing body;
- To include information in Annual Report and Accounts on senior staff pay which includes narrative on the remuneration process for senior staff and the overall justification for rewards, and relevant benchmarks, for example on Vice-Chancellor's pay as a percentage of turnover;
- As now, publish numbers above £100k in £10k bands.

We do not support an approach which would amend the requirement only to include 'managers', and exclude academics. Since it is professors who teach students and lead their subjects who make up the majority of senior staff, it would be divisive to the University community and would be subject to confusion about definition (many fulfil both roles, for example of a Professor who is also a Head of School).

**8. What are your views on the potential equality impacts of the proposals that are set out in this consultation? Please provide any relevant evidence if you can as this will support policy development going forward.**

We recognise that the government wishes to attract new providers to the higher education market, and as a successful provider in the current market we welcome this competition where it will help to increase breadth and quality of HE for students from all backgrounds. However, it is vitally important that the OfS does not undermine the world-leading UK HE sector by allowing transient, poor quality providers to enter the market and exploit students. We perceive that there is a significant risk that registration with the OfS will be seen as a kitemark for providers, and that some students will not recognise the fundamental differences between Approved Providers and Registered Basic providers. The UK HE kitemark has been built up over many years but could be damaged very quickly. It is too valuable to be given away in this way. Since students at Registered Basic providers will not be protected from poor quality provision or provider exit, the register and other communications to students should make clear the level of protection a student can expect based on the category of provider.

We would particularly note that students who access these providers are likely to be from more disadvantaged backgrounds, and consider that there could be a significant equality impact if sufficiently high barriers to entry are not put in place. We are very concerned that Registered Basic providers, who are likely to pose the highest risk of failure, are not required to produce Student Protection Plans, and that students at such providers will not be adequately protected.

To address this concern, we propose that robust Student Protection Plans should be a requirement of Registered Basic providers, since they are likely to pose the highest risk of failure.

We also propose that OfS registration fees should be, at least partially, risk based, in recognition that new providers should demonstrate the capability and willingness to invest upfront in setting up high-quality, long-lasting HE provision within the UK setting.

**9. Do you agree or disagree that participation in the TEF should be a general condition for providers in the Approved categories with 500 or more students?**

Slightly disagree

We recognise the desire to promote the TEF and are not opposed to participation at the institutional level being a condition of registration. At the same time, we note that this is contrary to the OfS' intention to regulate for baseline standards rather than benchmarking above that level (which is the purpose of TEF), and that it is not a condition of registration required by HERA.

The TEF methodology and rankings – particularly the benchmarking - remains contested, and we note that they are poorly understood by students and applicants, particularly overseas applicants, who may be misled by what the ratings mean. The independent review of the TEF required by HERA will therefore be important, and it will be important for the OfS to await the outcome of this before placing any reliance on TEF as an indicator that could be used for institutional risk monitoring.

The University of Birmingham is participating in both elements of the subject-level TEF pilot and we recognise that there is still very significant work to be done to ensure that the methodology for this is robust, recognised by the sector, and valuable to students. Participation in subject-level TEF should not be a requirement of registration, and certainly not until the outcomes from the pilots and Parliamentary review reports are known.

If TEF was ever to be made a condition of registration we consider that it should be a general condition for all providers, irrespective of size. There is no justification for a lower cut off given that there will be significant numbers of students in this part of the sector if the number of new entrants grows as intended by the government.

**10. Do you agree or disagree with the proposed ongoing general registration condition requiring the publication of information on student transfer arrangements? How might the OfS best facilitate, encourage or promote the provision of student transfer arrangements?**

Slightly disagree

We do not agree with the requirement to publish information on student transfer arrangements being an ongoing general registration condition.

In common with other institutions, we have in place processes through which students are able to transfer both internally and externally; the national and international credit frameworks support these arrangements, and our data show that there is take-up amongst students. It should remain the decision of individual universities how transfers are facilitated, encouraged and promoted to their students.

