25 January 2017

Dear Colleagues,

HIGHER EDUCATION AND RESEARCH BILL

Following the fifth day of Committee scrutiny of the Higher Education and Research Bill on 23 January, I am writing to offer clarification on a number of questions that were raised by Peers, on some of which Baroness Goldie and I committed to write. This letter responds to questions raised on the Teaching Excellence Framework (TEF), appeals processes, the OfS’s commissioning arrangements for validation of HE providers, and foundation degrees. Further information is provided as annexes, including on the independent quality body.

The Teaching Excellence Framework (TEF)

I am grateful to Peers for the productive debates we had in Committee on 23 January, relating to both quality assessment and the TEF. We were again pressed for time, so I would like to use this letter to address those points which I was not able to address fully in my response to Peers. On some issues I was able to give a more full response, such as on concerns raised on the National Student Survey, so I have not covered that material again here.

I will first quickly set out my views on some key principles on the TEF which we have returned to in our debates.

The Conservative Manifesto committed that we will “introduce a framework to recognise universities offering the highest teaching quality” and I have been pleased by the wide agreement within the House on the importance of improving teaching quality, and of
having a teaching excellence framework in some form. The framework that we are implementing has been designed over the past year and a half with the sector, through two consultations, and using the input of experts such as HESA and the ONS.

I hope that I have been able to reassure Peers that the TEF is not wholly metrics based, and most certainly not all about the National Student Survey. The NSS is just one of three principal sources of metrics data being used, and we have explicitly said that the NSS metrics are the least important. Crucially, providers submit additional evidence alongside their metrics and the TEF assessors use the metrics results and additional evidence to reach a holistic judgement. We have opted not to weight the different pieces of evidence, relying on the assessors to use their experience and academic judgement to reach a decision and to reward excellence wherever it is found. This qualitative and quantitative approach received strong support from the sector.

I was asked what would be in the provider submission. Providers will have the opportunity to provide further quantitative and/or qualitative evidence of how, taking into account their specific circumstances, they demonstrate excellence against the assessment criteria. It is for providers to determine the precise content, but we included a list of suggestions in the TEF Year 2 specification (published in September 2016, with the whole document available at [https://www.gov.uk/government/publications/teaching-excellence-framework-year-2-specification](https://www.gov.uk/government/publications/teaching-excellence-framework-year-2-specification) and have attached these at Annex B.

This included suggesting that providers refer to quantitative information on teaching intensity, such as weighted contact hours, recognition and reward schemes, and their impact and effectiveness of teaching, quantitative information relating to the qualification, experience and contractual basis of staff who teach and use and effectiveness of learner analytics in tracking and monitoring progress and development. All of these were points raised in the course of yesterday’s debate, and the debate on Wednesday 18 January, so I hope that Peers are reassured that these points are reflected within the existing framework. The examples of content that we have provided in the TEF specification are not prescriptive, and the provider guidance will also stress that these are potential examples only and will allow for any relevant additional evidence to ensure scope for innovation and creativity. Baroness Lister queried how the framework will stretch students to think critically and assess what they are being taught. The TEF Framework includes explicit criteria on rigour and stretch, which requires assessors to consider whether “Course design, development, standards and assessment are effective in stretching students to develop independence, knowledge, understanding and skills that reflect their full potential”.

The TEF assessors will follow the assessment process set out in the TEF specification. This means that they will reach an initial hypothesis based on the metrics, will then look at the provider submission and then use both pieces of evidence to reach a holistic judgment. Therefore we intend that the work of the panel will be driven as much by judgement as by metrics, with a view to ensuring that the distinctive character of institutions, and the diversity of missions and approaches across the sector, is recognised in the ratings awarded.

One of the key principles of the TEF is recognising that the highest teaching quality means differentiation, even within a quality sector, and that is why the ratings remain necessary. I was asked again about the likely distribution of TEF awards and whether this
was a quota. In the TEF specification, we indicated a likely distribution based on performance against the core metrics where approximately 20% of participating providers would receive the lowest rating, approximately 20-30% would receive the highest rating and the remaining 50-60% would receive the intermediate rating. This distribution is not a quota. The panel will not be expected to force an allocation of providers to categories based on these proportions. The decision of the TEF Panel will be the final determinant of a provider’s rating. The Panel will be under no obligation to comply with a quota or guided distribution when determining ratings. The panel will be encouraged in its assessment to reward and recognise quality wherever it finds it, without being bound by guideline distributions of gold, silver and bronze.

