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IMPLEMENTATION OF THE HIGHER EDUCATION AND RESEARCH ACT 2017



Universities UK

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INTRODUCTION

In April 2017, the Higher Education and Research Act received royal assent. This piece of legislation, which is the first major regulatory reform to the UK higher education sector in 25 years, is primarily concerned with the creation of two new bodies to regulate and fund higher education providers: the Office for Students (OfS) and UK Research and Innovation (UKRI). Annexe A provides information on the changes made to the legislation during its passage through parliament, many of which were secured by positive engagement between the sector, parliamentarians and the government.

Universities UK supported the bill's introduction on the basis that existing higher education legislation did not reflect changes experienced by the sector since 1992. The introduction of new legislation did present risks that changes could undermine features that are key to the sector's success, such as institutional autonomy. However, we believe that the final Act represents a positive outcome and should provide a stable framework for the sector into the future.

The central change put in place by the Act is the replacement of the Higher Education Funding Council for England (HEFCE) with the OfS. These reforms shift from conditions associated with the granting of funds to conditions associated with inclusion on the higher education register. In addition, the Act establishes UKRI, which combines the work of the UK-wide research councils as well as taking on administration of English quality-related funding.

The Act represents a first step toward establishing the new regulatory system for the sector. It will be essential for the sector to engage actively as the OfS and UKRI are established to shape how they approach their work and how the sector deals with these bodies. It will also be important for the higher education sector itself to consider the implications of the relationship between these two organisations and the impact on the relationship between teaching and research within universities.

The legislation also raises further questions about the relationship between the respective nations of the UK and a UK-wide higher education sector. The Act itself is principally focused on England with some notable exceptions, including the role and responsibility of UKRI and participation of devolved nations in the Teaching Excellence Framework (TEF). Just as significant are the ramifications of a shift to the OfS regulatory framework in England and potential cross-border impacts, including shared sector components such as the Quality Code for Higher Education.

This briefing outlines the main changes introduced by the Act, and identifies some of the main issues and questions that will need to be addressed by the sector and universities, as well as the timeline for the transition to the new framework. It also sets out how the regulatory relationship between the OfS and the sector envisaged by the Act are founded on principles of co-regulation. It goes on to explore what this means in practice and the changes that will need to be considered going forward.

THE OFFICE FOR STUDENTS

Establishment of the OfS

The Higher Education and Research Act 2017 replaces the Higher Education Funding Council for England (HEFCE) with the OfS from April 2018, with a period of transition for the academic year 2018–19. The Chief Executive will be appointed subject to approval by the secretary of state following the general election on 8 June. There will then proceed a programme of work to develop the new regulatory framework, and an associated programme of organisational development in advance of April 2018. This work will be led by the Chair and Chief Executive of the OfS with the support of the Department for Education (DfE). Sir Michael Barber has already been appointed as the incoming Chair of the OfS.

The appointment of a Director of Fair Access and Participation is also specified in the Act (Schedule 1). This director will be responsible for the OfS functions relating to access and participation plans, and provision of advice on good practice. This effectively transfers the functions of the Office for Fair Access (OFFA) into the OfS with agreed plans a condition of registration for institutions wishing to access public funding.

The rest of the board will be made up of a minimum of seven and maximum of 12 ‘ordinary members’. The composition of the board will include experience of the English higher education sector as well as experience of markets and regulation from other sectors. The requirements in the legislation are additions to the 1992 act requirement for sector representation, and highlights the different statutory duties and focus of the OfS. The board will be comprised of members based on their experience of:

- representing or promoting the interests of individual students
- providing or being responsible for provision of higher education in England
- employing graduates
- promoting choice for consumers or other service users from in industry or another sector
- experience of creating reviewing or managing regulation in industry or another sector
- managing or auditing the financial affairs of an organisation
- a broad range of different types of English higher education providers

This process presents an opportunity to support the continued development of a risk-based regulatory framework and organisational structure that meets the needs of the sector. Equally, the complexity of setting up a robust framework in the available timeframe presents a challenge for both the government and the sector, that may cause disruption in the short term and undermine long-term regulatory outcomes. Some priorities for UUK during this process include:

- ensuring that the governance of the OfS can protect the interests of the sector including universities and students, and embeds key groups, including the NUS, into decision making
- ensuring that the OfS adopts a co-regulatory approach that recognises the central role of institutions and the sector in delivering positive outcomes for students
- developing a risk-based approach to regulation that recognises diversity of providers and ensures that conditions and interventions are targeted where needed, and avoids unnecessary burden
- maintaining robust requirements for entry into the sector through registration conditions and revised processes for degree awarding powers and university title that protects students from low-quality or transient providers
- ensuring that sector-owned components of the new regulatory system – such as prospective designated bodies and the Quality Code – are suitable for the new regulatory landscape
- establishing an effective working relationship between the OfS and UKRI, including protection of the relationship between teaching and research, and the relationship between Research England and UK-wide funding

Statutory duties

Central to the development of the OfS will be how it interprets its general statutory duties outlined in Section 2 of the Act. These duties place a greater emphasis on the OfS as a market regulator and protector of student interests. However, some of the duties are potentially complex, such as the need to promote competition in the student interest while allowing for collaboration, as well as the need to promote value for money in the absence of significant direct funding capabilities. How the OfS interprets these duties in relation to the role of student information and the use of tools such as the TEF and Longitudinal Employment Outcomes data will be significant long-term questions for the OfS and the sector.

