

The OfS regulatory framework: summary paper

*This paper is exempt from publication until the publication of the OfS's regulatory framework.
Review date: 28 February, 2018.*

1. The purpose of this group of papers on the board's agenda is to allow the board to discharge its duty under section 75(1) of the Higher Education and Research Act (HERA) to prepare and publish a regulatory framework.
2. This summary paper sets the context for the board's consideration of the responses to the consultation on the OfS regulatory framework and the implications of these for the regulatory framework itself. It provides a guide to the materials provided in advance of the board meeting, information about the matters to which the board must have regard as it considers consultation responses and the regulatory framework; and a plan for the way in which we will structure the discussion of these issues in the board meeting.
3. The papers circulated with this summary paper are:
 - a. Bd-2018-Jan-2.2 Consultation Analysis: a pack of slides setting out the analysis of responses to the regulatory framework consultation carried out during the autumn, and which includes the key issues that have emerged from the consultation process;
 - b. Bd-2018-Jan-2.3 Draft Regulatory Framework: the full draft regulatory framework, not yet amended to take into account the consultation responses;
 - c. Bd-2018-Jan-2.4 Designated Bodies Paper: a paper seeking the board's views about the designation of a quality body and a data body;
 - d. Bd-2018-Jan-2.5 Equalities Impact Assessment: an equalities impact assessment that relates to the OfS's regulatory framework.
4. The board is asked to:
 - a. consider the analysis of the consultation responses and determine an appropriate response to these;
 - b. consider the draft regulatory framework and determine any changes that are required in response to the consultation responses, or for any other reason, to allow the board to satisfy section 75 of HERA;
 - c. consider the separate paper that relates to the designation of two bodies under the provisions of HERA;
 - d. consider the equality impact assessment and determine any changes that are required to this;
 - e. agree to delegate authority to the chair, the deputy chair, and the chief executive to:
 - i. approve for publication the document that sets out the OfS's narrative response to the regulatory framework consultation on the basis of the board's discussion today;

- ii. approve the drafting changes to the regulatory framework necessary to address the issues raised during the board's discussion today;
 - iii. approve the drafting changes to the equality impact assessment on the basis of the board's discussion today.
5. As it undertakes (a)-(d) above, the board is reminded that it needs to ensure that it has regard to its general duties as set out in section 2 of HERA, and to its public sector equality duty. More information about each of these is provided below.

Conflicts of interest

6. Some members of the board have direct links to providers that will be regulated under the OfS's regulatory framework. The board members and the corresponding providers are listed below:
 - a. Martin Coleman – member of the council of University of Kent. His brother is a professor at the University of Leeds and two children are studying at institutions; one as an undergraduate at the University of Bristol and the other as a postgraduate at the London School of Economics and Political Science
 - b. Gurpreet Dehal – member of Royal Holloway university council
 - c. Simon Levine – research fellow and visiting professor in the Business School at Imperial College, London, and managing partner and global co-CEO of DLA Piper, among whose clients are several English universities. His son is an undergraduate at the University of Bath.
 - d. Carl Lygo – non-executive director of the University College of Football Business, Chairman of Turner Schools Trust and Chairman of the Association of Cost Lawyers Training
 - e. Chris Millward – his partner is director of research and innovation at the Royal College of Art, his father is professor emeritus at the University of Manchester
 - f. David Palfreyman – bursar and fellow of New College, Oxford
 - g. Monisha Shah – chair of Rose Bruford College of Theatre and Performance
 - h. Steven West – vice-chancellor, president and CEO of the University of the West of England, UUK board member and board member of the West of England LEP
7. The chair has considered these relationships and does not consider it necessary for these board members to recuse themselves from discussions and decisions about the regulatory framework.

Directions and guidance from Secretary of State

8. As it considers the issues relating to its regulatory framework, the board is asked to note that:
 - a. The Secretary of State has not issued any directions under section 77 of the Higher Education and Research Act (HERA) with which the board must comply.
 - b. The Secretary of State has not given any guidance under section 2(3) to which the board must have regard.