We discussed again the ratings of gold, silver and bronze and whether further categories are necessary. We have consulted on this before, and received support for a 3 category system. The terms gold, silver and bronze are already widely used and accepted in the sector – for example, by the Athena Swan awards or for Investors in People. In each of these cases it is fully recognised that a bronze is still a high quality award, whilst gold is reserved for those of the highest quality. I would like to respond to a concern which has been raised throughout the debate that bronze will be interpreted as the “bottom” rating. A provider can only receive a TEF rating if they have already demonstrated that they have passed a high quality baseline. TEF focuses on identifying evidence of excellence above the baseline. Many providers fail to meet this quality baseline and therefore will not receive a TEF award. We aren’t, however, complacent about the risk of miscommunication and are working with the British Council and others to ensure that TEF ratings are communicated clearly to stress that these ratings represent excellence above this quality threshold, and will have a joint communication plan with them in place by the time TEF ratings is published.

To clarify, those awards will, under current plans, last for 3 years, but if a provider wishes to they may reapply the year following an award, to see if they can change rating.

I was pressed for time to respond fully on amendments regarding the handling of the metrics. The metrics were defined using advice and analysis from HEFCE and HESA, and were subject to an independent assessment by the ONS. Moving forward, we will also ensure that the TEF metrics reflect the changes as a result of any technical reviews.

We consulted extensively on the metrics as part of the year 2 Technical Consultation. Following the consultation, we made further improvements across the metrics and the sector has welcomed the changes we have made. For example, on the publication of the TEF Year 2 documentation Maddalaine Ansell, Chief Executive of University Alliance said:

“There are decisions here that we strongly welcome, such as a broader approach to benchmarking ... and a more granular system for looking at performance differences... We remain confident that we can work with government to shape the TEF so it works well as it develops.”

I am concerned that amendments which require the metrics to be laid before Parliament add a level of process which could reduce the incentive to make iterative changes to the scheme, or the metrics, by requiring that they are laid before Parliament every time they change. This reduction in flexibility is not required by other schemes supported by many Peers, such as the Research Excellence Framework. And amendments that require all
data sources to be laid before Parliament for a vote could in fact prove unworkable as the TEF is not just about metrics, but also includes whatever qualitative and contextual evidence a provider chooses to submit.

Baroness Wolf discussed amendments regarding the handling of statistics by the OfS and the standards that will apply. Compliance with the Code of Practice for Official Statistics is a statutory requirement on all UK bodies that are specified producers of official statistics.

In order to be so specified, an Official Statistics order under section 6 of the Statistics and Registration Service Act 2007 is required. We agree that it is desirable that the OfS should do this – but this is an issue that will be discussed with the Chair when he arrives. And without the proper procedure being followed, there will be nothing that gives the required duties and powers to the Office for Statistics Regulation to regulate the OfS – an important part of the picture.

I recognise that these amendments are also intended to encourage the OfS to behave in an open and transparent manner, and require that all statistics and metrics used that have an impact on fees should be published. I would like to reassure Baroness Wolf that such material is, and will continue to be, published. The underlying purpose of the TEF is to provide students with better and richer information about their chosen providers, and as such, we expect the OfS to continue to publish this information, without the need for additional legislative duties being placed on it.

I would also like to reassure Baroness Wolf that HEFCE, who currently administer the TEF, are confident that they are maintaining the required high standards.

We had an interesting discussion about the use of benchmarked statistics. For the TEF, a unique benchmark is calculated for each provider’s metrics. The benchmark is a weighted sector average where weightings are based on the characteristics of the students at the provider. This means that the provider is not being compared to a pre-set group of providers. Each provider will therefore have its own benchmark. The UK Performance Indicators and NSS outcomes already use this methodology.