The wider range of regulatory powers given to the OfS by the Act are balanced against a general statutory duty to protect institutional autonomy. This was an important concession which will also play an important role in defining the OfS's relationship with the sector. The definition of autonomy (Section 2.8) replicates the provisions of the 1992 act, and includes day-to-day management, the content and structure of courses, academic judgment, admissions and staffing. The secretary of state is also bound by these principles when giving guidance to the OfS (Section 2.5). There will be a 'public interest' governance condition (Section 14) of registration that must include the principle that academic staff must be free to test and challenge wisdom and ideas within the law, without the jeopardy of losing jobs or privileges.

Section 2.1:

- 1.** 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 where action is needed

The new regulatory framework

Another integral part of the setup of the OfS will be the development of its regulatory framework. The statutory powers of the OfS flow from conditions of registration through which institutions can access public funds, student support or accrue reputational benefits (Sections 3 to 22). These powers are also allied to broader powers over entry and exit from the market through administration of degree awarding powers and powers in relation to validation (Section 42 to 60). A consultation on this overarching regulatory framework is expected in autumn 2017 and will include:

- interpretation of general statutory duties
- mandatory risk-based conditions of registration, including financial sustainability and quality
- specific conditions of registration
- public interest governance conditions, including electoral registration duty, and role of governing bodies, and academic freedom
- penalties, suspensions and de-registration
- access and participation requirements
- transparency duty
- ‘Prevent’ duty
- registration sanctions
- powers of search and entry
- validation, degree awarding powers and university title

Additional dedicated technical consultations will also be required for OfS registration fees and a separate process for designating quality and statistical bodies.

A key question for the OfS will be how it approaches its relationship with registered institutions. This includes how the OfS will be accountable to the sector through registration fees, as well as how sector-led parts of the framework may need to evolve, such as the structure around quality and standards. Other issues that will need to be addressed include:

- how it deals with increasing institutional diversity in a transparent and consistent fashion across the whole sector, while protecting the interests of students and the general public
- the extent and ways in which the OfS will assess institutional sustainability and risk through financial assurance and mechanisms such as the Annual Provider Review
- the relationship between the OfS and UKRI, and other relevant agencies such as the Competition and Markets Authority (CMA), devolved administrations, and professional statutory and regulatory bodies (PRSB)

Transition to the register

The OfS's main regulatory mechanism will be the register of higher education providers which will be publicly available and follows the recommendation of the UUK Task and Finish Group on regulation in 2015. The transition from HEFCE to the OfS register will represent a substantive change in the way that the sector is regulated. The Act gives scope for the OfS and secretary of state to vary the conditions applied to different providers, particularly transparency conditions (Section 9). Other areas of differentiation also relate to access and participation conditions for institutions subject to the fee limit.

The Act includes a requirement that initial and ongoing regulatory conditions are proportionate to the risk of an institution failing to comply with regulations (Section 7). The establishment of a register is intended to ensure that the OfS has a comprehensive relationship with a wider range of higher education providers. The register will also enable a variable approach to regulation, set out in the government's [white paper](#), through three registration tiers:

- **Registered:** this is a largely new category of providers not in receipt of public funds or student support, and is intended to provide reassurance to students. Courses must match the academic standards as they are described in the Framework for Higher Education Qualifications (FHEQ) at Level 4 or higher, and they must subscribe to the independent student complaints body, the Office of the Independent Adjudicator (OIA).
- **Approved:** this is for those institutions who are designated for student support and puts recent ad hoc arrangements on a statutory footing. Successful quality assurance (QA); financial sustainability, management and governance (FSMG) checks; meeting the Competition and Markets Authority's requirements regarding students' rights as consumers; adherence to the OIA's good practice framework.
- **Approved (fee cap):** this will include most UUK member institutions and is for those institutions who continue to directly receive public funds. In addition to the requirements for approved status, approved (fee cap) will include more stringent FSMG requirements, comparable to current HEFCE requirements and the Higher Education Code of Governance; compliance with the relevant terms and conditions of government grant funding.

The registration fee will be an important mechanism for holding the OfS to account for the overall burden of conditions on the sector and individual institutions. A technical consultation is expected in autumn/winter 2017 on how registration fees for providers will be calculated and levied.¹ It is essential that the transition to the register runs smoothly and it is expected that the government will underwrite fees levied on established providers during the transitional year 2018–19.

