Universities UK

UUK response to the OfS consultation on 'new requirements for the oversight of subcontractual arrangements'

Universities UK (UUK) is the collective voice of 141 universities in England, Scotland, Wales, and Northern Ireland. Its mission is to create the conditions for UK universities to be the best in the world, maximising their positive impact locally, nationally, and globally. Universities UK acts on behalf of universities, represented by their heads of institution.

High quality, robustly governed franchised provision can play an important role in supporting access through innovative delivery and contributes to economic growth and skills. The makeup of students at franchised institutions can be different from the wider sector, with higher participation rates of mature students, part-time learners, students from the most deprived areas, and students seeking more flexible studying options.

Universities UK, and its members, are clear about the need to uphold high quality provision and effective governance of franchise partnerships, and over the past year we have been working across the sector to drive improvements in practice.

Last year, with GuildHE and the Committee of University Chairs (CUC), we produced a Franchise governance framework to support members in managing such arrangements. Earlier this year, we held sector workshops with Quality Assurance Agency (QAA), GuildHE, the Office of the Independent Adjudicator (OIA) and Independent HE to continue the conversations around responsible management of franchised partnerships. We continue to engage with the Department for Education (DfE) to consider emerging risks in the franchising space and consider how we can support the sector to respond. We think it is right that oversight of franchised

provision is extended and earlier this year we supported the proposal that franchise partners should be required to register with the OfS.

We share a view that further assurances about the oversight and transparency of franchised provision would be beneficial. It is important, though, that any new OfS interventions or powers are used proportionally within clear parameters, and that institutional autonomy, with regard to whom providers can partner with and when, is protected. We welcome the opportunity to contribute to the development of additional assurance measures through this consultation.

Our response

Proposal 1: Introduce a new general ongoing condition of registration (condition E8)

Q1: Are there aspects of the proposals you found unclear? If so, please specify which, and tell us why.

We find the proposals clear and support the aim of the condition to increase transparency and accountability of subcontractual arrangements. However, it should be noted that the OfS already has powers through its regulatory framework to carry out many of the proposed new functions. Without clearly defined parameters about when and how regulatory activity will be activated, there is a risk of regulatory duplication and an increased chance of disproportionate regulation. We would like to see the OfS more clearly define how these proposals differ from existing regulation (for example, the E good governance conditions) and how they will ensure interventions are deployed only when and where they are needed.

There is, therefore, a need for greater clarity around how the OfS will define 'reasonable grounds' and 'significant risk' in its decisions about whether or not to impose a subcontractual arrangement direction. While we appreciate the need to take a risk-based approach to decision-making and that the risks may look different in different contexts, the lack of clearer definitions here means providers will not have clarity on implications of the condition or the potential for regulatory action. It also becomes harder to ensure consistency and for the regulator to be accountable on this. We would recommend further detail on the assessment process for determining 'reasonable grounds' and 'significant risk' to provide greater clarity of these terms. Where possible, the OfS should consider using metrics in this process.

Q2: In your view, is the proposed definition of subcontractual arrangements clear and does it correctly capture the nature of these arrangements?

We note that the term 'subcontractual' and 'franchise' are often used interchangeably. For example, the recent DfE consultation proposals refer to 'franchised' providers and students, whereas the OfS consultation uses 'subcontractual provision/arrangements'. We would encourage OfS and DfE to consider using consistent language to avoid confusion.

In this response, we use the terms interchangeably, particularly where figures from existing reports or publications are referenced.

Q3: Do you have any comments on the scope of providers that will have obligations under the proposed condition?

We agree that the proposed condition should apply according to the parameters set out in the consultation. However, we have reservations about the ability of the OfS to re-visit and amend the scope without additional consultation. Paragraph 18 of the guidance states: '*The OfS may also in future decide to amend the definition of 'relevant subcontractual arrangements', or change the types of arrangements that fall within the scope of the exemption categories set out in E8.18.*' We are concerned that this could set a precedent for OfS intervention into areas outside the current scope (for example, into transnational education) which operate very differently to arrangements currently covered.

We feel it is important that OfS should not use the new condition to bring into scope other types of partnerships which are removed from its original purpose (eg domestic subcontractual arrangements) without additional consultation and careful review. While we recognise the particular challenges which have been observed in franchised provision, the OfS's regulatory framework should be designed in such a way that it is not necessary to regularly introduce new requirements in this way.

Q4: Do you have any comments on the impact of these proposals for particular groups of students?

We welcome the additional protection and assurance the proposed increased regulatory oversight would bring to all students, particularly those who benefit from the reach and flexibility that subcontractual provision can provide.

As noted in the National Audit Office (NAO) report 57,470 out of 97,000 (59%) students studying at franchised (subcontracted) providers in England in 2021-22 were from two neighbourhoods classed as high deprivation, compared with 40% of

students at all providers. Students studying at franchised (subcontracted) providers also tend to be older (40% were over 31 on entry compared to 18% of all students).

