



Department
for Education



Department for
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Dear Baroness O'Neill, Baroness Wolf, Lord Norton and Lord Stevenson,

In advance of this afternoon's debate when we will be discussing amendment 146, we wanted to set out our policy regarding how the Bill, primarily through robust, risk-based regulation by the OfS, will address concerns that have been expressed about the ownership of higher education providers operating in England.

Only providers who are carrying on all or most of their higher education activities in England will be eligible to register with the OfS. It is important to remember that such providers do not have a right to register – the OfS will look at each application for registration on its merits.

The assessment of whether a provider is carrying on most or all of their higher education activities in England is not simply a matter of where students are studying. Although each case will depend on its own facts, in determining where a provider carries on its higher education activities, a number of questions will need to be considered, such as: where the provider's management activities take place; where its courses are designed; where course material is prepared; and where supervision, marking or other evaluation takes place. These questions will need to be considered both in terms of whether a provider is eligible to be registered and, if it is eligible, whether the OfS should actually register it. As a result, we fully anticipate that only providers that have a physical presence in England will be able to apply successfully to join the OfS register. And it is only registered higher education providers, in the 'approved' or 'approved (fee cap) categories, that will be able to benefit from their students having access to student support. It is also worth noting that only registered higher education providers will be eligible to apply for Degree Awarding Powers where they do not already have those powers. The same is true of student support: only students studying at registered providers will be eligible.

It is the Government's view that additionally requiring incorporation in England in order for a provider's students to access student support is unnecessary: it is not by focussing on where an

institution was first established that will result in effective regulation. Instead it will be by ensuring that HE activity carried on in the UK can be effectively regulated. To focus on the place of corporate origin would place such providers at a significant competitive disadvantage and with no tangible benefit for those students. It is not clear what benefit such a blanket exclusion brings if the result is that potentially excellent providers are automatically excluded from registration to deal with concerns about a small number of providers whose credentials for registration are less well made. Those providers of doubtful repute will not, of course, be limited to those established overseas in any event.

We want to be absolutely clear here. We expect that those who wish to register as part of our new system should have a physical presence in the UK. And it is crucial that the OfS is satisfied that such providers can be held to account if they fail to comply with the regulatory regime operated by the OfS. If the OfS cannot be satisfied about this it is open to the OfS not to register them.

We should also have in mind that being established abroad in no way absolves a provider from having to comply with every aspect of the Bill in the same way as a provider exclusively based in the UK. In respect of a registered higher education provider's activities in England and Wales, the applicable law, regardless of where it is incorporated, will be that in the Higher Education and Research Bill, and other relevant English and Welsh law. Its activities in England will be subject to the relevant applicable law as it applies in England, for example tax and equalities legislation. It is not necessary for a provider to be incorporated under the law of the United Kingdom for English courts to have jurisdiction. English higher education providers operating overseas are not subject to similar restrictions which could be seen as a barrier to free trade. If we were to unilaterally impose restrictions on overseas providers operating in the UK, there is a real risk that other countries would retaliate – which risks damaging an important and valuable export industry for the UK. We must also be mindful that until we exit the EU we should not be legislating in a way, which conflicts with EU law. A requirement that a provider is incorporated in the UK may breach EU law on freedom of establishment and freedom to provide services.

However, we have heard and reflected upon the concerns that some have raised. We recognise that in some cases providers incorporated outside the United Kingdom may pose additional risks and the Bill already includes safeguards which address this:

- the Bill expressly provides that the OfS must take a risk based approach in deciding on what conditions to apply to a particular registered provider. Specific registration conditions can and would be applied to deal with risks arising from incorporation outside the UK, including, for example, specific financial undertakings and assurances, conditions relating to how effective enforcement action can be brought by the OfS and how students' complaints can be dealt with;
- the OfS can impose a public interest governance condition on registered higher education providers - which requires the provider's governing documents to be consistent with public interest principles listed by the OfS. The list must include (but is not limited to) the principle that all academic staff have the freedom within the law to (a) question and test received wisdom; and (b) put forward new ideas and controversial or unpopular opinions, without placing themselves at risk of losing their jobs or privileges;
- as happens now, we would expect the Designated Quality Body to have in place arrangements with overseas quality assurance bodies to share information about higher education providers operating in their respective jurisdictions.

Having considered the views expressed in the House of Lords on these issues, we can also confirm that the Government, in its guidance to OfS, will make clear the need for the OfS to identify and mitigate any degree of risk that is posed by any provider that is not incorporated in

the UK. This guidance will outline clearly the factors for the OfS to consider, and to address, when it decides whether to register a provider with a presence overseas and, if it does decide to register the provider, what registration conditions should apply to these providers.

I am copying this letter to all Peers and placing a copy in the Library of the House.

Yours ever,

A handwritten signature in blue ink, reading "James Younger". The signature is written in a cursive style with a large, stylized "Y" at the end.

VISCOUNT YOUNGER OF LECKIE