Student protection plans

Student protection plans will be a new requirement for all approved and approved (fee cap) providers. To date there is little detail on what these should entail other than the need for registered providers to notify the OfS of any campus, discipline or institutional closure (whether full or partial)

¹ For the UUK response to the initial call for evidence, see Universities UK (2016), Response to the Higher Education Green Paper, <http://www.universitiesuk.ac.uk/policy-and-analysis/reports/Pages/universities-uk-response-to-higher-education-green-paper.aspx>

and specifying how students will be protected. The starting point for plans is likely to be based on the statement of good practice on course changes and closures which forms part of the current regulatory baseline in England. This approach was noted in the House of Lords during the passage of the bill, including:

- i.** provision to teach out a course for existing students
- ii.** offering students an alternative course at the same institution
- iii.** making arrangements for affected students to switch to a different provider without having to start their course from scratch
- iv.** measures to compensate students who are affected financially

The OfS will take responsibility for ensuring that the plan is satisfactory and credible, taking a risk-based and proportionate approach to assessment and will work with providers to ensure orderly closure which protects students. Other considerations will include:

- Whether the OfS should require registered (basic) providers to have protection plans in place to protect their interests?
- What should be considered satisfactory credible and risk-based, particularly student's preference for continuity of study?
- Ensuring a clear balance between protection plans, the statutory autonomy of providers and provider's duties under consumer rights regulations.

Designation of quality and statistical bodies

The OfS will consult on whether there are appropriate bodies that can be recommended to the secretary of state to perform quality assessment and data collection activities in advance of April 2018 (Schedule 4 and 6 respectively). The consultation will review whether there is an appropriate body that commands the confidence of the sector to carry out these functions. In both cases the statutory duty remains with the OfS and it has within its scope the power to decline to recommend a body to the secretary of state.

Both the Quality Assurance Agency for Higher Education (QAA) and the Higher Education Statistics Agency (HESA), as prospective designated bodies, will need to review their approach to delivering core services to ensure alignment between the priorities of the sector and the OfS. This will include how subscription models will need to change to meet legislative requirements and the needs of the new regulatory system while also sustaining necessary shared sector architecture. The governance of designated bodies and their relationship with the OfS will also need to be updated in line with the new arrangements.

Quality and standards

The Act includes ongoing conditions of registration relating to the quality of, and standards applied to, the higher education teaching offered by the provider (including requiring the quality to be of a particular level or particular standards to be applied) (Section 23), while also including an explicit reference to standards. During the passage of the Act through parliament, an important

clarification was achieved in relation to standards, which means that conditions can only relate to ‘sector recognised standards’ as determined by persons representing the sector and commanding the confidence of the sector (Section 13.2 and 13.3).

Although the inclusion of standards alongside quality goes further than the 1992 act, it is hoped that this clarification serves to retain sector ownership of the definition of standards. There is also specific protection from secretary of state guidance on areas associated with institutional autonomy, including academic judgements (Section 2.5). Nevertheless, the conditions of registration will ultimately be set by the OfS which will need to be considered as part of the broader regulatory framework. Current HEFCE activity, as part of the new operating model for quality assessment, is focused on external and internal processes, ie external examiners and degree algorithms, that protect the integrity of academic judgments and final awards. Further considerations include:

- the relationship between institutional autonomy over assessment, sector-owned definitions of quality and standards, the designated quality body and the OfS’s risk-based registration conditions
- maintaining a consistent UK-wide approach to quality and standards that can address the priorities of the respective national regulators and funders
- establishing a workable framework that provides a shared reference point for academic quality which addresses student priorities and interests as well as wider public and regulatory priorities

The UK-wide standing committee on quality assessment is working to coordinate a shared regulatory baseline and is also reviewing how the quality code, including standards, may need to evolve in the context of the new regulations. HEFCE is also expected to conduct a review of the Annual Provider Review in the autumn which, alongside the regulatory framework consultation, will also be relevant to the subsequent approach adopted by the OfS.

University title and degree awarding powers

Concessions were secured in relation to degree awarding powers and university title during the legislative process. Degree awarding powers will now be subject to independent quality advice from either the designated quality body or from an independent committee, and replicates much of the role of the QAA’s Advisory Committee on degree awarding powers (Section 46). It is expected that there will be consultation on how the OfS should exercise its new powers, including ‘probationary’ degree awarding powers, and the removal of degree awarding powers.

The OfS must also have regard to factors in guidance given by the secretary of state when granting university title (Section 56.7). Before giving this guidance, the secretary of state must also consult bodies that represent higher education providers and students, and any other appropriate persons. Reassurances were also given in parliament that the consultation will be full and broad, will reference processes and practice overseas – for example, in Australia – and provide an opportunity to look at a range of factors to consider before granting university title.

