

Teaching Excellence Framework: Decision on policy approach to the publication of information

Introduction

1. In January 2022 we published a consultation on the Teaching Excellence Framework (TEF), which included proposals relating to the publication of information. In the consultation we proposed that TEF outcomes and the evidence used in assessment, including the TEF indicators, the provider submission and the student submission (where available) should be published in an accessible and timely way.
2. Alongside our TEF consultation, in January 2022, we launched a consultation on constructing student outcome and experience indicators for use in Office for Students (OfS) regulation (the 'data indicators consultation'). That consultation explained the format we intended to use in presenting and publishing the TEF indicators. In the analysis of responses and decision document for the TEF and in the analysis and decision document for the data indicators consultation ('data indicators response document'), we explained that we did not intend to make final decisions in relation to publication-related matters until we had considered responses to our separate consultation on publication of information about higher education providers. We then set out a series of decisions that we were minded to make, subject to our consideration of responses to the publication of information consultation.¹
3. We have now published our response to the consultation on publication of information (the 'publication of information response document') and this is available on our website.² The outcome of the consultation is that we have adopted a general policy on the publication of information about providers, and this is also available on our website as Regulatory advice 21.³
4. We have now also considered responses to the publication of information consultation and the outcomes from that consultation in relation to the TEF.
5. This paper explains our final decisions regarding the policy approach we will adopt in relation to publication of information about the TEF that is not covered by our general policy approach as set out in Regulatory advice 21, including how we have considered relevant points arising in the publication of information consultation. Our decisions will be implemented via amendments to Regulatory advice 21 and will be incorporated into forthcoming guidance that we will publish on the TEF.

Consultations on the Teaching Excellence Framework and data indicators

6. We consulted on proposals for the future TEF between 20 January and 17 March 2022. In the consultation we set out the information we proposed to publish related to the TEF.

¹ All the consultation and response documents relating to the TEF, student outcomes, and outcomes and experience data can be found at www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/.

² See www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers-analysis-of-responses-and-decision/.

³ See www.officeforstudents.org.uk/publications/regulatory-advice-21-publication-of-information/.

7. In the consultation we proposed to publish on the OfS Register the following information for English higher education providers:
 - a. Where a provider has participated in the TEF, either:
 - i. The overall rating awarded, the aspect ratings awarded, and the date the awards were made.
 - ii. That the provider 'requires improvement' to be awarded a TEF rating (where no rating was awarded by the TEF panel).
 - iii. That the provider is ineligible to retain a TEF rating because of a breach of minimum requirements.
 - b. Whether a provider has breached minimum requirements for quality and standards (as set out in our consultation on publication of information about higher education providers).
 - c. Whether a provider is eligible to take part in the TEF (as set out in our consultation on publication of information about higher education providers).
8. We also proposed that we would:
 - a. Publish TEF outcomes through other channels to make them widely accessible to prospective students and others. We proposed that we would publish the information in paragraph 7a. on the Discover Uni website, for all providers in England and in the devolved administrations that participate in the TEF. We would also work with UCAS on how this information can be communicated to students via its services.
 - b. Normally publish a wider set of related and ancillary information about a provider that participates in the TEF, for transparency. The information published on the OfS Register and the Discover Uni website, and by UCAS, would link to further information for each provider, which we would publish on the OfS website:
 - i. The written panel statement setting out the panel's reasoning for the outcomes.
 - ii. The provider's submission.
 - iii. The student submission (where available). There may, however, be circumstances where the OfS considers it appropriate not to publish the student submission wholly or in part, where we take the view that other factors outweigh the public interest in publishing it.
 - iv. The TEF indicators considered by the panel.
9. We also set out that we would publish information about the transfer of ratings. Where we decide that a TEF rating may be transferred from one provider to another, for example because of a merger, we proposed that we would update published information alongside the TEF ratings to explain the basis for the original rating, the basis on which it had been transferred, and relevant information about TEF ratings that had been held by relevant previous entities.
10. We also proposed that:
 - a. For providers that do not make representations, when the window for representations closes, ratings would be confirmed by the TEF panel and the OfS would publish these outcomes as soon as practicable.