The Government consulted on this approach, which allows the assessment to take into account factors beyond the institutions’ control, such as subjects chosen by students or student characteristics. The majority of respondents supported the approach, and the importance of maintaining consistency with the approach already taken by HESA. Professor David Phoenix, Chair of MillionPlus and Vice-Chancellor of London South Bank University, has said “The decision to include additional benchmarking criteria such as socio-economic background and disability is a step in the right direction.”

We have previously announced our intention to review the current benchmarking system to ensure it is fit for purpose, and are committed to doing so. However, removing the contextualisation which the current benchmarking provides could significantly disadvantage providers who take large numbers of students with low prior attainment or from disadvantaged backgrounds. This, in turn, could incentivise universities to recruit fewer students from such backgrounds.

Finally, Baroness Deech referred to a series of NSS questions. I would like to clarify the questions we are using as part of the TEF assessment, and they are included in Annex C
attached to this letter. We appreciate that some aspects of the question may be open to interpretation – and the challenges associated with different students having different expectations. However, I hope that I have reassured the House that we have recognised the NSS’s limitations clearly in our guidance to TEF assessors. Nevertheless, despite its limitations, we consider that it would not be credible with students, parents – or indeed anyone who values feedback - to have excluded the NSS from the TEF.

Appeals

Baroness Deech asked whether the Government has considered all the areas in the Bill that will be open to judicial review. As she has indicated, the Bill confers a range of decision-making functions, in particular on the OfS. That decision-making will need to comply with principles of good administration and administrative law in the usual way. The Bill aims to put the OfS in the best position to ensure it complies with these principles.

For example, the Bill requires the OfS to have regard, so far as relevant, to the principles of best regulatory practice, including the principles that regulatory activities should be transparent, accountable, proportionate and consistent, and targeted only at cases in which action is needed. The Bill lays down fair procedures (such as in relation to the alteration of registration conditions), lays down requirements in relation to the OfS and other decision-makers (for example, as regards experience) and it requires the OfS to prepare, consult on, and publish a regulatory framework setting out how it intends to perform its functions (clause 69 of the Bill).

This should serve to reduce the risk of legal challenges being brought and, if such challenges are brought, the risk of those challenges being successful. Where a person wishes to challenge a decision, in certain key areas, namely deregistration, monetary penalties, revocation of University Title, and variation and revocation of Degree Awarding Powers (where decisions are likely to have far reaching implications for providers and students alike), the Bill provides for a special appeal procedure to the First-tier Tribunal on a defined set of grounds, namely:

   a) that the decision was based on an error of fact;
   b) that the decision was wrong in law;
   c) that the decision was unreasonable

In other areas of decision-making where recourse to the First-tier Tribunal is not available – such as decisions that for example relate to Registration applications and TEF awards, any challenge will need to be brought by way of judicial review in the usual way. However, given the framework and tools provided by the Bill (mentioned above) we would expect the OfS to be in a strong position to defend any such challenge.

Technical education and foundation degree awarding powers

Lord Stevenson asked about the interaction between the proposals on technical education, as set out in the Government’s Green Paper “Building our Industrial Strategy”, and the Higher Education and Research Bill. In particular, he asked whether there was anything regarding the proposals on technical education that would affect the Bill’s framework. I can confirm here that this will not be the case and there is nothing in respect of the proposals on technical education that will require any further changes to this Bill.
Lord Stevenson also asked about the types of institution that can award foundation degrees. Foundation degrees are a form of ‘taught degrees’ that sit below Bachelor degrees on the current QAA framework. It is the case that under the Bill only an institution that is in the further education sector is able to apply solely for the powers to award foundation degrees. We call this ‘foundation degree awarding powers’.

The Privy Council route to foundation degree awarding powers was originally introduced in 2007 specifically to enable high quality Further Education colleges to award foundation degrees. It has never been the Government’s intention to change this position under this Bill. FE Colleges that have been given foundation degree awarding powers have been restricted from validating. Under the new regime, we intend for high quality FE colleges to apply to the OfS for the ability to validate.