We would support greater transparency of process and limitations as this could be beneficial for students, but this should be achieved through sector bodies such as UUK which have a nuanced understanding of the challenges related to student transfer rather than linked to ongoing general registration and thus overseen by the OfS. We support the promotion of greater clarity on student transfer arrangements but fear that the consultation underestimates the pedagogic difficulties that can arise for students and suspect there is a mistaken view that transfers are another indication of a successful market.

The approach outlined in the consultation does not recognise that transfers cannot always be accommodated for legitimate academic reasons (for example, if the 'new' programme has specific pre-requisites or learning outcomes that the student will not be able to meet). Students may also experience other barriers – particularly for external transfers – such as cost and personal circumstances, and we would recommend that the OfS seeks feedback from students on their expectations in relation to transfer arrangements.

The expectation that students will be able to transfer more easily between providers also assumes a level of comparability in programme content and approach to learning and teaching, which seems somewhat at odds with the need for institutions to provide a distinctive educational experience within an increasingly competitive market. Decisions to accept a student enrolment should be made by the academic body on academic grounds, not led by a concern in respect of institutional registration with the OfS. The varying nature of programmes means decisions are individual rather than wholesale requiring a detailed knowledge of the institutions concerned, the programmes of study and associated pre-requisite knowledge and of course the student's own achievement and likelihood of success.

#### **11. Do you agree or disagree with the proposed approach to sector level regulation in chapter 2?**

Slightly disagree

The framework should do more under sector-level regulation to recognise the importance of autonomous institutions in delivering a world-class HE sector in the student interest. We expand on this point more fully in our response to question one, but we propose that the final regulatory framework is expanded more fully to reflect that a world-class HE sector is built upon autonomous institutions that have the freedom to choose how they select and teach students, design and deliver courses, award degrees, and recruit staff.

For these reasons, it is critical that the OfS works closely with UKRI – as well as with other sector regulators – to take a whole-institution view of financial sustainability, and to assess the overall health of the HE sector. This is particularly important given the OfS' intention not to maintain in-house contextual knowledge of providers. We would welcome clarification as to how the OfS proposes to work with UKRI to ensure mutual cooperation, as well as with other regulatory bodies with responsibility for HE, to ensure a joined-up approach and form a rounded view of institutions and the HE sector.

We also note points that we have made elsewhere in this document in relation to the importance of focusing regulatory attention on a risk basis rather than a 'one size fits all' approach to registration and monitoring.

It would be useful for the OfS to clarify the position with respect to the role of the designated quality body in respect of FHEQ level 3 programmes, typically standalone international foundation programmes. These programmes are often part of a wider pathway to HE provision and there may be some value in the regulator overseeing the whole pathway.

#### **12. If you are a provider, can you provide an indication of which category you would apply for (under these proposals) and why?**

Approved (fee cap)

**13. The initial conditions should provide reassurance that providers will meet the general ongoing conditions without creating unnecessary barriers to entry. Given this, are the initial conditions appropriate?**

Strongly disagree

We consider that the initial and ongoing conditions of registration set out in the consultation will place an unnecessary and significant additional burden on well-established providers. Our response to question 18 expands further on our concerns in relation to the burden that will be imposed by ongoing registration. Here, we address our concerns relating to initial registration.

We are particularly concerned that the initial registration process is likely to place a considerable burden on institutions which will be subject to both the old and new regimes during the transition period. By way of example, we have already had to identify additional resource to undertake work to ensure we comply with the initial and ongoing registration requirements of the OfS. This does not suggest a light-touch approach to a well-established provider with the track record that we have set out above. It is important to note that this increased regulatory burden being imposed by the OfS will mean less resource is available for other value-added activities from which students will benefit, without any obvious gains in terms of a reduction in risk.