Jo Johnson’s comments regarding university title made in the House of Commons during Consideration of Lords Amendments stage were also restated by Viscount Younger of Leckie in the Lords:

“In a limited sense a university can be described as predominantly a degree-level provider with awarding powers. If we want a broader definition, we can say that a university is also expected

to be an institution that brings together a body of scholars to form a cohesive and self-critical academic community to provide excellent learning opportunities for people”

“We expect teaching at such an institution to be informed by a combination of research, scholarship and professional practice. To distinguish it from what we conventionally understand a school’s role to be, we can say that a university is a place where students are developing higher analytical capacities: critical thinking, curiosity about the world and higher levels of abstract capacity in their analysis.” [Official Report, 26/4/17; col. 1159.]

Powers to give financial support to institutions

The OfS retains the power to make grants or loans to the governing body of an eligible higher education provider for the provision of education, facilities or maintenance of other necessary activities (Sections 39 to 41). This allows the OfS to replicate funding powers by HEFCE around funding for high cost or strategic and vulnerable subjects. It also potentially gives scope for financial support for providers in financial difficulty, however, in the absence of a significant OfS budget, any decision to support an individual provider would likely involve DfE and Treasury input.

Sharia-compliant loans

Section 86 of the Act makes provision for alternative payments to be made for students that do not bear any interest. Repayments must be the same amount as if they were a standard tuition fee loan

Fee limits

Schedule 2 of the Act covers the powers of the secretary of state to set upper and sub-level amounts for those providers who are registered as approved (fee cap) which can be amended by statutory instrument (Section 119 (2) (i)). Changes to these regulations now requires affirmative procedure to be followed – an active approval by both houses of parliament – even if the fee increase is below inflation. This was a late concession by the government to smooth the passage of the bill during the final week of its progress through parliament.

The provisions in relation to fee caps are dependent on providers having an approved access and participation plan, and replicates the arrangements of the Higher Education Act 2004. Schedule 2 sets up three levels of fee limits:

- the higher amount which will ordinarily increase fees at a rate no greater than is required to maintain the value of the amount in real terms
- a sub-level amount defined by the secretary of state not exceeding the higher amount or floor amount
- a floor amount as defined by the secretary of state that is currently set at £9,000 by the statutory instrument which came into force from 2012–13

The Act makes provision for the secretary of state to link the higher amount and a ‘sub-level’ amount to achievement of a ‘high-level quality rating’ in the TEF (Schedule 2 (2)). The use of the sub-level amount has been delayed by a sunrise clause in respect of fees for the academic year starting in

2020 (Schedule 2 (2) (10)). Therefore, until academic year 2020 all providers participating in the TEF with access plans will be allowed to charge the full inflationary increase. The 2016 white paper proposed that providers achieving gold and silver TEF awards would receive the higher amount, while providers achieving bronze would receive 50% of the higher amount.

TEF independent review

The mechanism to allow institutions to increase fees is linked to the requirement of the OfS to establish a scheme for rating the quality and standards of a higher education provider (Section 25). A significant and welcome concession from the government was a requirement for the secretary of state to appoint an independent reviewer of the TEF before the differential link between performance and fees comes into place (Section 26). UUK called for this approach in the response to the government's original green paper in January 2016. The review itself will cover the following areas:

- a.** the process by which ratings are determined under the scheme and the sources of statistical information used in that process
- b.** whether that process, and those sources of statistical information, are fit for use for the purpose of determining ratings under the scheme
- c.** the names of the ratings under the scheme and whether those names are appropriate
- d.** the impact of the scheme on the ability of higher education providers to which the scheme applies to carry out their functions (including in particular their functions relating to teaching and research)
- e.** an assessment of whether the scheme is in the public interest
- f.** any other matters that the appointed person considers relevant

The secretary of state must then take account of the findings of the review before making any further decision on introducing a variable fee link between TEF results and fees. The earliest point at which the sub level amount can come in to use is for students enrolling for academic year 2020–21, which would entail a TEF assessment in winter 2018–19. Until this point participation in the TEF alone enables a provider to raise fees in line with inflation.

It will be important that the appointed person has the confidence of the sector. The appointment must be made by April 2018, although the length of time for the review is not specified. Other considerations that it will be important to consider as the review progresses include:

- future governance of the TEF, including the process and phasing of any future changes to the TEF to ensure consistency and practicability
- emerging findings from the subject-level pilots scheduled to take place over the course of 2017–18 and 2018–19
- the place of the TEF in the wider information landscape and the role of comparative and differentiating information in meeting the OfS duty to promote competition and choice

Student transfers

The OfS also has a duty to monitor the provision for arrangements for student transfers between higher education courses and providers and to facilitate, encourage and promote awareness of university transfer arrangements (Section 38). The section does not include a specific registration condition relating to transfers and is constrained by the statutory autonomy of providers over admissions (Section 2 (8) (b) (iii)). However, conditions related to student protection plans can be expected to include arrangements for enabling transfers. Universities should therefore consider ensuring process for enabling students to transfer to and from another institution are reasonable and transparent.