- b. Where a provider does make representations, the representations would be considered before a final decision is made by the TEF panel. This means that the outcome for that provider would be published at a later date, once a final decision has been made.
11. We identified two options to communicate why outcomes for some providers would not be published at the same time as others, in these circumstances. We would either:
 - a. Communicate that a provider's award is 'pending', so it is clear that the provider has participated in the TEF, and that an outcome would be published in due course.
 - b. Not communicate that a provider has participated in the TEF until its outcome has been decided and is published. Our reasons for these proposals were set out in the TEF consultation document at paragraphs 225 to 227.
12. The TEF consultation, under Proposal 9, set out a brief overview of the proposed indicators that the OfS would produce for the purpose of the TEF. It invited views on:
 - a. The indicators the OfS would produce to be used in TEF assessments, which would be numerical indicators based on the National Student Survey responses; and student outcomes indicators defined consistently with the indicators we proposed to regulate student outcomes through condition B3.
 - b. The level at which indicators would be reported.
 - c. How we would indicate a provider's performance against its benchmark, and communicate statistical uncertainty in the data.
13. Further details about how these indicators would be constructed and presented were also set out in the related data indicators consultation. We launched this alongside the TEF consultation and it set out proposals for the TEF indicators as, as well as indicators proposed for use in other areas of OfS regulation. Providers were supplied with their indicative indicators, and fictional data was made available for other consultees to illustrate the data we proposed to publish, and how we proposed to present it. We sought views on these proposals between 20 January and 17 March 2022.
14. On 26 July 2022, we published our analysis of responses received to both consultations and our resulting policy decisions. This is set out in the TEF response document and the data indicators response document. In those documents, we noted that the OfS was separately consulting on our general approach to the publication of information about higher education providers. We explained that, given the relevance of the publication of information consultation, we did not intend to make any final decisions on the publication proposals in the TEF consultation until we had considered responses to our publication of information consultation.
15. Nevertheless, in the TEF response document and data indicators response document, we considered responses related to our publication proposals. We set out that we were minded to proceed as set out in both consultations, and as described in paragraphs 7 to 13 of this paper, and to publish TEF outcomes as soon as practicable. We would indicate that an outcome was 'pending' where it was still being considered following representations made by the provider.
16. We also explained that, in relation to the TEF indicators, our preliminary view was that:
 - a. Indicators should be published annually as official statistics for all registered providers in England, whether they are required to participate in the TEF or not.

- b. Indicators should only be published for providers in the devolved administrations that choose to participate in the TEF. They would be published as soon as is practicable after the submission deadline. Indicators would not be published on an annual basis for providers in the devolved administrations, but we would make them available directly to providers annually.
 - c. We would clearly communicate that participation in the TEF is voluntary for certain providers.
17. Our reasons for these 'minded to' decisions, including analysis of the points made by respondents to the data indicators consultation, and the OfS's response to these, can be found at paragraphs 378 to 401 of the TEF response document and paragraphs 83 to 234 and 868 to 923 of the data indicators response document.
18. Additionally, in the student outcomes response document and the data indicators response documents, we considered responses related to our publication proposals and set out that we were minded to proceed with the proposals, with some amendments that are relevant to the publication of the TEF indicators. These are in relation to the proposals to publish individual provider dashboards and workbooks showing information about student outcomes. Because data is being produced consistently across the TEF, and our regulation of student outcomes, the following amendments would also be made to the TEF indicators:
- a. Tooltips that would give users more detailed explanations of what each element of the dashboard shows.
 - b. Increased layering in the presentation of the dashboards to enable users to focus on the key data that best meets their needs.
19. Since publishing the TEF and the data indicators response documents, we have considered the policy proposals in paragraphs 7 to 18 and our policy views, in response to respondents' comments in relation to the publication of information consultation. For the reasons explained in paragraphs 20 to 53, we intend to adopt our policy proposals broadly as set out in the response documents. However, because of the general policy approach set out in Regulatory advice 21 in relation to the broader publication of information, we have refined our approach to publishing information about the TEF and our policy will set out the information we would normally **expect to** publish (rather than information we **will** publish) and the factors we will consider when making publication decisions.