When underpinned by good governance and strong oversight, subcontractual provision can deliver high quality education for underrepresented and disadvantaged students who benefit from greater access opportunities and flexibility.

Q5: Do you have any alternative suggestions to the approach we have proposed?

We think the proposed approach is reasonable, proportionate and risk based, provided the scope of providers that will have obligations under the proposed condition remain limited to those delivering subcontractual provision. See our response to question 3.

Proposal 2: A governance and control environment for subcontractual provision

Q6: Do you have any comments on the nature of the risks that we have included in our draft guidance that we are proposing providers mitigate?

It is right that if universities are not appropriately addressing areas of concern that the regulatory system is set into action. We have seen extensive actions to tighten controls of subcontractual arrangements that universities in our membership have taken over the last two years and it is essential that vigilance must be ongoing. This includes regularly reviewing quality assurance processes, embedding systematic approaches to data collection and sharing, and regularly reviewing and escalating risks.

We agree with the overarching nature of the risks identified in the consultation, and that universities should be responsible for protecting public money by being accountable for the quality of provision and good governance of partnerships. We would also encourage continued work by the Department for Education (DfE), the OfS, and the Student Loans Company (SLC) to improve their processes for sharing data and intelligence with each other (as set out in the Public Accounts Committee report) and with providers to support the sector in tackling these issues.

One area we would like to see further clarity is on the expectations around a provider's rationale for franchising. We do not see the requirement to include a rationale for franchising itself as problematic, since transparency is important and there needs to be evidence a strategic decision having been made. However, it raises questions about how OfS will use this information in any regulatory action and any moral or principled judgement that could be attached to this. For example, it is not

clear in the proposals how the rationale will be considered in relation to risk assessments or regulatory judgments. A financially motivated arrangement is not inherently riskier than one motivated by social mission, if the governance and management arrangements are robust. The OfS should, as a matter of principle, be supportive of institutional efforts to diversify income particularly in the context of significant financial pressures on institutions, which themselves pose a risk to students.

We would like to understand why the OfS would perceive a financially motivated partnership to be riskier if governance arrangements are robust. Without clarity on how this information will factor within OfS decision making, there is a risk that the OfS is seen as the arbiter of what a 'good' rationale looks like.

We would encourage the OfS to provide further detail on how it will use the rationale information in its risk assessment/investigations. When considering the assessment of risks, the OfS should a) ensure that a provider's decision about who and why to partner remain autonomous and b) not restrict or penalise providers based solely on their rationale for partnerships. If partnership outcomes are good quality and they are governed in accordance with good practice, there should be no need for regulatory intervention based on why a provider has chosen its partner.

Q7: Do you agree or disagree with the minimum content requirements we have proposed for the single document we propose a provider should maintain? Please give reasons for your answer.

Yes, we agree with the minimum content requirements, provided the OfS can provide clarity about how it will use the information (particularly regarding the provider 'rationale' for franchising, see Q6) in its regulatory activity.

We agree that the other minimum content requirements (regarding new arrangements, governing body oversight, policies and procedures, and adaptability) should already be in place and can be brought together in the comprehensive source of information. This should be consistent with other OfS requirements (eg condition E6). OfS should ensure its compliance assessment with these conditions are consistent and proportionate.

Providers will have myriad ways to address these specific requirements not only because internal structures and processes will be unique to each institution, but the nature of the franchise partnerships will also be different. While we appreciate OfS' role to consider risk, it should take care not to intervene unnecessarily with the governance of providers and how they organise and articulate their arrangements.

Q8: Do you have any views on any challenges that you anticipate with the implementation of this proposal?

We agree that providers with existing good governance should have this information already. However, it should be recognised that the information may be spread out across an institution and its partner(s) or require input from several departments. Therefore, while we do not oppose the four-week implementation period, we would encourage OfS to also recognise progress towards providers' estimated completion date if the comprehensive source of information is not fully completed within the four-week timeframe.

Proposal 3: A provider to operate in accordance with the comprehensive source of information

Q9: In your view, are there any barriers to implementing the measures in this proposal, which require a provider to operate in accordance with its comprehensive source of information? If so, please specify which, and tell us why.

We encourage all providers to have effective and robust management and governance of their provision. This includes being able to evidence how partnerships are managed.

We note the consultation (paragraph 114) suggests that OfS investigations will consider 'contractual barriers' in its assessment of risk. While we are not opposed to this in theory as we recognise this is part of a risk-based approach, the OfS should ensure that 'contractual barriers' does not mean that an omission of particular wording or elements of a contract is, by default, considered evidence of malpractice or non-compliance.

Proposal 4: Power of direction

Q10: Do you have any comments on the proportionality and effectiveness of our proposed approach to using subcontractual arrangement directions?