To address this concern, and to reduce the burden on the OfS during the transition phase early in 2018, we would urge the OfS to adopt a triage approach to initial registration, making use of existing evidence before deciding where further information is required. The approach could be simplified by:

- Using existing access agreements, which have already been agreed by OFFA, for initial registration purposes;
- Using a short template for governance self-assessment, which allows links to online documents in the public domain rather than submitting copies of statutes, for example.
- Using existing 'information for applicants' and a Student Charter, where one exists, instead of a new document describing how provider relationships with students comply with consumer law.

We would urge OfS to be true to its own stated aim of being a risk-based regulator, by explaining how it will explicitly reduce the level and scope of regulation where institutions have a proven track-record of delivering outcomes in line with the OfS's primary objectives and where they continue to do so.

In relation to the barriers for entry, our response to question 8 sets out our concerns that the barrier to entry has been set too low, and that the UK HE 'kitemark' is being given away too easily. If Student Protection Plans are to be of any practical value they should either be a requirement placed on those providers deemed to be of most risk of failing, which would be our preference, or for all registered providers not just those in the approved categories. We propose that robust Student Protection Plans should be a requirement of Registered Basic providers, since they are likely to pose the highest risk of failure. We also propose that OfS registration fees should be, at least partially, risk based, in recognition that new providers should demonstrate the capability and willingness to invest upfront in setting up high-quality, long-lasting HE provision within the UK setting.

**14. Do you agree or disagree with the proposed lists of public interest principles and who they apply to?**

Slightly agree

The core principles listed on pp.46-50 of the guidance are sound, but there are inconsistencies with other legislative requirements that are open to confusion and need to be resolved.

For example, condition E2 requires that 'the provider must adhere to its governing documents, which must be consistent with the public interest principles that are applicable to the provider.' As a charity, the University has an obligation to act in the public interest, and in accordance with our governing documents which have been drafted in accordance with the Charity law, and the Charity Commission has substantial guidance on this. The proposed list in the regulatory framework does not coincide with the Charity Commission requirements, nor does it even refer to them. The OfS requirements for a fit and proper person are much wider without clear justification. We propose that the OfS guidance should refer to and be aligned with Charity Commission requirements.

The Freedom of Speech formulation is different to that within Section 43 of the Education (No 2) Act 1986, which states: 1) Every individual and body of persons concerned in the government of any establishment to which this section applies [which includes universities] shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers. 2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with— (a) the beliefs or views of that individual or of any member of that body; or (b) the policy or objectives of that body.' We propose that the OfS definition should be amended to be consistent with the Education Act.

**15. Do you agree or disagree with the proposed approach on the application of conditions for providers wishing to seek a Tier 4 license?**

Slightly agree

**16. Do you agree or disagree that paragraph 7 and 8 should be removed from Schedule 2 of the Education (Student Support) Regulations 2011, which lists the types of courses that allow with access to the student support system? If you disagree, are you aware of any courses dependent on these provisions to be eligible for support?**

Slightly agree

There do not appear to be any issues with this proposal.



**17. Do you agree or disagree with the proposed approach for the benefits available to providers in the different registration categories?**

Strongly disagree

It is unclear why registration as an Approved fee cap provider is required for an institution to have “access to all types of research funding from the Science & Research budget – including Quality Related research funding from Research England”. It is inappropriate that registration with the student-focused regulatory body (whose requirements are entirely focused on risks to students) should be a requirement for access to public research funding delivered through other government agencies and departments. This appears to be a significant overreach for the OfS and is not underpinned by legislation. Access to research funding should not be subject to OfS registration.

We propose that a provider’s ability to access QR and research funding should not be linked in any way to its registration with the OfS, since a provider’s ability to deliver research is not contingent on its ability to deliver teaching programmes. Indeed, some institutions in receipt of QR funding do not offer undergraduate programmes. Instead, it should be for UKRI to determine which bodies receive funds, including QR.