Publication of information consultation

20. In December 2020, the OfS published an initial consultation seeking views on our proposed approach to the publication of information about particular providers and particular individuals connected with them. This set out proposals for certain types of information we would normally expect to publish, other types that we would not normally expect to publish, and factors we would normally expect to consider in making publication decisions. We then published a supplementary consultation in May 2022, which contained some amended proposals, including that the publication of information relating to investigations should fall within 'information we would normally expect to publish' rather than 'information we would not normally expect to publish'.
21. We have since published the publication of information response document, which discusses responses received to the December 2020 and May 2022 consultation documents, and explains our resulting policy decisions. We decided to implement the proposals in broadly the

same form as we consulted on in the December 2020 consultation, as updated and revised in the subsequent supplementary consultation of May 2022, and with some specific amendments to the factors we will consider when making decisions regarding publication of information. In particular we amended the factors we will consider to reflect more explicitly the legal requirements placed on the OfS, in particular by section 67A of the Higher Education and Research Act 2017 (HERA).

22. The general policy we have adopted following the consultation on the publication of information is set out in Regulatory advice 21.⁴ Table 1 of Regulatory advice 21 sets out the categories of information we would normally expect to publish. Particularly relevant to the proposals we made in the TEF consultation are parts 7 and 12 of Table 1, as follows:

	Main subject matter	Main content in respect of that subject matter	Any related or ancillary material
[...]	[...]	[...]	[...]
7	<p>Information about a provider's compliance with its conditions of registration and any action the OfS has taken in response to actual or likely non-compliance:</p> <p>A breach of a condition of registration</p> <p>Imposition of a specific condition of registration, whether or not there has been a breach of a condition</p> <p>Imposition of a monetary penalty</p> <p>Suspension of registration</p> <p>Deregistration</p>	<p>The decision that there is or has been a breach of a condition of registration and the reasons for that decision</p> <p>The content of any specific condition and the reasons it has been imposed</p> <p>The decision to impose a monetary penalty, the amount of that penalty (and how it was calculated), and the reasons for those decisions⁵</p> <p>The information about suspension of registration listed in section 16 of HERA and the reasons for that suspension</p> <p>The information about deregistration listed in section 18 of HERA and the reasons for that deregistration, and the reasons for the imposition of any transitional or saving provision</p>	<p>The OfS's detailed assessment of a provider's compliance with the relevant condition(s) of registration, including the underlying evidence considered in that assessment</p> <p>The report of any assessment of quality and standards undertaken for the provider where that is relevant to the main subject matter</p>
12	Other information to be published in the provider's entry on the Register as listed in the table at paragraph 72 of	N/A	N/A

⁴ See www.officeforstudents.org.uk/publications/regulatory-advice-21-publication-of-information/.

⁵ See www.officeforstudents.org.uk/publications/consultation-on-ofs-approach-to-monetary-penalties/.

	<p>the regulatory framework, and not covered by the preceding rows in this table:</p> <p>[...]</p> <p>Whether the provider is eligible to take part in the Teaching Excellence Framework (TEF) and the provider's current TEF outcome.</p>		
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23. Regulatory Advice 21 states that:

'When making a publication decision, we will have regard to the factors set out below, and will consider them in the manner we consider to be appropriate for an individual case.'

'We will consider the factors as we decide whether information about a particular subject matter should be published and, if so, the particular content of that publication. It follows, for example, that our consideration of the factors may result in content being included in a publication that seeks to address the potential for publication to result in misunderstanding or unintended consequences. We may also consider these factors when deciding when, how or where to publish information.'

'In addition to the factors set out below we will have regard to other relevant factors on a case-by-case basis. For example, we may consider principles from relevant legal cases or judgments insofar as they remain good law.'

24. Regulatory Advice 21 lists these factors as follows:

- a. **The student interest.** We will consider the interests of students on higher education courses provided by English higher education providers and the interests of people thinking about undertaking, or who have undertaken, such courses.
- b. **The public interest.** We will consider the public interest.
- c. **The provider interest.** We will consider the impact of publication on English higher education providers.
- d. **The risk of seriously and prejudicially affecting the interests of a body or individual.** We will consider the need for excluding from publication, so far as practicable, any information which relates to the affairs of a particular body or individual, where publication of that information would or might, in the opinion of the OfS, seriously and prejudicially affect the interests of that body or individual.
- e. **Other legal duties on the OfS.** We will consider matters to which we are required to have regard, for example, our general duties under section 2 of HERA.