We are concerned about the suggestion that the OfS could impose 'subcontractual arrangement directions' (SCD) without requiring an investigation, with the current list of possible interventions ranging from small actions (eg requiring the publication of information) to significant action (eg stopping payments to providers). More robust OfS governance and oversight mechanisms are needed to ensure an SCD is only deployed when it is required and when existing regulation fails to address risks. It is

not clear how the SCD would differ from an investigation which is a power that the OfS already has. The current proposals suggest the SCD would not be proceeded by an investigation which means the imposition of an SCD could have more directive regulatory implications for providers (for example, by requiring action/inaction by a provider via a SCD rather than providing an opportunity to have a dialogue to resolve issues). Unlike student protection directions which may need to be deployed at pace due to its time critical nature, we see little need to impose a SCD in the same way. The OfS should define stricter criteria on the scope of SCD actions that can be imposed and clearly establish when these powers can be proportionally deployed. We suggest that imposing a direction is reserved for more serious matters or where typical engagement with providers has not produced a sufficient result. For example, a direction for smaller activities should only be used if the provider is refusing to take the action forward in their own way. Providers should first be given the opportunity to resolve an issue (in a given timeframe).

If the SCD proposals go ahead, there should be appropriate checks and balances to their use and the decision to deploy an SCD should be taken with a degree of independence. For example, if an issue was raised in relation to quality, the decision to impose an SCD could be taken by non-OfS staff TEF assessors. Alternatively, the OfS could establish a panel through its scheme of delegation to take decisions. In cases where issues, risks or interventions are more serious (eg suspension of payments), it will be essential to have established and robust oversight.

We would also suggest that OfS establish a strict timeframe within which to resolve the SCD. We do not consider current proposal clear enough as it states only that the SCD will be lifted when the risk 'has been appropriately controlled or mitigated'. Considering some issues may take a significant time to resolve (for example if the SCD requires taking steps to 'improve quality and standards') this means an SCD could be in place for an extended period of time. The aims of the SCD should be to swiftly address specifically identified risks or issues. A lengthy and resource intensive regulatory process may detract providers from dedicating resource to addressing the problems identified. In order to mitigate these risks, we would recommend that the OfS provide clear timescales in which the SCD will operate. For example, the OfS should aim to conclude any enquires related to the SCD within 30 days. If after that time, the provider is compliant and making progress in addressing concerns, the SCD should be lifted. If it is deemed sufficient progress has not been made, the OfS should set out how long the SCD is likely to remain in place.

This should be supplemented by a clear commitment from the OfS to work with providers in advance of an SCD with a view to avoiding more formal regulatory action.

Proposal 5: Requirements for providers to provide specified information relating to subcontractual provision

Q11: Are there aspects of the proposal to require additional disclosures in a relevant provider's audited financial statements that you found unclear? If so, please specify which, and tell us why?

See our response to question 6 regarding the 'subcontractual rationale'.

Further, the proposal suggests that fee retention information is included in providers' financial statements. It states that *'a lead provider may wish to add its own commentary to explain this information but is not required to'*. We would be concerned if the OfS judges a provider to be 'higher risk' if a provider chooses not to present this commentary or context (which they may not wish to do for commercial reasons). The OfS should honour its assertion that this is not required.

Subcontractual arrangements can often be a stepping stone for new providers seeking to establish themselves in the sector, with some working towards achieving OfS registration and degree awarding powers, as envisaged by the Higher Education and Research Act 2017 (HERA). This is one way in which the sector is increasingly providing students with more choice for what and where they study. Some lead providers retain a higher proportion of fees than others yet use this to facilitate the development of their partners in this endeavour. In other cases, a proportion of the fee is retained to provide additional support to students (eg student support, careers services or library services). Some providers may not wish to disclose every aspect of the financial arrangements they have with their partners, but it must be understood in regulatory activity that fee retention will often be delivering these benefits. This should be respected and accounted for in any regulatory activity.

While we would not be against this proposal as it provides greater transparency, the financial arrangements must not be viewed in isolation, even where the provider chooses not to include its own commentary.

Q12: In your view, are there any barriers to implementation of this proposal?

No, we do not see any barriers to implementation.

Q13: Do you have any comments on the proposals to publish this information, either in providers audited accounts or by the OfS?

We welcome greater transparency about subcontractual arrangements. However, we would warn against OfS creating an unintended negative narrative by publishing

information about provider's subcontractual arrangements without accompanying context. For example, the publication of fees retained by a lead provider does not necessarily tell the full story of the relationship between the lead provider and its partner (see our response to question 11). Publication of this information without context could result in a misleading picture.

Proposal 6: Monitoring compliance

Q14: Do you have any comments on the appropriateness and effectiveness of our proposed approach to monitoring compliance with the proposed condition?

We welcome the risk-based approach to monitoring compliance.