**18. Do you agree or disagree with the general ongoing registration conditions proposed for each category of provider (see the Guidance for further detail)?**

Strongly disagree

Whilst we welcome the commitment to free providers “from unnecessary regulation, and those that clearly meet high minimum requirements will receive much less regulatory contact than in the past” (p.27), our analysis of the proposals in the document suggests that well-established providers will in fact be subject to much greater bureaucratic burden than at present. This is in addition to requirements that have already been increasing at pace in recent years. Focusing on these new requirements could affect our international competitiveness, and runs contrary to the UK’s post-Brexit ambition to reduce bureaucracy in the national interest.

A well-established and managed university will, under the new framework, be required to comply with the following new or significantly changed conditions:

- a new access and participation plan approved by OfS
- student contracts informed by the OfS working with the CMA and OIA;
- value for money statements in addition to annual value for money reports;
- student protection plans;
- student transfer arrangements;
- details on how provider relationships with students comply with consumer law;
- TEF participation;
- Reporting conditions on staff paid more the £150,000;
- an as yet unclear expectation on reporting data in as near real time as possible;
- a self-assessment, backed by a long list of evidence, describing the relevant provisions in the governing documents, the arrangements implementing the requirements and an explanation of their appropriateness;
- New annual reporting on admissions by student characteristics;
- facilitating student electoral registration.

The starting point taken by the regulator appears to be that the full range of general conditions should apply to all providers rather than making a judgement based on the risk assessment. Where these requirements are additional to the mandatory conditions required by HERA, the consultation document fails adequately to justify the reasons for their inclusion. In particular, the document fails to justify why the imposition of these conditions is proportionate and how they will address the student risks set out in the framework. HERA provides that "the OfS must ensure that the initial registration conditions applicable to an institution and its ongoing registration conditions are proportionate to the OfS's assessment of the regulatory risk posed by the institution". Regulatory risk is defined as the risk of the institution, once registered, failing to comply with regulation by the OfS. Rather than doing this, the consultation sets out several conditions that are intended to apply to all providers without any assessments of individual institutional regulatory risk.

From the above list, this could be seen to apply to student protection plans, where the framework applies the same conditions to all providers irrespective of the risk they pose to students of exit; the requirements on senior staff pay, which do not justify why this is a proportionate response to the issue of value for money (given that VC pay normally constitutes a very small proportion of a university's income); and freedom of speech requirements, where the requirements are not proportionate to any assessment of an institution's risk of failing to promote freedom of speech. Similar points also apply to near-real-time data reporting, and governance self-assessments. We believe the OfS should review the requirements set out in the consultation, and amend them to make them risk-based and proportionate to individual institutions, rather than a blanket requirement for all. This would make the registration regime truly risk-based and lower burden for low-risk, well-established providers.

We have already proposed that the OfS undertakes a triaging approach to initial registration in our response to question 13. For ongoing registration conditions, we propose that the OfS reviews the requirements set out in the consultation, particularly those that are not mandated by HERA, and considers the opportunity to make the requirements for compliance proportionate to the risk posed to the four student objectives by each provider, rather than a blanket provision. This could include student protection plans, governance self-assessment, freedom of speech requirements, and senior-staff-pay reporting requirements.

The expectation that reporting be "in as near real time as possible" is likely to place considerable demands on institutions for gains which are not specified. Our experience is that new processes can be heralded as reducing burden and yet the reality of their practical implementation is that they actually result in, at best, no change and, at worst, significant additional burden. It is worth stressing that each new request, even where it appears to be a minor change to an existing requirement, creates considerable burden for institutions. An example is Data Futures, which was originally envisaged as a way to reduce data collection burden but now envisages very little reduction in the number of returns to be required. Indeed, Data Futures could effectively require universities to submit three HESA returns a year instead of one. In addition, as new questions are asked, frequently universities are required to submit new information which is often not easily accessible. An example would be the Teaching Intensity metrics that we are currently piloting as part of our participation in the subject-level TEF pilots. This requires a very high level of granularity of data around detailed delivery models, module by module. At almost all universities in the pilot, extracting these data with accuracy requires considerable manual effort. This creates additional burden, but the benefit is questionable given the issues with the accuracy of the data.