25. In Regulatory advice 21 we set out illustrative and non-exhaustive examples of considerations that may weigh in favour or against publication in relation to each of the factors.

26. Some of the information we proposed to publish about the TEF is now covered by our general policy regarding publication, as set out at paragraph 20 and in Regulatory advice 21. This is as follows:

- a. The overall rating awarded and the aspect ratings awarded.

- b. That the provider 'requires improvement' to be awarded a TEF rating (where no rating was awarded by the TEF panel).
 - c. Whether a provider has breached minimum requirements for quality and standards (as set out in our consultation on publication of information about higher education providers).
 - d. Whether a provider is eligible to take part in the TEF (as set out in our consultation on publication of information about higher education providers).
27. We considered comments made in response to the TEF consultation about the TEF ratings, and outcomes as these have relevance to publication matters. Some respondents suggested that that the term Bronze has negative connotations and would not be seen by stakeholders as an award for excellence but rather a mark of poor quality compared with Silver and Gold. Some respondents also suggested that a 'requires improvement' outcome could be misleading, as in their view it could be misunderstood as a provider not meeting the minimum quality requirements, creating reputational damage for a provider and the sector more broadly. It was also suggested that there could be a negative impact on the prospects of students studying at a provider categorised as requiring improvement. We responded to comments about Bronze ratings at paragraph 136, and about a requires improvement outcome at paragraphs 152 to 158, of the TEF response document, and we continue to take the views expressed there.
28. Accordingly, we would therefore normally expect to publish this information in line with our general policy. Following our general policy, we will consider the factors set out in Regulatory advice 21 in the manner we consider appropriate before making publication decisions about the publication of information about individual providers. The reasoning for adopting the general policy decision is set out in the document 'Consultation on the publication of information about higher education providers analysis of consultation responses and decision' document.
29. The other information we proposed to publish in relation to the TEF is not covered by our general policy on the publication of information. This includes publication of:
- a. The date of the TEF award.
 - b. That the provider is ineligible to retain a TEF rating because of a breach of minimum quality requirements.
 - c. TEF outcomes on the Discover Uni website, for all providers in England and in the devolved administrations that participate in the TEF. We would work with UCAS on how this information would be communicated to students via its services.
 - d. A wider set of related and ancillary information about a provider that participates in the TEF, for transparency, including:
 - i. The written panel statement setting out the panel's reasoning for the outcomes.
 - ii. The provider's submission.
 - iii. The student submission (where available), but that there may be circumstances where the OfS considers it appropriate to not publish the student submission wholly or in part, where we take the view that other factors outweigh the public interest in publishing it.
 - iv. The TEF indicators.

- e. The publication of information about the transfer of ratings where the OfS decide that a TEF rating may be transferred from one provider to another, for example due to a merger, including an explanation for the basis for the original rating, the basis on which it had been transferred, and relevant information about TEF ratings that had been held by relevant previous entities.
- f. That a TEF outcome is pending.

30. We have therefore considered these proposals further in paragraphs 31 to 53.

Responses to the publication of information consultation

- 31. We note that by respondents made a number of general points relevant to our proposals about the publication of information about the TEF.
- 32. A very small number of comments directly referred to the publication of information about the TEF. One respondent to the publication of information consultation took the view that, while publishing data related to TEF outcomes may be necessary for the OfS to carry out its functions, there may be a risk that it is published at a disproportionate level of detail. It was suggested that the OfS should test the presentation of information with students and further consult with providers on presentation.
- 33. Another respondent asked whether historical TEF outcomes would continue to be published, and which students they apply to (given that outcomes were made using different assessment frameworks). They also asked how long outcomes remain 'current' and applicable to current and future students.
- 34. We also considered points raised in responses to the publication of information consultation that did not specifically comment on our proposals to publish information about the TEF, and which are not already covered by the general policy on publication of information, but that nevertheless have relevance for those proposals. In doing so we identified some comments that reflected responses also made to the TEF consultation about the potential for reputational damage in publishing 'requires improvement' ratings, the complexity of information and opportunities for providers to check data prior to publication.⁶
- 35. The issue of reputational damage is set out in a number of places in the publication of information response document, but is summarised in paragraph 12. Related to reputational damage were comments, summarised in paragraph 112, about the potential for the publication of information to also damage the commercial interests of a provider. Comments, summarised in paragraph 47, also included mixed views on whether the OfS should publish its underlying assessment of a provider's non-compliance with conditions of registration; some respondents suggested it would support the transparency of OfS decision-making while others were concerned about the potential impact on a provider's reputation. We consider this is relevant for the TEF because we proposed to publish a statement by the TEF panel with the reasoning for its judgements.
- 36. Paragraph 110 of the publication of information consultation outcomes document notes that some respondents questioned whether students would appropriately interpret regulatory information relating to an individual provider, particularly negative judgements or outcomes, without contextual information, clear benchmarking, or further guidance. We consider this is