The OfS's general duties

9. Section 2 of the Higher Education and Research Act (HERA) sets out the OfS's general duties. In performing its functions the OfS must have regard to:
 - a. the need to protect the institutional autonomy of English higher education providers;
 - b. the need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers;
 - c. the need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers;
 - d. the need to promote value for money in the provision of higher education by English higher education providers;
 - e. the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers;
 - f. the need to use the OfS's resources in an efficient, effective and economic way; and
 - g. so far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be—
 - i. transparent, accountable, proportionate and consistent; and
 - ii. targeted only at cases in which action is needed.
10. These general duties are framed in terms of the need for the OfS to 'have regard' to each of them as it performs its functions. This means that in reaching decisions about the content of the regulatory framework and about the steps to take, or not take, in response to the consultation responses, the OfS must take all of these general duties into account, weighing one against the others as it sees appropriate.
11. The board might find it helpful to note that the requirement 'to have regard' to certain matters is not expressed in absolute terms, 'the OfS must protect...'. Instead it is required to have regard to the need to do so. The nature of the 'have regard' duty was examined by the Court of Appeal in the context of duty to have regard to the need to promote equality of opportunity between people of different racial groups. The court held that this duty was not a duty to achieve a result, namely, to eliminate unlawful racial discrimination. It was a duty to have regard to the need to achieve this goal. The court said that this distinction was vital.
12. We have set out in Annex A a non-exhaustive account of the ways in which the regulatory framework has allowed the OfS to have regard to each of its general duties.

The OfS's Public Sector Equality Duty

13. As it considers its regulatory framework, the board must be able to show that it has taken due regard of the need to eliminate discrimination against people with a protected characteristic, advance equality of opportunity and foster good relations

between people who share a protected characteristic and people who do not. An equality impact assessment has been undertaken (Paper Bd-2018-Jan-2.5) and is provided to assist the board in doing so.

14. In this context, and as mentioned above, the OfS also has a general duty to have regard to the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers.

The OfS's regulatory framework

15. Section 75 of HERA says that the OfS must, from time to time, prepare and publish a regulatory framework. It goes on to say that the OfS's regulatory framework is to consist of:
 - a. a statement of how it intends to perform its functions; and
 - b. guidance for registered higher education providers on the general ongoing registration conditions.
16. The statement under (a) must set out how the OfS intends to perform its functions in relation to a registered higher education provider in proportion to the OfS's assessment of the regulatory risk posed by the provider. Guidance under (b) must include guidance for the purpose of helping to determine whether or not behaviour complies with the general ongoing registration conditions. This guidance may in particular specify:
 - a. descriptions of behaviour which the OfS considers compliant with, or not compliant with, a general ongoing registration condition;
 - b. factors which the OfS will take into account in determining whether or not behaviour is compliant with a general ongoing registration condition.
17. Section 75 also requires the OfS is required to consult before it publishes a regulatory framework.
18. In October 2017 under the provisions of section 118 of HERA, the DfE consulted on a draft regulatory framework. The OfS must now consider for itself the outcome of the consultation.

Consideration of the responses to the consultation

19. As it adopts its regulatory framework, the board needs to conscientiously take into account the product of the consultation. Paper Bd-2018-Jan-2.2 sets out the material points raised during the consultation process, and summarises and groups these accordingly. Points that seem particularly significant, either because of their nature, or because of who has made them, or because of the number of people making them, have been identified. In addition to the analysis provided in the paper, the board may wish to drill down to the underlying analysis and individual responses: these will be

available during the meeting, and are also available on request in advance of the meeting.

Structure of the board's discussion

20. We propose to take the following approach to the board's discussion:

Activity	Supporting documents
Introduction to the issues that the board needs to consider today	This summary paper
Working in four groups to consider the analysis of consultation responses and key themes – see Annex B for groups and themes	Bd-2018-Jan-2.2 Bd-2018-Jan-2.5
Whole group discussion – feedback from the individual groups	
Working in four groups to consider the draft regulatory framework and key issues – see Annex B for groups and issues	Bd-2018-Jan-2.3 Bd-2018-Jan-2.5
coffee break	
Whole group discussion – feedback from the individual groups	
Decision-making - agreement of policy changes to the regulatory framework resulting from discussion of the consultation responses; - agreement of any other changes the board wishes to make to the regulatory framework; - consideration of the separate paper on the designation of two bodies; - consideration of the equality impact assessment; - agreement of timeline for next steps as set out below	Bd-2018-Jan-2.2 Bd-2018-Jan-2.3 Bd-2018-Jan-2.4 Bd-2018-Jan-2.5

Next steps

21. After the board's consideration of these issues, the next steps will be:

- a. During the week beginning 12 February we will circulate to the board the final version of the regulatory framework and will invite any further comments. We are asking the board to delegate authority to the chair, the deputy chair and the chief executive to approve any final changes needed as a result of this process.
- b. The regulatory framework, the narrative response to the consultation, and the equality impact assessment will be published on 28 February 2018.