Switching between providers has been used as a mechanism of consumer empowerment in several regulated utility markets. However, as noted by the CMA, in the case of higher education this mechanism is limited by students' study preferences as well as financial and geographical considerations. In practice the main priority should be enabling students to make the right initial choice of study. Consideration of reforms to the rules around clearing and adjustment to enable students to revise their initial choices should they wish to do so may also merit consideration

Accelerated degrees

The Act also makes provision for the secretary of state to make variations to regulations for different purposes, cases or areas (Section 119). This provision has been used to enable the secretary of state to make provision for different fee levels for courses defined as 'accelerated'. An 'accelerated course' is currently defined as a higher education course at least one year shorter than usual for that course, or a course of equivalent content leading to the same or an equivalent academic award (Schedule 2 (4)).

UK RESEARCH AND INNOVATION

Establishment of UKRI

Like the OfS, UKRI will start operating from April 2018. The government has announced that the Chief Executive of the new body will be Sir Mark Walport, while Sir John Kingman has been appointed as Chair on an interim basis to set up the new organisation. The actual dates for the different processes involved with setting up UKRI are less clear than those described above relating to the establishment of the OfS.

With the Chair and Chief Executive of UKRI in place, the coming months will see appointment of the Chief Financial Officer and between nine and twelve ordinary board members. These posts will be assigned by the secretary of state in consultation with the Chair of UKRI, and will be in place by the start of formal operations of the new body in April 2018.

One of the first activities of the newly established UKRI will be to draft its research and innovation strategy. While there is no legislative requirement for consultation on this strategy, it is expected that this document will be produced in collaboration with the research sector.

Under Section 97 (4) of the Act, Research England will have to consult on the terms and conditions attached to the quality-related funding it supplies to English higher education providers. Again, at this time there is no clear indication about when this process will take place, or the format of any consultation with the sector.

Structure and functioning of UKRI

The Higher Education and Research Act 2017 leads to the creation of UKRI, which will bring together the seven existing research councils with Innovate UK and Research England.

Research England is a new body that will take on the research and knowledge exchange funding responsibilities of what is currently HEFCE, with David Sweeney as its Executive Chair. The work of UKRI will be structured around its research and innovation strategy, a document that is subject to approval by the secretary of state, which will be translated into activity by each of the nine councils through strategic delivery plans.

Within the new UKRI structure, the seven research councils will retain their current names and characteristics, and will continue to be able to form direct research partnerships with other organisations. It would be possible for the secretary of state to rename or change the specialisms of the research councils in the future, but only after consultation with the research sector (Sections 92 and 95). Section 92 (3) prevents the secretary of state from changing the name or abolishing either Research England or Innovate UK.

Innovate UK will continue to have a business focus, with an explicit requirement for the organisation to concentrate on increasing economic growth (Section 96). In addition to the overall UKRI board, each council will continue to have its own executive chair and board members (though reduced to between five to twelve members in total). The secretary of state is responsible for appointing the executive chairs (after consultation with UKRI) and one other council member, while UKRI appoints all other members.

There are a number of provisions in the Act to ensure that the OfS and UKRI collaborate effectively. This cooperation is particularly important for English higher education providers, given that the funding they receive for teaching and research will now be entirely divided between different bodies.

Section 112 sets out provisions for cooperation and information sharing between the two new organisations. In response to concerns that these provisions did not go far enough, the government also introduced amendments to require UKRI's annual report to include a statement of how it has cooperated with the OfS over the previous year (Schedule 9 (15)). With degree awarding powers now the responsibility of the OfS under the 2017 Act, there is also a provision to ensure that any decision by the OfS to grant or revoke research awards will have to be informed by the views of UKRI (Section 46 (5)).

Allocation of funding

During the passage of the Act through parliament, significant concerns were raised concerning how the £6 billion annual funding granted to UKRI by the secretary of state will be allocated between the seven research councils, Innovate UK and Research England.

There are limited prescriptions on the face of the legislation about how this allocation will take place. Ministers were clear that they viewed this as necessary to ensure flexibility in meeting emerging research challenges, but stated that: '[w]hen considering what the balance of funding should be, as now, the secretary of state will take advice from UKRI and consider issues such as the strategic priorities of the research base and the sustainability of higher education, research capability, and other research facilities supported through the UKRI budget.'

Introduced towards the end of the passage of the Act through parliament, Section 101, which relates to the allocation of funding by the secretary of state to UKRI, now has an explicit requirement that the government must publish details of the funding provided to UKRI, the terms and conditions

attached, and the amount granted to each of the seven councils. This is designed to give public oversight of the process, and to encourage responsible allocation of funding to the different councils.

The government also made clear that the establishment of UKRI – with both recurrent and grant funding being the responsibility of bodies within its structure – will not undermine the dual support system. Repeated assurances were given that dual support would be protected, pointing to provisions in Section 103 which for the first time establish the ‘balanced funding principle’ on the face of primary legislation. The same section also protects institutional autonomy by preventing terms and conditions being attached to Research England funding which relate to programmes of research, staff recruitment or student admissions.