⁶ See paragraphs 126 and 147, and 318 to 323 of 'Consultation on the Teaching Excellence Framework (TEF): Analysis of consultation responses and decisions', available at www.officeforstudents.org.uk/publications/regulatory-advice-21-publication-of-information/.

relevant to the consideration of the publication of TEF ratings in particular, but also the ancillary information we proposed to publish.

37. Paragraph 111 of the document sets out that respondents agreed that the provider interest should be considered when making publication decisions. In particular, respondents agreed that the OfS should consider whether information could damage a provider's legitimate commercial interest or create a competitive advantage for other providers.
38. Paragraph 113 of the document sets out that many respondents agreed that, in principle, publication of information may be in the public interest, with some commenting that it would help to increase transparency and maintain public confidence in the OfS's regulatory approach and the English higher education sector. This is consistent with responses received to the TEF and data indicators consultations.
39. Paragraph 116 of the document sets out that some respondents suggested that the OfS should reframe its consideration of the public interest, so that information is published only where there is 'genuine', 'strong' or 'legitimate' public interest, and that the OfS should set out in more detail the factors that it would use to determine whether that test is met, such as contextual information about a provider, its student population and local economy.
40. Paragraph 148 of the document sets out that many respondents thought that validating information to ensure its accuracy was important, prior to the publication of any information. Some respondents linked this to the need for a consultation or representations process with individual providers in relation to publication decisions.
41. Paragraph 176 of the document sets out some respondents noted that it was important for students with protected characteristics to be able to identify where a provider may have a poor track record in providing good outcomes for underrepresented groups of students or those with protected characteristics. It was also suggested that information published by the OfS should be appropriately contextualised to enable students with protected characteristics to make informed choices.

OfS response

42. Regarding the comments about the level of detail and presentation of TEF data, it should be noted that these were received prior to our third phase of consultation on quality and standards, in which we consulted on these matters. The consultation phase covered student outcomes and the TEF and included a separate consultation on constructing student outcome and experience indicators for use in OfS regulation. We also sought advice from independent statistical experts in developing our proposals through the TEF Metrics Peer Review group, which includes student representatives.
43. Regarding the ongoing publication of TEF outcomes, we consider it appropriate for our approach to publication of information about the TEF to be consistent with the approach we have set out for other types of information in Regulatory advice 21. This means that current and previous TEF eligibility and outcomes will normally be published on the OfS Register, and the ancillary TEF material we would normally publish will remain on the OfS website with a clear explanation of the time period to which it relates.
44. We have considered the issue of potential reputational or commercial damage for a provider and consequential effects on its staff and students. Because the TEF seeks to recognise excellence above our minimum quality requirements, we expect the majority of providers will receive outcomes reflecting this. Therefore, even where there may be indicators that are

below benchmark, for the majority of providers the suite of outcomes will provide constructive and positive information and should not have a detrimental reputational impact.