However, I should also clarify that foundation degrees can be, and are, awarded by a wider range of institutions than those from within the FE sector. Under the current system, institutions that provide higher education can apply for ‘taught degree awarding powers’ – this is a broad suite of powers that includes the ability to grant foundation degrees. So, at the moment, any institution that has taught degree awarding powers can also award foundation degrees. We do not see this changing. It is also the case that a number of these providers currently validate foundation degrees, delivered by a wide range of different institutions, including those from outside of the FE sector. I hope you find this clarification helpful.

I look forward to further debate and scrutiny of the Bill as we pass through Committee and on to the Report stage. I am very happy to discuss the clarifications above, or the Bill itself, further with Peers who wish to do so. Officials from the Department for Education and the Department for Business, Energy and Industrial Strategy will also be available for factual briefings on the Bill during Committee stage of the Higher Education and Research Bill. I am placing a copy of this letter in the library of the House.

Yours ever,

James Younger

VISCOUNT YOUNGER OF LECKIE

Quality

We are agreed on the importance of having an independent quality body to undertake the assessment functions under clause 23 with additional effective oversight built into the quality system, and I undertook to set out how that structure will work.

Under the Bill the OfS is given powers to designate a quality body. That body must be independent from the Government, in that it must not be a servant or agent of the Crown, or a body to which the Secretary of State appoints members, and must exercise its functions independent of any particular HE provider. It has to have the confidence of registered HE providers, a test it would be unlikely to meet if it were not perceived to be sufficiently independent.

If the OfS does not exercise its power to consult to identify a body, we have set out in our White Paper that the Secretary of State may instruct the OfS to do so. The power to do this is outlined in the Bill under paragraph 1(2) of Schedule 4.

Once a body is designated, the assessment functions in relation to both quality and standards would be carried out by it. Although the OfS, in having ultimate responsibility for the register of Higher Education providers, has to retain appropriate oversight of the exercise of its functions by the designated quality body, and will have contact with the body, the Bill is specific about how this relationship can work. For instance, the Bill grants the OfS the power to require the body to provide it with information which the body holds for the purposes of the performance of the OfS’ functions. It will also allow the OfS to give the designated quality body directions. These directions must be general in nature, and must not relate to an individual provider only. For example, they might specify that advice from the body may be required to fit with the OfS’ register cycle. When giving directions, the OfS must have regard to the need to protect the Quality Body’s expertise. This does not take away the fact that the designated body will have statutory responsibility for the quality assessment functions.

Creating a new statutory body, with a Chair, Chief Executive and Board appointed by the Secretary of State would abolish the system of co-regulation which has endured for almost two decades, by removing a truly third party, sector-owned body such as the QAA from the regulation of quality, and risks significantly reducing the voice of the sector in these matters. That is why we resisted amendments from Peers on such a proposal.

We also discussed amendments that Peers had tabled on student representation within the quality system. We listened to points raised in Committee in the Commons and have amended Schedule 1 of the bill to ensure that at least one member of the OfS Board must have experience of representing or promoting the interests of individual students or students generally. Schedule 4 also requires the OfS, when consulting on finding a suitable quality body, to consult with persons who appear to the OfS to represent or promote the interests of a broad range of students, and when the OfS reports on the quality body it must have regard to the views of persons representing or promoting the interests of students.

The OfS must also establish a Quality Assessment Committee to give advice on the exercise of the quality assessment functions. Advice must be given to the OfS about the performance of the Designated Quality Body of the quality assessment functions, where designated. We expect that the Quality Assessment Committee will operate in a similar way to the current HEFCE Quality, Accountability and Regulation Standing Committee, which advises HEFCE on whether it has met the appropriate statutory duties, as well as on other matters.

The Quality Assessment Committee will be a sub-committee of the OfS, but Clause 24 ensures that the majority of the members of the Quality Assessment Committee are not members of the OfS, offering the Committee the flexibility to draw on the expertise of individual OfS members if needed, without undermining the independence of its membership as a whole.

Amendment 171, which the Government resisted, requested that the OfS appoint a Chair to the Quality Assessment Committee and for the appointment to be someone that is without political affiliation or membership of any political party. This would place new limitations on the OfS that restrict how it runs this Committee and who it appoints to provide expert advice. It would also set a level of prescription that could undermine the effectiveness of the advice the Committee provides. We would prefer them to be able to appoint who they think is the best person for the job, to setting out requirements in legislation on political affiliation.