For the first time, the Act also places the Haldane principle in primary legislation with respect to funding provided to UKRI. The principle is defined in Section 103 (3): ‘that decisions on individual research proposals are best taken following an evaluation of the quality and likely impact of the proposals (such as a peer review process).’

UKRI and the devolved nations

The government has stated that the funding allocation for Research England will not only ensure that the dual support system is protected, but that the UK-wide focus of Innovate UK and the seven research councils will be retained within the new UKRI structure. Again, transparency conditions around grant allocations prescribed in Section 101 are intended to provide accountability if funding is not spread across the councils in an appropriate manner.

With respect to recurrent funding provided by the government, ministers also made clear at Lords Committee stage that the features of the current system in relation to the devolved administrations would remain the same: ‘[c]urrently, allocations to funding bodies are discussed with the Treasury, which assesses any Barnett implications for the devolved Governments. This is not changed by the Bill.’

To try to ensure that UKRI gives equal regard to all nations of the UK, there is a provision in the Act to encourage devolved representation on the organisation’s board. Schedule 9 (2) (6) sets out the ‘desirability of the members including at least one person with relevant experience in relation to at least one of Wales, Scotland and Northern Ireland.’ The government stopped short of making this an absolute requirement, but noted that nothing prevents multiple, or many, UKRI board members from having research experience from the devolved nations.

The government also provided assurances in the House of Lords that when UKRI is producing its research and innovation strategy, it will ‘incorporate the views of the devolved governments’. Ministers envisage that such engagement will take place outside of the narrow and infrequent publication of this strategy, and that the body will be involved in ‘regular consultation with the devolved administrations on UKRI’s priorities.’

Timeline for the implementation of the Higher Education and Research Act

Universities UK will be working its members, the Department for Education, HEFCE and the new leadership of the OfS and UKRI to ensure an effective transition to the new system. Over the course of the next 12 months there will be a variety of milestones and opportunities for input that will benefit from active engagement to develop an effective framework that works for the whole sector. Some of the dates are summarised in the table below.

Stage	Date
TEF Year 2 outcomes announced	14 June 2017
Appointment of OfS CEO	June 2017 (expected)
Call for expressions of interest for designated quality and statistical bodies	Summer 2017
Publication of TEF lessons learned, revised specification for TEF year three and subject level pilots	June/July 2017
Full OfS consultation on regulatory framework published	September/October 2017
Technical consultation on OfS registration fees	Autumn/Winter 2017
Technical consultation on designation of quality and statistical bodies	Autumn/Winter 2017
DfE consultation on guidance for granting university title	TBC
The OfS and UKRI commence operation	April 2018
Designation of quality and statistical bodies by secretary of state	April 2018
Deadline for appointment of independent reviewer of the TEF by secretary of state	27 April 2018
Register of English Higher Education Providers transitional year commences	September 2018
Final transition to Register of English Higher Education Providers	September 2019
Earliest academic year permissible for the secretary of state to set a sub-level fee amount	2020–21

CONCLUSIONS

The new regulatory framework represents both an opportunity to protect and promote the interests of students and the whole UK sector’s international standing. This will require a positive relationship between UKRI and the OfS, and between the OfS and an increasingly diverse sector, and with the devolved funding bodies. This relationship will in part be dependent on how the OfS interprets its statutory duties around the student interest, while abiding by general and specific duties concerning the protection of institutional autonomy. Similarly, the sector itself will need to consider how it engages with the new organisations and how sector approaches to quality and standards may need to evolve.

Central to the success of the system will be the establishment of new principles and practices of co-regulation founded on a shared commitment to enabling universities to support their students. This includes principles of consultation, representation and administration that embed the key groups, including the NUS, into decision making and avoiding overly directive or intrusive approaches to regulation and performance. The sector will also need to evaluate the parameters of ‘self-regulation’ in partnership with the OfS to establish a model of public accountability based on a rounded view of student outcomes.

ANNEXE A: CHANGES MADE TO THE HIGHER EDUCATION AND RESEARCH ACT DURING ITS PASSAGE THROUGH PARLIAMENT

During the passage of the Higher Education and Research Act through parliament, UUK worked closely with parliamentarians and the government to improve the legislation and ensure that the UK university sector can continue to thrive under the new regulatory system.

While not an exhaustive list, these improvements included:

- **Teaching Excellence Framework:** the introduction of a legislative requirement for an independent review of the TEF beginning in 2018, and a delay in the introduction of the subject-level TEF by a year, as well as an additional pilot year of this phase.
- **Institutional autonomy:** a new clause which will prevent the government from interfering in the governance of higher education providers in various areas, and specific safeguards for academic freedom.
- **Quality and standards:** numerous changes to the bill to ensure that ‘quality’ and ‘standards’ are properly defined and separated, and that the independent ability of institutions to set their own academic standards is fully protected.
- **Sector entry:** tightened regulation around degree awarding powers and university title to protect students and the reputation of our higher education sector. Secured the creation of a strong, independent body to scrutinise degree awarding powers and university title, and introduced additional ministerial oversight of new providers which have not previously been in validation arrangements.
- **Sector collaboration:** a new duty on the OfS to encourage collaboration in the higher education sector, in addition to competition.
- **Protection of existing institutions:** amendments to specify additional conditions which must be met before the OfS can vary or revoke the degree awarding powers or university title of existing institutions, and ensure that royal charters cannot be revoked in full.
- **Functioning of UKRI:** a new requirement for annual reporting of how UKRI and OfS are cooperating, and an amendment to embed the Haldane Principle on the face of the bill with respect to allocation of funds by UKRI.