45. Providers that are most likely to be negatively affected are those that receive a 'requires improvement' outcome following a TEF assessment. Points relating to the potential for reputational damage of such an outcome were made in response to the TEF consultation. As set out in the TEF consultation response document, our decision to proceed with the 'requires improvement' category was that it would 'provide a strong incentive for a provider with this outcome to improve and deliver excellence for its students'. We consider that the benefit of publishing information about a provider that receives such an outcome in order to support improvements for future students outweighs the risk of publication: that is, securing improvement for current and future students must be prioritised and publication is an important mechanism for creating the incentive for a provider to improve. We consider the risk of reputational damage is appropriately addressed by clear communication of the purpose of the TEF and explanations of the 'requires improvement' outcome.
46. We acknowledge that providers that have information published about ineligibility to retain a TEF award, as a result of a decision that there has been a breach of minimum quality requirements, may suffer negative publicity and students may be dissuaded from applying to a provider as a result. However, registration with the OfS attracts benefits, such as access to student loan funding for the provider's students. Our regulatory requirements are in the student, provider and public interest and it is appropriate for us to expect all registered providers to comply with them and to be able to communicate with students and others about our regulatory decisions. We note that the factors set out in section 67A(5) of HERA mean that we will consider the interests of providers and students as well as the risk of information seriously and prejudicially affecting the interests of the provider in decisions about publication.
47. We note that there was support throughout the TEF consultation for the publication of the proposed information, and in response to the data indicators consultation for publication of the TEF indicators. We consider that there is considerable public, provider and student interest in publication of dashboards showing performance in student outcomes measures. Students are likely to benefit from the publication of data, as it will help them compare providers and make more informed choices about what and where they study.
48. With regard to the comments about the complexity of student decision-making, we are not persuaded by suggestions that students would, as a matter of course, be unable to understand regulatory information including TEF ratings. Nonetheless, we will seek to provide appropriate supporting information to users of published TEF information. We said in the TEF consultation outcomes document:

'We are aware of the importance of ensuring the TEF outcomes can be accurately interpreted and we think it is important to ensure that the overall package of information published is as accessible and clearly communicated as possible. Our current view is that this it should include providing a clear explanation about how students should interpret and use both the ratings themselves and the associated evidence and that guidance and resources are made available alongside the data dashboards, to aid users' understanding of our data definitions. We agree that students and applicants may come across TEF ratings in isolation. As we explain under proposal 3, this is why we consider that the clearly defined hierarchy of Gold, Silver and Bronze is important.'
49. In relation to points that information should be published only where there is a 'strong' public interest, we set out in our response to the publication of information consultation that we do

not agree with this view. We consider it inappropriate to qualify, or quantify degrees of, public interest; our general policy refers simply to 'public interest'.

50. On balance we consider that the benefits to students and in the public interest of publishing the information we proposed relating to the TEF outweighs the risks that might exist for individual providers.
51. We note points made about the opportunity for providers to confirm the accuracy of data before it is published and opportunities for representations. Similar points were made in response to the TEF and data indicators consultation and we provided a response in paragraphs 125 to 127 of the data indicators response document. We do not consider that new points were made that change our views on this matter. In summary, our view is that the existing mechanisms to check and verify the accuracy of data are sufficient, without the need to introduce an additional validation or representations process for the indicators generated from this data.
52. Having considered the analysis of responses and decisions in relation to the publication of information consultation, and our general policy on the publication of information published in Regulatory advice 21, we do not consider it appropriate to substantially change the way we were minded to proceed as set out in the TEF and data indicators response documents. However, because of the general policy approach set out in Regulatory advice 21, we have refined our approach to publishing information about the TEF. Our policy will set out the information we would normally expect to publish (rather than information we will publish) and the factors we will consider when making publication decisions, which will replicate the factors set out in Regulatory advice 21.
53. We will, however, clarify within our policy approach that we would normally publish information about current and previous TEF eligibility and outcomes on the OfS Register, and that the ancillary material we would normally publish would remain on the OfS website with a clear explanation of the time period to which it relates.

Decision

54. Having considered the responses to the publication of information consultation and our general policy on the publication of information published in Regulatory advice 21, we have decided to adopt a general policy that we would normally expect to publish:
 - a. Information on the OfS Register relating to the date of a provider's TEF outcome.
 - b. Information on the OfS Register that the provider is ineligible to retain a TEF rating due to a breach of minimum requirements.
 - c. TEF outcomes on the Discover Uni website for all providers in England and in the devolved administrations that participate in the TEF. We will work with UCAS on how this information will be communicated to students via its services.
 - d. A wider set of related and ancillary information about a provider that participates in the TEF, for transparency, including:
 - i. The written panel statement setting out the panel's reasoning for the outcomes.
 - ii. The provider's submission.
 - iii. The student submission (where available) but that there may be circumstances where, having considered the factors set out in this policy approach, the OfS decides to not publish the student submission wholly or in part.

iv. The TEF indicators.