To address these concerns, we propose that the OfS should introduce a process whereby changes or additions to data collections are scrutinised to establish that the benefit offered to students outweighs the cost of their implementation by universities, recognising that ultimately it is the students who pay for the changes that universities are required to make. This could draw on experience from other sectors that require significant central data returns such as the NHS, who have a 'Challenging Burden Service' as part of NHS Digital, and the government's 'one in two out' approach.

We are also concerned that the framework introduces dual and duplicating regulation. Examples of this include:

- The risk that differing interpretations of student contract regulation by the CMA and the OfS will cause confusion and raise uncertainty. We address this in our response to question 5.
- Tier 4, which is regulated by UKVI. Although some simplification of process for Approved providers is proposed, for those that provide both HE and FE it will be a higher burden;
- The framework proposes that the OfS takes a role with regard to student unions, especially on wider student experience, Prevent, and freedom of speech. However, student unions are regulated by the Charity Commission as separate legal bodies.
- The new system maintains dual oversight by both the principal regulator and the Charity Commission for charitable HE. Additionally, the Privy Council approval process for providers with Royal Charters or Private Acts will continue in parallel to the oversight exercised by the OfS under its registration conditions.

The OfS regulatory framework should be aligned to these pieces of legislation where appropriate.

Finally, it is difficult to understand why requirements such as the delivery of well-designed courses that provide a high quality academic experience are not universal.

#### **19. Do you agree or disagree with the proposed approach to risk assessment and monitoring?**

Slightly disagree

Our response to question 18 describes our concerns in relation to the proportionality of the proposals in the framework, and also explains our concerns about some of the more onerous requirements, which will be used as part of the risk assessment and monitoring process such as Data Futures.

It will be vital for the OfS to develop a contextual understanding of providers in order to make informed judgements about the risk that they pose. We would welcome reassurance about how the OfS plans to develop relationships with providers, and particularly reassurance that those undertaking risk monitoring for the OfS will have the appropriate experience and knowledge of the sector to make informed views which reflect an understanding of the different types of institution within UK HE. In seeking to avoid being captured, the OfS must not distance itself too far from providers to the point it lacks a grounded understanding to do its job properly.

We note the intention to conduct efficiency studies "to improve the economy, efficiency and effectiveness in the management of a registered HE provider" (p.98). We have serious reservations as to the trigger mechanisms that will be used to justify such an intrusive intervention in the operation of providers. On p.109 it seems that an efficiency study follows

the identification of concerns through risk monitoring. Efficiency studies might be of benefit if conducted at a sector level as is suggested on p.109 but as currently envisaged they read more like sanctions against individual providers especially relating to senior staff remuneration.

We note the intention for there to be a random sample of 5% providers annually and would welcome more detail on how these will be conducted.

**20. Do you agree or disagree with the proposed approach on interventions (including sanctions) and do you agree or disagree with the proposed factors the OfS should take into account when considering whether to intervene and what intervention action to take?**

Slightly disagree

We note that there does not seem to be a right of appeal against the suspension of a provider from the register, only against de-registration. We would argue that there needs to be an appeal mechanism if the suspension lasts for a significant period of time.

We propose that the framework should include a requirement for the OfS to act reasonably when imposing sanctions. This would apply, for example, to paragraph 289, and paragraph 307. The latter would read that the 'provider is required as a registration condition to have an access and participation plan and fails, in the REASONABLE view of the OfS, to comply with an equality of opportunity provision'.

**21. Do you agree or disagree with the proposed approach the OfS takes to regulating providers not solely based in England?**

Slightly agree.

**22. Do you agree or disagree with the principles proposed for how the OfS will engage with other bodies?**

Slightly agree

We welcome the commitment to co-operate and share information with the UKRI, and would affirm the criticality of the OfS working closely with UKRI – as well as with other sector regulators – to take a whole-institution view of financial sustainability, and to assess the overall health of the HE sector. This is particularly important given the OfS' intention not to maintain in-house contextual knowledge of providers.