Annex A

The OfS's general duties are framed in terms of the need for the OfS to 'have regard' to each of them as it performs its functions. This means that in reaching decisions about the content of the regulatory framework and about the steps to take, or not take, in response to the consultation responses, the OfS must take all of these general duties into account, weighing one against the others as it sees appropriate.

We have set out below some non-exhaustive examples of the ways in which the regulatory framework has allowed the OfS to have regard to each of its general duties.

The OfS must have regard to...	Examples of how each of the general duties are addressed include:
the need to protect the institutional autonomy of providers	<p>The regulatory framework does this by:</p> <ul style="list-style-type: none"> - ensuring that providers remain free to determine their own strategies and priorities and to determine who is admitted, what and how and by whom they are taught; - adopting a risk-based approach to regulation that puts in place regulatory requirements only where these are necessary to protect the interests of students; - setting the initial and ongoing conditions of registration in relation to the outcomes it wishes to see rather than by prescribing the way in which a provider should achieve these; - using its regulatory levers in relation to individual providers only to ensure that a minimum acceptable baseline is achieved for students, but not to seek to drive continuous improvement beyond this baseline; - using transparency and sector-wide regulatory tools where possible to deliver its regulatory objectives, rather than setting more extensive requirements.
the need to promote quality, and greater choice and opportunities for students, in the provision of higher education	<p>The regulatory framework does this by:</p> <ul style="list-style-type: none"> - setting a minimum baseline for quality and using sector-wide tools, such as the TEF, to drive improvement in quality beyond this; - supporting prospective students to make informed choices through the provision of better information about courses and providers; - directly regulating to continually improve access, participation and outcomes for students from under-represented groups in those providers where the risk of not achieving this is greatest; - promoting arrangements for students to transfer to another course or provider and exercise choice; - creating a single point of entry to the register for all providers and reducing unnecessary barriers to entry (such as validation arrangements and the route to degree awarding powers); - setting the initial and ongoing conditions of registration so that a wide and diverse variety of providers are able to demonstrate that they meet them but through risk-based student protection plan, ensure that students can complete their studies successfully.
the need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of	<p>The regulatory framework encourages competition by:</p> <ul style="list-style-type: none"> - securing the conditions for a greater diversity of providers and provision to be possible;

<p>students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers</p>	<ul style="list-style-type: none"> - publishing information to help students to make good study choices, for example through the TEF and the transparency condition; - setting out in its conditions of registration the minimum requirements a provider has to meet to enter and remain in the higher education system; <p>The regulatory framework also exploits the benefits of collaboration through:</p> <ul style="list-style-type: none"> - identifying and sharing good evidence-based practice, for example in access and participation; - using its funding powers to support collaboration where this would not happen if left to competing providers; - operating thematic reviews, which will explore and encourage collaboration to tackle sector wide issues.
<p>the need to promote value for money in the provision of higher education</p>	<p>The regulatory framework does this through:</p> <ul style="list-style-type: none"> - framing one of its primary regulatory objectives in relation to value for money for students and setting out a further intention to also promote value for money for the taxpayer; - setting conditions of registration that include measures to provide greater transparency and accountability on senior staff pay, and a requirement for providers to publish a value for money statement; - requiring continuous improvement at provider level in relation to access and participation, thereby improving practice to secure better use of investment.
<p>the need to promote equality of opportunity in connection with access to and participation in higher education</p>	<p>The regulatory framework does this by:</p> <ul style="list-style-type: none"> - expressing the OfS's primary regulatory objectives in relation to all students from all backgrounds, and tying the first of these specifically to the promotion of equality of opportunity; - promoting access and participation through other conditions, such as those on quality, support for students and successful outcomes, and its broader sector-level activities; - setting general conditions of registration which allow the OfS to deploy its full range of interventions if insufficient progress is made towards delivering access and participation plans and their ambitious targets; - enhancing choice for students from a wide range of backgrounds, particularly those needing to study whilst in work or alongside caring responsibilities; - improving the provision of information for students to account for the particular needs of students with no family experience of higher education and considering higher education later in life.
<p>the need to use the OfS's resources in an efficient, effective and economic way</p>	<p>The regulatory framework does this by:</p> <ul style="list-style-type: none"> - adopting a risk-based and proportionate approach, with resources targeted at providers and issues that pose the greatest risk to students; - exploiting student engagement activities to ensure that regulatory mechanisms continue over time to focus efforts on the things that matter most to students; - using data and qualitative intelligence rather than routine cyclical reviews to monitor providers and assess the level of risk they pose.