55. The TEF indicators that we would normally expect to publish are those described in the document 'Description of student outcome and experience measures used in OfS regulation: Definition of measures and methods used to construct and present them'.⁷
56. We expect that the TEF indicators will normally be published annually as official statistics for all registered providers in England, whether they are required to (or choose to) participate in the TEF or not. The first annual publication, subject to decision making, will be in 2022 at the start of the TEF submission window.
57. We expect that the TEF indicators for the next TEF exercise will normally only be published for providers in the devolved administrations that choose to participate in the next TEF and where there is also the appropriate consent of the relevant devolved administration. They would normally be published as soon as is practicable after the submission deadline.⁸
58. The TEF Indicators would not normally be published by the OfS on an annual basis for providers in the devolved administrations. Indicators may be made available to providers annually, subject to the appropriate consent of the relevant devolved administration.
59. We will clearly communicate that participation in the TEF is voluntary for certain providers.
60. Where we decide that a TEF rating may be transferred from one provider to another, we would normally expect to update published information alongside the TEF ratings to explain the basis for the original rating, the basis on which it had been transferred, and relevant information held about TEF ratings.
61. We will normally publish TEF outcomes as soon as practicable. We will indicate that an outcome is 'pending' where it is still being considered following representations made by the provider.
62. When making a publication decision, we will have regard to the factors set out in paragraph 64, and will consider them in the manner we consider to be appropriate for an individual case.
63. We will consider the factors as we decide whether information about a particular subject matter should be published and, if so, the particular content of that publication. It follows, for example, that our consideration of the factors may result in content being included in a publication that seeks to address the potential for publication to result in misunderstanding or unintended consequences. We may also consider these factors when deciding when, how or where to publish information.
64. In addition to the factors set out below we will have regard to other relevant factors on a case-by-case basis. For example, we may consider principles from relevant legal cases or judgments insofar as they remain good law. For example, at the time of publication of this document, we consider the judgment of the High Court in *R (on the application of Barking & Dagenham College) v Office for Students* [2019] EWHC 2667 (Admin) to be a particularly relevant judgment, particularly following the endorsement by the Court of Appeal in *R (on the*

⁷ See www.officeforstudents.org.uk/publications/description-and-definition-of-student-outcome-and-experience-measures/.

⁸ As indicators for providers in the devolved administrations would not be publicly available as official statistics, as they are in England, we would expect providers from the devolved administrations to share their indicators with students involved in preparing the student submission at the earliest opportunity.

application of the Governing Body of X) v Ofsted [2020] EWCA Civ 594. Similarly, in some cases we may consider case law relating to privacy rights.

- a. **The student interest.** We will consider the interests of students on higher education courses provided by English higher education providers and the interests of people thinking about undertaking, or who have undertaken, such courses.
- b. **The public interest.** We will consider the public interest.
- c. **The provider interest.** We will consider the impact of publication on English higher education providers.
- d. **The risk of seriously and prejudicially affecting the interests of a body or individual.** We will consider the need for excluding from publication, so far as practicable, any information which relates to the affairs of a particular body or individual, where publication of that information would or might, in the opinion of the OfS, seriously and prejudicially affect the interests of that body or individual.
- e. **Other legal duties on the OfS.** We will consider matters to which we are required to have regard, for example, our general duties under section 2 of HERA.

65. We will amend Regulatory advice 21 to incorporate the information that we normally expect to publish in relation to the TEF.

Matters to which we have had regard in reaching our policy decisions

66. In Annex E of our analysis of responses and decisions in relation to the TEF consultation we set out that in formulating our proposals, the OfS had regard to:

- our general duties as set out in section 2 of HERA.
- the Public Sector Equality Duty.
- statutory guidance issued by the Secretary of State.
- the Regulators' Code.

General duties

67. We have considered these again as we have made our final policy decisions set out in this document. In relation to this decision we consider it particularly relevant to general duties (b), (c), (d), (e) and (g); which relate to quality, choice and opportunities for students; competition where this is in the interests of students; equality of opportunity in connection with access to and participation in higher education; and to best regulatory practice.

68. This is because our policy intention sets out that we want TEF ratings to create incentives by putting a spotlight on the quality of a provider's courses, influencing its reputation and informing student choice. The intended effect of the TEF is to improve the quality of higher education overall, by improving the student experience and student outcomes above our minimum expectations for quality including student outcomes.