**23. Do you agree or disagree with what additional information we propose that the OfS publishes on the OfS Register?**

Neutral

**24. Do you have any comments on the proposed exercise of OfS functions in relation to validation, in particular in relation to ensuring that the validation service is underpinned by the necessary expertise and operates in a way that prevents or effectively mitigates conflicts of interest?**

If the OfS is authorised by the Secretary of State to undertake validation of a provider's degree programmes, it will be vital for the OfS to have a robust internal process for assuring the standards on these programmes. In discharging this function – and assuming this would only be in the most exceptional of circumstances - it will be essential for the OfS to avoid damaging either its own reputation or that of the wider sector. It will be necessary to avoid any risk that this breaches natural justice particularly in relation to rules against bias, potential pecuniary advantage (assuming the OfS will be paid for its validation service), and also a conflict of interest. The concept of a separate department is not sufficient, or appropriate, and contrary to the Nolan principles of integrity and objectivity.

**25. Does the information provided offer a sufficiently clear explanation of how a provider will apply for registration in the transitional period and what the consequences of registration are in this period?**

No

As we have highlighted earlier in this response, we are very concerned about the increased burden on well-established providers to provide new evidence in order to be registered, including a new access and participation plan, a governance self-assessment, backed by a long list of evidence, consumer law compliance, and student protection plans.

We urge the OfS to use existing evidence wherever possible and to simplify the initial registration process. This could include:

- Using existing access agreements, which have already been agreed by OFFA, for initial registration purposes;
- Using a short template for governance self-assessment, which allows links to online documents in the public domain rather than submitting copies of statutes, for example.
- Using an existing Student Charter, where one exists, instead of a new document describing how provider relationships with students comply with consumer law.

These points link with our early response to Q11 about the need for a pragmatic and proportionate approach to the transitional arrangements and our suggestion of a triage approach to initial registration.

We note that the conditions which will apply during the transition period are F,I,J1 and O.

F- we would welcome further clarification as to the level of detail required in the Student Protection Plan. The HE sector is diverse and different institutions will require different levels of protection based on the risk they pose to their students. Whilst we agree there is a need to offer students assurance as to what will happen should a particular programme close down, well-established universities will not exit the market entirely. The approach to the SPP should recognise this. It is also worth noting that there are already charitable obligations if a charity is likely to fail.

J1- this is a blanket requirement to provide any information requested to anyone. It should be qualified by 'acting reasonably', or 'relating to the obligations placed upon the institution

by the OfS' or 'within the law'. When determining whether or not a provider has failed to meet the criteria it should be a requirement that OfS acts reasonably in making that decision, noting that 'reasonableness' is a legal concept which could be tested through a legal process if required.

**26. Do you have any comments on the above proposal of how the OfS will act as the principal regulator for exempt charities?**

We have some concerns where the language used in the framework is not consistent with Charity Commission guidance, and requirements. In our view, HEFCE has acted very effectively as Principal Regulator for universities which are exempt charities, for example supporting institutions when changes to governing documents have been made, or interpreting Charity Commission guidance for large, complex, and international universities. We would hope, therefore, that the OfS will continue act in a similar way.

**27. Provided that the Secretary of State considers OfS regulation is sufficient for these purposes, should exempt charity status apply to a wider group of charitable higher education providers? In particular, considering that providers in the Approved categories will be subject to conditions relating to Financial Sustainability, Management and Governance, and the provision of information (as set out in the Guidance), do you have any views on whether the OfS's proposed regulation of providers in these categories would be sufficient for the purposes of it carrying out the functions of Principal Regulator.**

Having the OfS act as the Principal Regulator for any charitable higher education providers will help to ensure there is a common interpretation of the rules over charitable purpose within higher education, which have become more sensitive with the increase in home fees.