The Quality Assessment Committee will operate in a similar way to the current HEFCE Quality Committee that has provided advice free from political interference or influence for a number of years, without the need for legislative intervention. There is no reason to believe that continuing with a similar approach would be an issue going forward. Ultimately it will be for the OfS to decide how it manages its appointments, but we would expect it to follow the good practice that applies to public appointments generally and anticipate that this would include building in processes to ensure fairness and transparency, as well as ensuring that a person with the right experience to Chair the Committee is chosen.
### Possible Examples of Additional Evidence for Each Aspect

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<th>Aspect</th>
<th>Possible Examples of Evidence</th>
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| Teaching Quality (TQ)          | • Impact and effectiveness of involving students in teaching evaluation e.g. collecting and acting on their feedback  
                                | • Impact and effectiveness of schemes focused on monitoring and maximising students' engagement with their studies such as the UK Engagement Survey (UKES) and others  
                                | • Recognition of courses by professional, statutory and regulatory bodies (PSRBs)  
                                | • How the provider is achieving positive outcomes for students, whilst also successfully identifying, addressing and preventing grade inflation  
                                | • Quantitative information on teaching intensity, such as weighted contact hours  
                                | • Impact and effectiveness of external examining  
                                | • Impact and effectiveness of teaching observation schemes  
                                | • Impact and effectiveness of innovative approaches, new technology or educational research  
                                | • Recognition and reward schemes, and their impact and effectiveness, including progression and promotion opportunities for staff based on teaching commitment and performance  
                                | • Quantitative information relating to the qualification, experience and contractual basis of staff who teach  
                                | • Impact and effectiveness of feedback initiatives aimed at supporting students' development, progression and achievement |
| Learning Environment (LE)      | • Impact and effectiveness of initiatives aimed at supporting the transition into and through a higher education course  
                                | • Quantitative information demonstrating proportional investment in teaching and learning infrastructure  
                                | • Use and effectiveness of learner analytics in tracking and monitoring progress and development  
                                | • Extent, nature and impact of employer engagement in course design and/or delivery, including degree apprenticeships  
                                | • Extent and impact of student involvement in or exposure to the latest developments in research, scholarship or professional practice (one or more)  
                                | • (For relevant providers) Evidence of Welsh medium provision contributing to students' academic experiences  
                                | • Impact and effectiveness of initiatives aimed at understanding, assessing and improving retention and completion |
| Student Outcomes and Learning Gain (SO) | • Learning gain and distance-travelled by all students including those entering higher education part-way through their professional lives  
                                | • Career enhancement and progression for mature students  
                                | • Evidence of longer-term employment outcomes and progression of graduates including into highly-skilled employment  
                                | • Evidence and impact of initiatives aimed at preparing students for further study and research  
                                | • Evidence and impact of initiatives aimed at graduate employability  
                                | • Extent of student involvement in enterprise and entrepreneurship  
                                | • Number, impact and success of graduate start-ups  
                                | • Use and effectiveness of initiatives used to help measure and record student progress, such as Grade Point Average (GPA) |
| • Impact of initiatives aimed at closing gaps in development, attainment and progression for students from different backgrounds, in particular those from disadvantaged backgrounds or those who are at greater risk of not achieving positive outcomes. |
ANNEX C - letter from Viscount Younger on the Higher Education and Research Bill, 25 January 2017

NSS questions being used in the TEF

The teaching on my course

1 - Staff are good at explaining things.

2 - Staff have made the subject interesting.

3 - Staff are enthusiastic about what they are teaching.

4 - The course is intellectually stimulating.

Assessment and feedback

5 - The criteria used in marking have been clear in advance.

6 - Assessment arrangements and marking have been fair.

7 - Feedback on my work has been prompt.

8 - I have received detailed comments on my work.

9 - Feedback on my work has helped me clarify things I did not understand.

Academic support

10 - I have received sufficient advice and support with my studies.

11 - I have been able to contact staff when I needed to.

12 - Good advice was available when I needed to make study choices.