69. Given that the adoption of our general policy approach is expected to lead to information being published, in having regard to the general duties, we have considered matters related to the consequences of information being published. Not publishing the information set out in paragraph 54 would weaken incentives on providers, reduce the information available to students and in turn mean the TEF was not able to meet the stated policy intention.

70. We set out in Annex E of the TEF response document how splitting the indicators by student characteristics would enable a provider to evaluate how it performs for different groups of students, and enable the panel to consider this in its judgements, and that this related to our duty to consider equality of opportunity in connection with access to and participation in higher education. Publishing this information will therefore help incentivise excellence for all groups of students at a provider.
71. We have considered the principles of best regulatory practice and have not changed our view, as set out in Annex E of the TEF response document, that the approach we were minded to take and the application of the general policy for publishing TEF outcomes will provide clear and useful information about the judgements made and the ratings awarded, in a way that is accessible for multiple stakeholders, creating both transparency and accountability.

The Public Sector Equality Duty

72. We have had regard to the Public Sector Equality Duty set out in section 149 of the Equality Act 2010. This requires the OfS to have due regard to the need to eliminate unlawful discrimination, foster good relations between different groups and take steps to advance equality of opportunity.
73. In the TEF consultation we sought views on any unintended consequences of our proposals, for example on particular types of provider or student. We also sought views about the potential impact of our proposals on individuals on the basis of their protected characteristics. Responses to this consultation have informed our assessment of the impact of our proposals on different groups.
74. Some respondents referred to previous research that found that students from minority ethnic backgrounds would be less likely than white students to apply for Gold-rated providers, which would not support inclusion and diversity. This would have implications for a policy approach to publish TEF outcomes. However, the research conducted YouthSight, which tested a number of rating options, did not replicate these findings.
75. We consider that a policy that sets an expectation for the publication of sector-wide and provider level data supports equality of opportunity because if the data is published it will highlight the difference in performance between students with different characteristics, some of which are protected characteristics, identifying such differences is the first step to providers being able to take steps to address them. Transparency about differences in performance through publication of the data provides an incentive for providers to improve where there are differences in performance between student groups with protected characteristics.
76. We also consider that the publication of provider and student submissions, and panel statements, will also support equality of opportunity as these will provide evidence for actions and interventions that improve the student experience and student outcomes for different groups of students, some of which will have protected characteristics.

Guidance issued by the Secretary of State

77. We have had regard to the March 2022 guidance issued by the Secretary of State under section 2(3) of HERA,⁹ which welcomed the proposed introduction of the 'requires improvement' category and requested that ratings be published from the new scheme as early

⁹ See 'Guidance to the OfS on strategic priorities for financial year 2022-23 (March 2022)', available at www.officeforstudents.org.uk/advice-and-guidance/regulation/guidance-from-government/.

as possible in 2023. We have decided to take forward proposals which will introduce the 'requires improvement' category, and as part of this would normally expect to publish information about providers that receive this outcome. The March 2022 guidance also requested that where a provider is ineligible for the TEF because it is below the quality baseline, it should be categorised appropriately in relation to providers that are categorised as 'requires improvement'. We have included in our general policy approach that we would normally expect to publish this information on the OfS Register.

The Regulators' Code

78. We have had regard to the Regulators' Code.¹⁰ While we have had regard to the code as a whole, section 1 is particularly relevant, as it discusses the need for regulators to 'carry out their activities in a way that supports those they regulate to comply and grow'. Section 5 is also relevant, which discusses the need for regulators to make available 'clear information, guidance and advice to help those they regulate meet their responsibilities to comply'.
79. We note that the TEF aims to incentivise excellence above our minimum regulatory requirements. A policy approach that normally expects to publish information as set out in this document is likely to support providers in understanding regulatory decisions about excellence which will better enable them to achieve performance above our minimum regulatory requirements.
80. Paragraph 5.3 requires regulators to have 'mechanisms in place to consult those they regulate in relation to the guidance they produce to ensure that it meets their needs'. As part of the consultation, we sought views on our approach to publication of information.
81. Section 6 discusses the need for regulators to ensure that their approach to their regulatory activities is transparent. Our decisions about our approach to the publication of information, will increase the amount of information in the public domain about our regulatory activities and so aid transparency.

¹⁰ See www.gov.uk/government/publications/regulators-code.