The majority of amendments to the legislation were tabled at Report stage in the House of Lords, with the government producing [explanatory notes](#) to set out in detail the changes made. Further concessions made during ping-pong were explained in a [joint letter](#) from GuildHE and UUK to parliamentarians.

ANNEXE B: REGULATORY COMPARISONS WITH THE FURTHER AND HIGHER EDUCATION ACT 1992

The below table compares regulatory provisions in the Further and Higher Education Act 1992 with what is prescribed in the Higher Education and Research Act 2017. This is not an exhaustive list of provisions contained in each, but is intended to provide an overview of the comparable sections in each act. The main text of this paper explains how many of these legislative changes will substantively impact higher education institutions once implemented.

HEFCE/OfS: statutory duties and responsibilities

Subject	Further and Higher Education Act 1992	Higher Education and Research Act 2017
Funding	<p>Section 65 gives powers to HEFCE to administer funds to higher education institutions for:</p> <ul style="list-style-type: none"> • the provision of education and the undertaking of research • the provision of any facilities, and the carrying on of any activities, necessary or desirable for the purpose of education or research • local authority or further education institutions offering courses in higher education • the provision by any persons of services related to education or research in the higher education sector <p>HEFCE may make grants, loans or other payments to higher education institutions in respect of expenditure incurred for the above purposes, subject to terms and conditions (see ‘Funding conditions’ below).</p> <p>‘Higher education institution’ is defined as a university, higher education corporation or a designated institution.</p>	<p>Section 39 of the act relates to powers of the OfS to give financial support to registered higher education providers. This part of the legislation features similar wording to the 1992 act, but excludes research. Research functions of the OfS now are overseen by Research England within the new UKRI structure.</p> <p>Section 40 covers institutions maintained by local authorities and further education institutions offering higher education courses.</p> <p>As set out in the content of this paper, the new regulatory framework established by the 2017 act is based primarily around the new higher education register.</p> <p>The 2017 act is significantly more prescriptive about the statutory functions and duties of the OfS, the majority of which are outlined in Section 2.</p>

Implementation of the Higher Education and Research Act 2017

<p>Advice to the Secretary of State</p>	<p>Section 69 sets out that HEFCE shall provide advice to the secretary of state on the provision of higher education ‘as he may from time to time require’ in a manner determined by the secretary of state. HEFCE may also provide advice about higher education provision it considers appropriate.</p>	<p>Section 78 establishes the power of secretary of state to require information and advice from the OfS.</p> <p>While there is no legislative mechanism for the OfS to give unsolicited advice to the secretary of state, the government has been clear that they envisage this to happen when necessary.</p>
<p>Quality assessment</p>	<p>Section 70 requires HEFCE to ‘secure that provision is made for assessing the quality of education provided in institutions for whose activities they provide, or are considering providing, financial support’.</p> <p>The same section also sets out the establishment of the Quality Assessment Committee to provide advice on the discharge of this duty.</p>	<p>Section 23 allows the OfS to ‘assess, or make arrangements to assess, the quality of, and standards applied to’ English higher education providers. Section 24 requires the establishment of a Quality Assessment Committee to provide advice on its functions under Section 23.</p> <p>Section 25 establishes the Teaching Excellence Framework in primary legislation, while Schedule 2 sets out how the associated tuition fee limit link will function.</p> <p>Schedule 4 of the 2017 act sets out in detail the functions of any body designated by the OfS to assess quality within the higher education sector.</p>
<p>Degree-awarding powers and university title</p>	<p>Section 76 establishes that the Privy Council may specify by order that an institution is competent for degree awarding powers. The granting of degree awarding powers also allows institutions to authorise other providers to grant awards on their behalf, to grant awards jointly with another institution, and to deprive awards granted to persons by the institution.</p> <p>Section 77 sets out that the use of university title requires the consent of the Privy Council.</p>	<p>The 2017 act moves authority over degree awarding powers and university title away from the Privy Council to the OfS.</p> <p>Section 42 allows the OfS to grant degree awarding powers to institutions by order, while Section 56 allows the body to do the same for university title. There are also new powers to allow the OfS to vary or revoke degree awarding powers (Section 45) and revoke university title (Section 58).</p> <p>Under Section 46 (5), any decision by the OfS to grant or revoke degree awarding powers must be informed by the views of UKRI.</p>