so far as relevant, the principles of best regulatory practice	The regulatory framework adopts a risk-based approach, based on principles of regulatory best practice. It complies with the Regulators' Code. In developing the regulatory framework, the OfS has consulted with experts, drawn on best practice, and learned from the latest in regulatory theory. The consultation document contained case studies of the approaches taken by other regulators and these have influenced the design of the final framework.
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Annex B

Group session 1: consider the analysis of consultation responses and key themes

The purpose of this group session is to consider the analysis of responses to the regulatory framework consultation summarised in the pack of slides in Bd-2018-Jan-2.2.

Slides 5-11 set out a summary of the substantive points raised during the consultation and that we would like the board, in particular, to consider.

Slides 14-20 provide a summary of the responses from the sector representative bodies and mission groups.

Slides 21-46 provide a summary of the responses to each question in the main regulatory framework consultation.

Slides 47-67 provide an analysis of the responses to the separate consultation on degree awarding powers and university title. The board is asked to note that a number of the issues subject to this consultation are matters for decision by the Secretary of State rather than for the OfS board.

In addition to the analysis provided in the slide pack, the board may wish to drill down to the underlying analysis and individual responses: these will be available during the meeting.

Each group is invited to consider any and all of the issues raised in the analysis. In addition, we have identified particular key themes for each group to focus on; these are set out in the table below.

Group 1	Group 2	Group 3	Group 4
Martin Coleman Steve West Ruth Carlson Philippa Lloyd	Gurpreet Dehal Elizabeth Fagan David Palfreyman Simon Levine	Kate Lander Katja Hall Chris Millward	Carl Lygo Monisha Shah Nicola Dandridge
Note taker: Josh Fleming	Note taker: Nolan Smith	Note taker: Yvonne Hawkins	Note taker: Ed Davison
Key themes: The 'registered basic' registration category – slide 5 Quality – slide 10	Key themes: Student representation, engagement and advocacy – slide 6 Student contracts – side 11	Key themes: The OfS's primary regulatory objectives – slides 7 and 8 OfS as a validator – slide 10	Key themes: Risk-based approach, regulatory burden and new providers – slide 9 TEF – slide 11

Group session 2: consider the draft regulatory framework and key issues

The purpose of this group session is to consider the draft regulatory framework provided in Bd-2018-Jan-2.3.

The draft regulatory framework is in five parts:

Part I: the OfS's risk-based approach

Part II: sector-level regulation

Part III: regulation of individual providers

Part IV: validation, degree awarding powers and university title

Part V: guidance on the general ongoing conditions of registration

Each group is invited to consider any and all of the draft regulatory framework and to consider, in particular, the regulatory burden created by the framework as a whole. In addition, we have identified particular sections for each group to focus on; these are set out in the table below.

Group 1	Group 2	Group 3	Group 4
Martin Coleman Monisha Shah Nicola Dandridge Simon Levine	Gurpreet Dehal Katja Hall Steve West Chris Millward	Kate Lander Ruth Carlson David Palfreyman	Carl Lygo Elizabeth Fagan Philippa Lloyd
Note taker: Josh Fleming	Note taker: Nolan Smith	Note taker: Yvonne Hawkins	Note taker: Ed Davison
Sections: Part I: the OfS's risk-based approach From Part V, the conditions on: Access and participation – conditions A1-3	Sections: Part II: sector-level regulation From Part V, the conditions on: Quality and standards – conditions B1-3, C1-2, P	Sections: Part III: regulation of individual providers From Part V, the conditions on: Financial sustainability and management and governance – conditions D and E1-2	Sections: Part IV: validation, degree awarding powers and university title From Part V, the conditions on: Student protection – conditions E4, F, G