<p>Additional powers of the secretary of state</p>	<p>Under Section 69 (5), ‘the secretary of state may by order confer or impose on a council such supplementary functions relating to the provision of higher education as he thinks fit.’</p> <p>Under Section 81, the councils must comply with general directions given to HEFCE about the exercise of its functions. It also allows the secretary of state to give directions to HEFCE about the provision of financial support to any institution which seems to be financially mismanaged.</p>	<p>There is a similar provision related to supplementary functions outlined in Section 76.</p> <p>Section 77 (6) (a) allows the secretary of state to give financial support directions if it appears that the financial affairs of a provider have been or are being mismanaged.</p>
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Institutional duties and responsibilities

Subject	Further and Higher Education Act 1992	Higher Education and Research Act 2017
<p>Funding conditions</p>	<p>Section 65 states that funding provided by HEFCE to higher education institutions is ‘subject in each case to such terms and conditions as the council think fit.’ HEFCE may require the repayment (in whole or part) of sums paid if terms and conditions are not complied with, or require payment of interest on unpaid money due to the body.</p> <p>Section 66 establishes that HEFCE must first consult on funding terms and conditions with ‘bodies representing the interests of higher education institutions as appear to the council to be concerned’, or the governing bodies of any relevant institutions. In drafting the terms and conditions, HEFCE must have regard to the needs of denominational institutions and those with distinctive characteristics.</p> <p>Section 68 allows the secretary of state to make grants to HEFCE with terms and conditions attached as he thinks appropriate. The secretary of state may impose requirements to be complied with by institutions in subsequent receipt of this funding.</p>	<p>Section 41 relates to the terms and conditions attached to funding provided by institutions by the OfS, along with a requirement for consultation. With the new regulatory framework focused around the higher education register, parts of the legislation relating to registration conditions (ie Sections 5 to 14) are also relevant.</p> <p>Section 74 mirrors parts of the 1992 act which relate to grants from the secretary of state to the OfS with attached terms and conditions.</p> <p>Not set out in the 1992 act were sanctions which the regulatory body can make if a provider is in breach of funding conditions. Sanctions related to breaches of registration conditions are detailed in the 2017 act, primarily in Sections 15 to 21 and Schedule 8.</p>

Implementation of the Higher Education and Research Act 2017

Duty to provide information	Section 79 places a duty on the governing bodies of higher education institutions to provide information to HEFCE for the purposes of its functions set out in legislation.	Data requirements placed on registered providers are significantly more expansive than in the 1992 act. Section 9 relates to mandatory transparency conditions of registered institutions, while Sections 62 to 67 set out various information powers of both the OfS and any designated statistical body. Schedule 6 prescribes how any designated statistical body should be established.
Fair access and participation	While not included in the 1992 act, the Higher Education Act 2004 led to the creation of the Office for Fair Access (OFFA). This body monitors institutions' access and participation plans, which were a new requirement for providers wishing to charge tuition fees above the basic rate.	Under the 2017 act, the Director of Fair Access will now be positioned within the OfS (Sections 12, 21, 29 to 37, Schedules 1 and 2). The Director will retain their authority over access and participation plans, similar to in the 2004 act. Section 32 outlines in more detail the required content of access and participation plans, which are essentially identical to provisions in the 2004 act.

Institutional autonomy

Subject	Further and Higher Education Act 1992	Higher Education and Research Act 2017
Terms and conditions attached to funding	Section 68 (3) states, in reference to terms and conditions of grant funding from the secretary of state to HEFCE: 'Such terms and conditions may not be framed by reference to particular courses of study or programmes of research (including the contents of such courses or programmes and the manner in which they are taught, supervised or assessed) or to the criteria for the selection and appointment of academic staff and for the admission of students.'	Section 2 (4) to (8) covers the protection of institutional autonomy in various areas of governance, in addition to new protections for academic freedom. Section 74 (3) specifies that the secretary of state must have regard to institutional autonomy in drafting terms and conditions for OfS funding. Section 74 (4) and (5) prohibits interference in courses offered by institutions. Sections 101 (3) and 102 (3) have similar protections for providers in receipt of quality-related funding from Research England.

Institutional standards	<p>In Section 76 (6), with reference to the ability of institutions to award degrees, it states that:</p> <p>‘It shall be for the institution to determine in accordance with any relevant provisions of the instruments relating to or regulating the institution the courses of study or programmes of research, and the assessments, which are appropriate for the grant of any award and the terms and conditions on which any of the powers conferred under this section may be exercised.’</p>	<p>The 2017 act contains substantially more provisions around the assessment of quality and standards. UUK secured amendments to ensure these two concepts – which have very distinct definitions in the higher education sector – are separated, and that institutions retain the independence to define their own academic standards.</p> <p>Institutional autonomy around academic standards is covered by the sections in the column above, as well as in other provisions which limit regulatory control to threshold standards: Section 13 (2) and (3), Section 23 (3), Section 44 (7), Section 45 (9) and Section 46 (10).</p>
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